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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES This Pleading Relates to Included Action: REBECCA LEE WILLIS, on behalf of herself and all others similarly situated, Plaintiff, vs. LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; PHELAN PINON HILL COMMUNITY SERVICE DISTRICT; and DOES 1 through 1,000; Defendants.	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408 CASE NO. BC 364553 **APPENDIX OF NON-CALIFORNIA CASES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CLASS REPRESENTATIVE INCENTIVE AWARD** Date: February 24, 2010 Time: 10:00 a.m. Dept: 1 Judge: Hon. Jack Komar Coordination Trial Judge

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Plaintiff Willis hereby submits this appendix of Non-California authorities in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Incentive Award:

Non-California Cases

Dated: January 24, 2011

KRAUSE KALFAYAN BENINK & SLAVENS LLP

/s/Ralph B. Kalfayan
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United States Court of Appeals,
Ninth Circuit.
John DAVIS; Wayne Broughton, a minor, through his guardian and mother Sharon Broughton; Doug Durbin; Ed Rodius, and Don Taylor, Plaintiffs-Appellees-Cross-Appellants,
v.
MASON COUNTY; Mason County Sheriff's Department; Pete Cribben, in his capacity as a Mason County Deputy Sheriff and as an individual; Jack Gardner, in his capacity as a Mason County Deputy Sheriff and as an individual; Susan Gardner, his wife, and the martial community composed thereof; Garry Ohlde, in his capacity as a Mason County Deputy Sheriff and as an individual; Doug Quantz, in his capacity as a Mason County Deputy Sheriff and as an individual, and; Ray Sowers, in his capacity as a Mason County Deputy Sheriff and as an individual, Defendants-Appellants-Cross-Appellees.

Nos. 88-3947, 88-4394 and 88-3951.
Argued, Submission Deferred Dec. 4, 1989.
Resubmitted Dec. 13, 1989.
Decided March 12, 1991.
As Amended May 6, 1991.
As Amended June 6, 1991.

In § 1983 action against county, its sheriff and several deputies, the United States District Court, Western District of Washington, Robert J. Bryan, J., entered judgment on jury verdict finding defendants liable for damages for excessive use of force used while arresting citizens in four separate incidents. Defendants appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) sheriff was official policymaker regarding law enforcement practices; (2) county's failure to adequately train its deputies as to constitutional limits of use of force was deliberate indifference to safety of county inhabitants as matter of law for purposes of § 1983 liability; (3) evidence supported award of punitive damages; and (4) evidence supported determination that plaintiff was "seized" when deputy's wife ordered him down from hay wagon and put him in patrol vehicle.

Affirmed.

Wallace, Chief Judge, filed concurring and dissenting opinion.

West Headnotes

[1] Federal Courts 170B ⇨813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

District court's decision regarding severance may be set aside only for abuse of discretion; under abuse of discretion standard, reviewing court cannot reverse unless it has definite and firm conviction that district court made clear error of judgment in its conclusion. Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

[2] Federal Courts 170B ⇨612.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of

Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk612 Nature or Subject-Matter of Issues or Questions
170Bk612.1 k. In General. Most Cited Cases
(Formerly 170Bk612)
County's failure to raise before district court issue of whether requirements for permissive joinder in § 1983 action were met precluded county from raising issue before Court of Appeals absent showing of any reasons why county failed to raise issue below. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1956

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1956 k. Separate Trial as to Particular Parties. Most Cited Cases
District court did not abuse its discretion in rejecting county's motion to sever claims of § 1983 plaintiffs; even if each plaintiff had separate trial, evidence of pattern of misconduct would still have been admitted because each plaintiff presented claim against at least one individual defendant and against county. Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 2142.1

170A Federal Civil Procedure
170AXV Trial
170AXV(F) Taking Case or Question from Jury
170AXV(F)2 Questions for Jury
170Ak2142 Weight and Sufficiency of Evidence
170Ak2142.1 k. In General. Most Cited Cases
(Formerly 170Ak2142)
Directed verdict is proper if court finds that evidence and its inferences, viewed in light most favorable to nonmoving party, permits only one reasonable conclusion as to verdict.

[5] Civil Rights 78 1345

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1345 k. Acts of Officers and Employees in General; Vicarious Liability and Respondeat Superior in General. Most Cited Cases
(Formerly 78k206(2.1), 78k206(2))

Civil Rights 78 1351(1)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))
Municipalities may be held liable under § 1983 for actions which result in deprivation of constitutional rights, but cannot be held liable on respondeat superior theory; municipal liability is incurred under § 1983 only when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury. 42 U.S.C.A. § 1983.

[6] Civil Rights 78 1351(1)

78 Civil Rights
78III Federal Remedies in General

78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))
To establish municipal liability under § 1983, it must be shown that decision maker possesses final authority to establish municipal policy with respect to action ordered. 42 U.S.C.A. § 1983.

[7] Civil Rights 78 ⚿1351(4)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(3))
As chief executive officers under Washington law, sheriffs possess final authority with respect to training of their deputies and, thus, their actions constitute county policy on subject for purposes of imposing municipal liability under § 1983. 42 U.S.C.A. § 1983; West's RCWA 36.28.010.

[8] Civil Rights 78 ⚿1351(4)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(3))
Sheriff was official policymaker regarding law enforcement practices for purposes of § 1983 municipal liability claim arising from deputies' use of excessive force while arresting citizens, even though sheriff did not have final authority over all employment practices; training of officers on use of force was type of law enforcement practice that fell squarely within sheriff's policymaking authority under Washington law. 42 U.S.C.A. § 1983; West's RCWA 36.28.010.

[9] Federal Courts 170B ⚿630.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk630 Instructions
170Bk630.1 k. In General. Most Cited Cases
(Formerly 170Bk630)
County's failure to object to jury instruction in § 1983 action, that failure to train deputies concerning use of force could serve as basis of county liability if county exhibited "reckless disregard for" or "deliberate indifference" to safety of inhabitants, barred county from raising issue on appeal, as governing circuit case at time of instruction indicated that state of mind sufficient to find failure-to-train liability was not settled point of law. 42 U.S.C.A. § 1983.

[10] Civil Rights 78 ⚿1437

78 Civil Rights
78III Federal Remedies in General
78k1433 Instructions
78k1437 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k245)
Jury instructions in § 1983 action al-

lowing jury to find municipal liability for failure to train deputies concerning use of force only upon showing of "reckless disregard" or "deliberate indifference" were not inconsistent with "deliberate indifference" standard enunciated by Supreme Court; definition of "reckless disregard" was effectively the same as cited Supreme Court language. 42 U.S.C.A. § 1983.

[11] Civil Rights 78 ⚿1352(4)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(4))

County's failure to adequately train its deputies as to constitutional limits of use of force was deliberate indifference to safety of county inhabitants as matter of law for purposes of imposing municipal liability under § 1983; sheriff department's "field training program" for deputies, although apparently adequate on paper, was never followed in practice. 42 U.S.C.A. § 1983.

[12] Federal Courts 170B ⚿823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Trial court has broad discretion in admitting and excluding expert testimony and its decisions will not be reversed unless manifestly erroneous; thus, district court's evidentiary rulings are reviewed for abuse of discretion.

[13] Federal Courts 170B ⚿823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Admission or exclusion of evidence under Federal Rule of Evidence addressing exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time or under rule addressing character evidence is reversible only for clear abuse of discretion. Fed.Rules Evid.Rules 403, 404, 28 U.S.C.A.

[14] Federal Civil Procedure 170A ⚿2011

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In General. Most Cited Cases

Testimony of police expert was properly excluded in civil rights action as cumulative; county admitted that sheriff testified for defendants on same topic. Fed.Rules Evid.Rule 404, 28 U.S.C.A.

[15] Federal Civil Procedure 170A ⚿2011

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In General. Most Cited Cases

Testimony of former county deputy who was not listed as witness in pretrial or-

der was properly excluded in civil rights action; witness' testimony would not only have been cumulative, but county offered no compelling reasons to add him as witness. Fed.Rules Evid.Rule 403, 28 U.S.C.A .

[16] Civil Rights 78 ⚿1412

78 Civil Rights
78III Federal Remedies in General
78k1408 Admissibility of Evidence
78k1412 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k241)

Evidence of previous altercation involving plaintiff was properly excluded when offered to show plaintiff's proclivity to violence, in civil rights action arising from deputies' use of force. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[17] Evidence 157 ⚿506

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters Directly in Issue. Most Cited Cases

Evidence 157 ⚿512

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due Care and Proper Conduct in General. Most Cited Cases

Testimony of § 1983 plaintiffs' police expert, that sheriff was reckless in his failure to adequately train his deputies in use of force and that there was causal link between that recklessness and plaintiffs' injuries, was not improper opinion testimony on question of law, and was properly admitted. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.; 42 U.S.C.A. § 1983.

[18] Civil Rights 78 ⚿1465(1)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))

Jury may award punitive damages under § 1983 when defendant's conduct was driven by evil motive or intent, or when it involved reckless or callous indifference to constitutional rights of others. 42 U.S.C.A. § 1983.

[19] Civil Rights 78 ⚿1465(1)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))

Plaintiff's inability to show compensable injury in § 1983 action does not bar award of punitive damages. 42 U.S.C.A. § 1983.

[20] Civil Rights 78 ⚿1465(2)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(2) k. Government Liability. Most Cited Cases
(Formerly 78k275(2))

Under § 1983, punitive damages may

not be recovered from municipalities. 42 U.S.C.A. § 1983.

[21] Federal Courts 170B ⚿871

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk871 k. Damages and Extent of Relief. Most Cited Cases

Federal Courts 170B ⚿872

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk872 k. Inadequate and Excessive Damages. Most Cited Cases
Unless amount of damages is grossly excessive, unsupported by evidence, or based solely on speculation, reviewing court must uphold jury's determination of amount.

[22] Civil Rights 78 ⚿1465(1)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))
Evidence in § 1983 action arising from deputies' excessive use of force was sufficient to support inference of reckless or callous indifference to plaintiffs' federally protected rights, providing basis for assessing punitive damages even if there was insufficient evidence of evil intent or motive. 42 U.S.C.A. § 1983.

[23] Federal Courts 170B ⚿631

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk630 Instructions
170Bk631 k. Requests and Failure to Give Instructions. Most Cited Cases
Issue of whether jury should have been instructed to consider defendants' net worth in § 1983 action when assessing punitive damages was not preserved on appeal; county did not offer evidence before jury and did not object when jury was not instructed on issue. 42 U.S.C.A. § 1983.

[24] Federal Courts 170B ⚿636

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk636 k. Necessity of Specific Objection or Exception. Most Cited Cases
In order to preserve issue on appeal, objections to jury instructions must be specific.

[25] Civil Rights 78 ⚿1465(1)

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))
Punitive damages assessed against individual defendants in § 1983 action would stand even though remedial measures were taken. 42 U.S.C.A. § 1983.

[26] Federal Courts 170B ⚿846

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk846 k. Substantial Evidence. Most Cited Cases
If jury verdict is supported by substantial evidence, reviewing court must let it stand; "substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support conclusion.

[27] Federal Courts 170B ⚿847

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk847 k. Verdicts in General. Most Cited Cases
If sufficient evidence is presented to jury on particular issue and if jury instructions on issue stated law correctly, court must sustain jury's verdict.

[28] Arrest 35 ⚿68(4)

35 Arrest
35II On Criminal Charges
35k68 Mode of Making Arrest
35k68(4) k. What Constitutes Seizure. Most Cited Cases
Person is "seized" within meaning of Fourth Amendment whenever police officer restrains his or her freedom to walk or drive away. U.S.C.A. Const.Amend. 4.

[29] Civil Rights 78 ⚿1420

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1420 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k242(5))
Evidence supported jury's conclusion that § 1983 plaintiff had been illegally "seized" within meaning of Fourth Amendment; plaintiff testified that he stayed on wagon while deputy was beating plaintiff's uncle because he believed deputy would shoot and that he complied with order of deputy's wife to get off wagon and into patrol car thinking that she was police deputy as well. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 4.

[30] Damages 115 ⚿57.10

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.8 Nature of Injury or Threat in General
115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

(Formerly 115k56.20, 115k50)
Washington law does not require physical manifestations in order to make emotional distress claim.

[31] Damages 115 ⚿192

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases
Evidence, including testimony from physician that plaintiff suffered from posttraumatic stress syndrome as result of seeing his uncle bloodied by deputies and having gun pointed at him, supported jury's determination with respect to plaintiff's emotional distress claim under Washington law, that deputies' behavior was so outrageous as to go beyond bounds of decency.

[32] Federal Civil Procedure 170A ⚿2723

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2723 k. Discretion of Court. Most Cited Cases

Federal Courts 170B ⚿830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases
District court has broad discretion to grant attorney fees and costs and Court of Appeals reviews its decision only for abuse of discretion.

[33] Civil Rights 78 ⚿1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or Activities for Which Fees May Be Awarded. Most Cited Cases
(Formerly 78k301)
District court may not use § 1988 as basis to award expert witness fees exceeding statutory limits of $30 per day. 28 U.S.C.A. §§ 1821, 1920; 42 U.S.C.A. § 1988.

[34] Civil Rights 78 ⚿1476

78 Civil Rights
78III Federal Remedies in General
78k1476 k. Costs. Most Cited Cases
(Formerly 78k291)
Travel expenses were properly awarded to prevailing parties in § 1983 action under § 1988. 42 U.S.C.A. §§ 1983, 1988.

[35] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases
(Formerly 78k303)
Hourly rate allowed in attorney fee award to § 1983 plaintiffs of $135 per hour was reasonable for the Western District of Washington. 42 U.S.C.A. §§ 1983, 1988.

[36] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases
(Formerly 78k303)
Generally, relevant community for de-

termining reasonableness of attorney fee rates is one in which district court sits. 42 U.S.C.A. § 1988.

[37] Civil Rights 78 ⚿1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)

Trial court in § 1983 action did not abuse its discretion in determining amount of attorney fee award to prevailing plaintiffs; trial court used lodestar method of calculation in addition to 12-factor analysis. 42 U.S.C.A. §§ 1983, 1988.

[38] Civil Rights 78 ⚿1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)

"Lodestar" figure in context of calculating attorney fee award is multiplication of number of hours reasonably expended by reasonable hourly rate. 42 U.S.C.A. § 1988.

[39] Civil Rights 78 ⚿1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)

Twelve factors enumerated for use in calculating attorney fee award include such considerations as novelty of case, experience, reputation and ability of attorneys, and skill required to perform legal service properly. 42 U.S.C.A. § 1988.

[40] Civil Rights 78 ⚿1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
(Formerly 78k296)

Attorney fees awarded in § 1983 action would not be reduced to extent that plaintiffs did not prevail on their claims for injunctive relief; plaintiffs submitted affidavit attesting to minute amount of time spent on injunction claim, county produced no evidence in support of assertion that plaintiffs spent much of their time working on injunction issue and plaintiffs prevailed on 18 of 20 basic verdicts. 42 U.S.C.A. §§ 1983, 1988.

***1477** Nancy K. McCoid, Merrick, Hofstedt and Lindsey, Seattle, Wash., for defendants-appellants.

Timothy K. Ford, Kathleen Wareham, MacDonald, Hoague & Bayless, Seattle, Wash., Robert Wilson-Hoss, Hoss & Wilson-Hoss, Shelton, Wash., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, Chief Judge, PREGERSON and NELSON, Circuit Judges.

PREGERSON, Circuit Judge:

Mason County, its sheriff and several deputies appeal from a jury verdict finding them liable under 42 U.S.C. § 1983 for damages for excessive force used while ar-

resting citizens in four separate incidents. We affirm the jury verdict and find municipal liability of Mason County and the Sheriff's Department.

BACKGROUND

Each of the plaintiffs-appellees' complaints arose out of traffic stops which resulted in arrests, beatings, and false charges that were later dropped. The incidents occurred within a nine-month period between June, 1985 and March, 1986.

A. The Durbin Incident

Early on the morning of June 29, 1985 as Doug Durbin returned home from a local ***1478** tavern, Deputy Ray Sowers followed him and waited outside of Durbin's home. Deputy Tom Furrer later arrived as backup. Sowers, flicking an electric stun gun on and off, ordered Durbin out of his house. Durbin, who complied, was arrested for drunk driving. After taking one step toward his house, the two deputies tackled Durbin and threw him to the ground. Though Durbin never attempted to resist, Sowers began to beat him on the back of his head with his fist. In the patrol car on the way to the jail Sowers slammed on the brakes, causing Durbin, who was handcuffed and thus defenseless, to smash into the screen with his face.

Durbin was charged with driving while intoxicated [FN1], resisting arrest and obstructing an officer. Yet after Durbin signed a "Release and Satisfaction" against Mason County, the charges against him were dismissed.

FN1. Durbin's breathalyzer test, taken at the Mason County Jail, read .05, well below the legal definition of intoxication.

B. The Taylor Incident

Deputy Doug Quantz pulled over Don Taylor as he was driving through Shelton on the afternoon of July 20, 1985, allegedly for driving too fast. Quantz ordered Taylor to spread-eagle against the patrol vehicle and proceeded to conduct a pat-down search. Under the guise of this search, Quantz twisted the skin on Taylor's arms and legs, struck him on the sides, hit him in the testicles, and slammed him against the side of the patrol car. Later, in the jail elevator, Quantz hit Taylor in the kidneys with his fist.

After signing a "Partial Covenant Not to Sue," promising not to bring charges against Mason County, the charges against Taylor, including reckless driving, obstructing an officer, and resisting arrest, were dropped.

C. The Davis/Broughton Incident

John Davis and his fifteen year-old nephew, Wayne Broughton, were driving a loaded hay wagon drawn by a team of four horses on the afternoon of July 28, 1985. Because some cars were slowed behind the wagon, Deputy Jack Gardner came alongside the wagon in his patrol vehicle and, using his loudspeaker, ordered Davis to pull over. Davis lost control over the horses, who had been frightened by the noise of the loudspeaker. Gardner pulled in front of the wagon, took out his gun, pointed it at Davis and Broughton and threatened to shoot if they did not stop. As Davis got down from the wagon to attend to his horses, Gardner beat him on the legs with his nightstick and struck him on the head. He then knocked him down to the ground and continued to beat him. After Deputies Pete Cribben and Garry Ohlde arrived at the scene, all three hit him, kicked him, and shocked him with an electric stun gun. According to one witness, Davis

"looked like he had been dipped in a bucket of blood" after the officers finished beating him.

Deputy Gardner's wife, who had been riding with him as a passenger and who was not an officer, ordered Broughton down from the wagon, and then took him by the arm and put him in the patrol car. After being questioned for an hour, Broughton was released.

Davis was arrested and charged with felony assault, resisting arrest and obstructing an officer. The misdemeanor charges were dismissed, and a jury, which found that Davis was acting in self-defense, acquitted him of the felony charge.

D. The Rodius Incident

When Deputy Ray Sowers observed four young people talking between a car and a truck on the evening of March 15, 1986, he pulled over both vehicles. Sowers ordered Ed Rodius, a passenger in the truck, into the patrol car after he asked why they had been stopped. When Rodius refused to comply, Sowers jumped on Rodius, choked him, pulled on his hair, and then threw him to the ground and rubbed his face on the gravel of the parking lot.

***1479** Rodius was arrested and charged with possession of alcohol as a minor, purchasing liquor, and resisting arrest. Rodius was tried twice on the resisting arrest charge. The first trial resulted in a hung jury, and the second was declared a mistrial after the prosecution violated a motion *in limine* by referring to the case at bar in front of the jury. The Mason County Prosecutor's office eventually dismissed the charges.

In the present case, the jury returned verdicts against all the individual deputies and the County, awarding $528,000 in compensatory Punitive damages were awarded only against the individual deputies, not the County. The jury awarded $225,000 in punitive damages and $150,000 compensatory to Davis; $10,000 in punitive and $5,000 compensatory to Broughton; $25,000 in punitive and $5,000 compensatory to Durbin; $25,000 in punitive and $0 compensatory to Rodius; and $35,000 in punitive and $1,500 compensatory to Taylor. The district court awarded attorneys' fees, expenses, and costs to plaintiffs in the amount of $323,559.65.

Defendants-appellants timely appealed. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

DISCUSSION

I. Whether the district court erred in denying defendants' motion to sever.

Defendants-appellants (collectively "Mason County") argue that the district court erred in denying their motion to sever. This argument is based on two theories. First, they contend that the requirements for permissive joinder were not met. Second, they maintain that even if the requirements for permissive joinder were met, the motion to sever the plaintiffs' claims should have been granted because not doing so resulted in prejudice to the individual defendants.

[1] Federal Rule of Civil Procedure 42(b) gives a district court broad discretion to order separate trials. A district court's decision regarding severance may be set aside only for abuse of discretion. *United States v. Sanchez-Lopez,* 879 F.2d 541, 551 (9th Cir.1989). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the district court made a clear error of judgment in its conclusion. *Abatti*

v. Commissioner, 859 F.2d 115, 117 (9th Cir.1988).

A. Permissive Joinder

[2] Mason County did not raise the issue of whether the requirements for permissive joinder were met below. They are thus precluded from raising it now. This court will not "review an issue not raised below unless necessary to prevent manifest injustice." *International Union of Bricklayers and Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir.1985). This court will address the issue only if the proponent can point to "exceptional circumstances why the issue was not raised below." *Id.* (quoting *Taylor v. Sentry Life Ins. Co.,* 729 F.2d 652, 655-56 (9th Cir.1984) (per curiam)). Because Mason County does not show any reasons why they failed to raise the issue below, this court will not consider the issue.

B. Prejudice to the Defendants-Appellants

[3] Mason County moved before trial to sever the claims of the plaintiffs because, they argued, joinder would result in prejudice to the individual defendants. It is true that by trying the claims against the individual defendants with the claims against Mason County and the Sheriff's Department, evidence of the series of incidents of excessive force involving different police officers which would have been inadmissible against individual defendants not involved in the particular episode, were admissible against the County and the Sheriff's Department in order to show a pattern of misconduct.

Yet, while severing the defendants would have surely eliminated this prejudice, severing the plaintiffs would not have solved the problem. Even if each plaintiff had a separate trial, evidence of a pattern of misconduct would still have been admitted because each plaintiff (except Taylor who did not sue Mason County) presented a claim against at least one defendant *and* against ***1480** the County. Since defendants requested severance of the *plaintiffs'* claims, the court below did not abuse its discretion in rejecting the motion.

II. Whether the district court erred in not granting a directed verdict on the issue of municipal liability of Mason County and the Sheriff's Department, and whether the jury was properly instructed on the issue.

[4] A directed verdict is proper if the court finds that the evidence and its inferences, viewed in the light most favorable to the non-moving party, permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy,* 771 F.2d 1244, 1256 (9th Cir.1985), *cert. denied,* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). A directed verdict "is inappropriate if there is substantial evidence to support a verdict for the non-moving party." *Id.* Jury instructions are reviewed for abuse of discretion. *Maxwell v. Hapag-Lloyd Aktiengesellschaft, Hamburg,* 862 F.2d 767, 768 (9th Cir.1988).

[5] Plaintiffs sued the individual deputies, Mason County, and the Sheriff's Department for violation of their federal constitutional rights protected by the Fourth Amendment. Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). However, a municipality cannot be held liable on a *respondeat superior* theory. *Id.* at 691, 98 S.Ct. at 2036. Municipal liability is incurred under section 1983 only when "execution of a government's

policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." *Id.* at 694, 98 S.Ct. at 2037.

The Supreme Court recently addressed the issue whether the inadequacy of police training may result in municipal liability under section 1983 in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In determining liability the Court said that the adequacy of the training program must be assessed in relation to the tasks the officers must perform. *Id.* at 390, 109 S.Ct. at 1205. Further, the failure to train must "reflect[ ] a 'deliberate' or 'conscious' choice by a municipality-a 'policy'...." *Id.* at 389, 109 S.Ct. at 1205.

A. Sheriff Nat Stairs was a policy-making official

[6][7] To establish municipal liability under section 1983, it must be shown that the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986) (plurality opinion). Because "municipalities often spread policymaking authority among various officers," a particular officer may have authority to establish binding policy with respect to particular matters, but not others. *Id.* at 483, 106 S.Ct. at 1300. According to Washington law, in counties organized like Mason County, "[t]he sheriff is the chief executive officer and conservator of the peace of the county." Wash.Rev.Code § 36.28.010 (1990). As chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject.

The dissent argues that "[f]inal authority for personnel administration does not rest with the county sheriff; rather it rests with the civil service commission." Dissenting opinion at 2630. This conclusion misses the point: the majority opinion holds that Mason County is liable as a matter of law for failing to train its officers on the constitutional limits of force-not for its hiring practices.

The purpose of the Washington Sheriff's Office Civil Service statute "is to establish a merit system of employment for county deputy sheriffs and other employees of the office of county sheriff...." Wash.Rev.Code § 41.14.010; *Fezzey v. Dodge,* 33 Wash.App. 247, 249, 653 P.2d 1359, 1361 (1982). To this end, the Commission is ***1481** empowered to make rules and regulations regarding "appointments, promotions, reallocations, transfers, reinstatements, demotions, suspensions, and discharges," along with "other matters connected with the general subject of personnel administration." Wash.Rev.Code § 41.14.060(1). But nowhere does the statute extend the Commission's powers to the field of law enforcement, or specifically in this case, *peace officer training. See Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs,* 92 Wash.2d 844, 847, 601 P.2d 943, 946 (1979) (en banc) ("A full reading of [§ 41.14 of the Revised Code of Washington] reveals that in its enactment the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' *selection, promotion and termination* .") (emphasis added).

Our holding is consistent with the Supreme Court's teachings in *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915,

99 L.Ed.2d 107 (1988), and *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Both provide for municipal liability in the circumstances here. The example in *Pembaur,* reiterated in *Praprotnik,* bears repeating:

> [T]he County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, *although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.*

Id. at 483 n. 12, 106 S.Ct. at 1300 n. 12 (plurality opinion) (emphasis added); *see Praprotnik,* 485 U.S. at 140, 108 S.Ct. at 932 (Brennan, J., concurring).

[8] This example explains that a Sheriff can be the official policymaker regarding law enforcement practices without having final authority over all of its employees' employment practices. This is the case here. The training of peace officers on the use of force is a type of law enforcement practice that falls squarely within the policymaking authority of a County Sheriff.

B. Jury instructions with respect to municipal liability

[9] The trial judge instructed the jury that failure to train could serve as the basis of County liability if the County exhibited a "reckless disregard for" or a "deliberate indifference to" the safety of its inhabitants. The instructions given by the district court required a higher mental state than the "gross negligence" standard prescribed by this circuit at that time. *See Bergquist v. County of Cochise,* 806 F.2d 1364, 1369-70 (9th Cir.1986). The County did not object to the instructions. After trial, however, the Supreme Court held in *City of Canton v. Harris* that failure-to-train liability is proper "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388, 109 S.Ct. at 1204.

Mason County now argues that it was reversible error to instruct on the "reckless disregard" standard for failure-to-train liability in addition to the "deliberate indifference" standard. We have held that where a jury instruction correctly stated the law of the circuit at the time it was given, yet subsequent authority changed the law, consideration on appeal is not barred by the fact that no exception was taken to the instruction at the time of trial. *Robinson v. Heilman,* 563 F.2d 1304, 1307 (9th Cir.1977). "No exception is required when it would not have produced any results in the trial court because a 'solid wall of Circuit authority' then foreclosed the point." *Id.* The rationale for this rule is that while district courts should not be burdened by objections to settled points of law, neither should parties be penalized for failing to object if this settled law is later overturned.

Bergquist is not, however, a "solid wall of Circuit authority" regarding the mental state sufficient to find failure-to-train liability. Although in *Bergquist* we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 ***1482** liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.' " *Bergquist,* 806 F.2d at 1370 (quoting

Daniels v. Williams, 474 U.S. 327, 334 n. 3, 106 S.Ct. 662, 667 n. 3, 88 L.Ed.2d 662 (1986)). The Supreme Court subsequently answered this question in *City of Canton.* In *Bergquist,* by saying that the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law. Thus, the *Robinson* exception for waiving objections does not apply to the issue in this case. Mason County, having failed to object to the jury instruction, lost the right to raise this issue on appeal. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.,* 732 F.2d 1403, 1410 (9th Cir.1984).

[10] Even if Mason County did object to the jury instruction regarding the standard for municipal liability, we still would hold that the district court did not commit reversible error. "We examine whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." *United States v. Kessi,* 868 F.2d 1097, 1101 (9th Cir.1989). The instructions given by the district court allowed the jury to find municipal liability only upon a showing of "reckless disregard" or "deliberate indifference." We do not find the court's instructions, taken as a whole, to be inconsistent with the "deliberate indifference" standard enunciated in *City of Canton.* In *City of Canton,* the Court stated that "the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." 489 U.S. at 390, 109 S.Ct. at 1205.

Similarly, the district court in this case instructed that a person acts with reckless disregard when he "disregards a substantial risk that a wrongful act may occur *of which he is aware, or which is so obvious that he must have been aware of it,* and his disregard of that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." (Emphasis added). The district court's definition of reckless disregard is effectively the same as the language cited from *City of Canton;* both allow a jury to impose municipal liability in failure-to-train cases for acts that so clearly violate the rights of an individual that the policymakers can be said to be deliberately indifferent.

In fact, after *City of Canton,* two circuits have suggested that § 1983 liability may be imposed on a municipality if it exhibits a "reckless disregard" for an individual's constitutional rights. *See D.T. v. Independent School Dist. No. 16,* 894 F.2d 1176, 1192-93 (10th Cir.) ("[u]nder the standard [for municipal liability] mandated by [*City of Canton*] ... the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a *reckless disregard or deliberate indifference* ") (emphasis added), *cert. denied,* 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990); *Clipper v. Takoma Park, Maryland,* 876 F.2d 17, 20-21 (4th Cir.1989) (reaffirming the "deliberate indifference to or reckless disregard to" standard used in *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir.1987), *cert. denied,* 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988)). *But see Calvert Ins. Co. v. Western Ins. Co.,* 874 F.2d 396, 400 n. 5 (7th Cir.1989) ("[a] recent Supreme Court case has held that an allegation of mere reckless failure to train does not state a cause of action against a municipality under § 1983").

C. Failure-to-train liability as a matter of

law

[11] The jury instructions on this issue were nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law.

The training that the deputies received was woefully inadequate, if it can be said to have existed at all. Sheriff Stairs himself never attended the State Training ***1483** Academy and Undersheriff Harry "Bud" Hays had neither training nor experience. Although Washington law requires all police officers to complete academy training within fifteen months of hire,[FN2] Deputy Sowers did not complete the academy until sixteen months after he was hired.

FN2. Wash.Rev.Code § 43.101.200 (1990).

Instead of academy training, the Sheriff's Department devised a "field training program" for the officers. While this program may have seemed adequate on paper, in practice it was never followed. Indeed, one of the Department's two original field training officers, both of whom quit, called the program "a joke." The field training program was supposed to include tests, reports, and reviews by the field training officer and supervising sergeant on a periodic basis, yet there is no evidence that this was ever done. Although the program was supposed to last twelve months, in actuality it lasted only for a small fraction of that time. [FN3] One of plaintiffs' experts testified that as a result of the inadequacy of the field training program, the Department "sent officers out on the street to perform police services without any training whatsoever." The officers involved in these four incidents had received minimal or no training.

FN3. Sowers received only three or four weeks in field training before he was sent out on patrol alone.

At the time of the Durbin incident (June 29, 1985), Sowers had not attended the State Academy. His only training besides minimal field training, which was cut short, consisted of the explorer cadets, a program in which teenagers with interest in law enforcement rode with officers. Deputy Quantz had received no training whatsoever prior to the Taylor incident (July 20, 1985). [FN4] Although Deputies Gardner and Ohlde had attended the State Academy prior to the Davis incident (July 28, 1985), Deputy Cribben had not. He had only received minimal police-type training in other contexts, such as a private security guard.

FN4. Although Taylor did not sue the Mason County, this fact is still relevant to show the County's practice in training its officers.

The issue is not whether the officers had received *any* training-most of the deputies involved had some training, even if it was minimal at best-rather the issue is the adequacy of that training. *City of Canton,* 489 U.S. at 390, 109 S.Ct. at 1205. More importantly, while they may have had some training in the use of force, they received no training in the constitutional limits of the use of force. The Supreme Court in *City of Canton* declared: if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, ... the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* The Court went on to say in a footnote that "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so

could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.* at 390 n. 10, 109 S.Ct. at 1205 n. 10 (citation omitted).

In the case at bar, the deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of the inadequacy of the training the deputies received. Mason County's failure to train its officers in the legal limits of the use of force constituted "deliberate indifference" to the safety of its inhabitants as a matter of law.[FN5] Moreover, there was certainly more than enough evidence presented regarding the inadequacy of training in order to survive Mason County's motion for a directed verdict on the issue of municipal liability.

> FN5. Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim-negligent hiring practices and failure to provide adequate supervision-subjected the County to liability.

III. Whether the district court erred in various rulings related to the admission of evidence.

[12][13] Defendants-appellants object to various of the district court's evidentiary ***1484** rulings. A trial court has broad discretion in admitting and excluding expert testimony and its decisions will not be reversed unless "manifestly erroneous." *Taylor v. Burlington N.R.R.,* 787 F.2d 1309, 1315 (9th Cir.1986). Thus, its evidentiary rulings are reviewed for an abuse of discretion. *Roberts v. College of the Desert,* 870 F.2d 1411, 1418 (9th Cir.1988) . The admission or exclusion of evidence under Fed.R.Evid. 403 or 404 is reversible only for a clear abuse of discretion. *Coursen v. A.H. Robins Co.,* 764 F.2d 1329, 1333, *amended,* 773 F.2d 1049 (9th Cir.1985).

A. Testimony of Dr. Kevin Parsons

[14] Mason County contends that the district court improperly excluded the testimony of one of their police experts, Dr. Kevin Parsons. A district court may exclude relevant, but cumulative evidence, because of "considerations of undue delay, waste of time, or needless presentation." Fed.R.Evid. 403. The court ruled that each side was free to call two experts to the stand. Mason County argues that the testimony of their third witness, Dr. Parsons, was necessary, not cumulative, because he "brought a different level of expertise and experience to the topic." But the County admitted that Sheriff Jones testified for them on the "same topic." The district court therefore did not abuse its discretion by excluding Dr. Parson's testimony as cumulative evidence.

B. Testimony of Bryan Kelly and Mike Smith

[15] Mason County maintains that the trial court erred in excluding the testimony of former Mason County deputies Bryan Kelly and Mike Smith regarding the Taylor arrest. However, the district court *did* grant the County's motion to include Kelly to its witness list; Mason County never called Kelly.

Smith was not listed as a witness in the pretrial order, and it was not until late in the trial that Mason County moved to include him. Not only would Smith's testimony have been cumulative, Mason County offered no compelling reasons to add him. Fed.R.Evid. 403 gives the district court broad discretion in excluding cumulative evidence. *See Hamling v. United States,* 418 U.S. 87, 127, 94 S.Ct. 2887,

2912, 41 L.Ed.2d 590 (1974). The district court did not abuse its discretion in excluding Smith's testimony.

C. Testimony on the James Davies incident

[16] The day before the Davis/Gardner incident, there was an altercation between John Davis and James Davies. Davies, allegedly drunk and annoyed at being caught behind Davis' wagon, attacked Davis' teenage son. In defending his son, Davis bloodied Davies' nose. Although Davis filed a police report reporting the incident, he did not press charges against Davies for initiating the attack, and the matter was dropped. Yet after the Davis/Gardner incident, the Sheriff's Department brought assault charges against Davis, who was acquitted in a jury trial.

Mason County sought to bring in evidence regarding this incident in order to show Davis' proclivity to violence. Fed.R.Evid. 404(b) says, however, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *See Coursen v. A.H. Robins Co., Inc.,* 764 F.2d at 1335. The trial court did not abuse its discretion in refusing to admit evidence of the Davies incident.

D. Testimony of Donald Van Blaricom

[17] Mason County objected to plaintiffs' police expert, Donald Van Blaricom, because he testified that Sheriff Stairs was reckless in his failure to adequately train his deputies, and that there was a causal link between this recklessness and plaintiffs' injuries. They contend that this was improper opinion testimony on a question of law.

This argument is without merit. Fed.R.Evid. 704 allows expert witnesses to express an opinion on an ultimate issue to be decided by the jury. ***1485***Northrop Architectural Sys. v. Lupton Mfg. Co.,* 437 F.2d 889, 891 (9th Cir.1971). Moreover, Fed.R.Evid. 702 permits expert testimony comparing conduct of parties to the industry standard. *Yucinich v. Paine, Webber, Jackson & Curtis, Inc.,* 803 F.2d 454, 461 (9th Cir.1986). The trial court did not abuse its discretion in admitting Van Blaricom's testimony.

IV. Whether there was sufficient evidence to support the findings of punitive damages in the amount assessed.

[18][19][20] The jury awarded punitive damages against the individual deputies totalling $320,000.[FN6] A jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others. *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). Moreover, a plaintiff's inability to show compensable injury does not bar the award of punitive damages. *Id.* at 55 n. 21, 103 S.Ct. at 1639 n. 21.

FN6. Punitive damages were not awarded against Mason County. Under § 1983, punitive damages may not be recovered from municipalities. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271 (1981); E. Chemerinsky, *Federal Jurisdiction* § 8.11, at 477 (1989) ("Punitive damages may be recovered from individual officers, although not from government entities.").

[21] Unless the amount of damages is grossly excessive, unsupported by the evidence, or based solely on speculation, the reviewing court must uphold the jury's de-

termination of the amount. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League,* 791 F.2d 1356, 1360 (9th Cir.1986), *cert. denied,* 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987).

The deputies make four arguments regarding the amount of punitive damages awarded. First, they argue that the punitive damages award should be stricken because there was insufficient evidence of any evil intent or motive. Second, they contend that the jury should have been instructed that their net worth should be considered in assessing punitive damages. Third, the deputies assert that because remedial measures were taken, punitive damages were unnecessary. Finally, they argue that since the jury awarded Rodius $0 in compensatory damages, he should not have been awarded punitive damages.

A. Reckless or callous indifference

[22] The deputies' argument that the punitive damages award should be stricken because there was insufficient evidence of evil intent or motive is completely without merit because the alternative basis for assessing punitive damages is "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. at 56, 103 S.Ct. at 1640. The jury could certainly infer that there was "reckless or callous indifference" based upon the evidence presented of the excessive force used.

B. Deputies' net worth

[23][24] Plaintiffs concede that evidence of the deputies' net worth would have been relevant in assessing punitive damages. However, the deputies did not offer this evidence before the jury, and they did not object when the jury was not instructed on this issue. In order to preserve the issue on appeal, objections to jury instructions must be specific. *Kopczynski v. The Jacqueline,* 742 F.2d 555, 560 (9th Cir.1984), *cert. denied,* 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985). We will not consider the issue on appeal.

C. Remedial measures

[25] The deputies believe that the remedial measures taken rendered punitive damages unnecessary. Yet, they have failed to cite any Ninth Circuit case which supports this proposition. Further, punitive damages were assessed only against individual defendants. The jury obviously felt that the punitive damages were necessary to deter future unlawful and egregious behavior by the deputies. The jury's decision on this issue should stand.

D. Compensatory damages

Rodius received $25,000 in punitive damages and $0 in compensatory damages. ***1486** The deputies' argument that the jury erred in awarding punitive damages while not awarding compensatory damages fails. The Supreme Court has held that punitive damages may be available under Section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury. *Smith v. Wade,* 461 U.S. at 55 n. 21, 103 S.Ct. at 1639 n. 21.

V. Whether there was sufficient evidence both to show that Broughton had been seized and to support his state law outrage claim.

The jury ruled that Broughton had been illegally seized when Deputy Gardner's wife ordered him down from the hay wagon, and then took him by the arm and put him in the patrol vehicle. Mason County claims that there is insufficient evidence to sustain the jury's verdict on this issue.

[26][27] If the jury verdict is supported

by "substantial evidence," the reviewing court must let it stand. "Substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support a conclusion. *Oltz v. St. Peter's Community Hosp.,* 861 F.2d 1440, 1450 (9th Cir.1988); *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1014 (9th Cir.1985), *cert. denied,* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986). If sufficient evidence is presented to a jury on a particular issue and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict. *Transgo,* 768 F.2d at 1014.

A. Jury instruction

[28] The district court instructed the jury that "[a] person is seized within the meaning of the Fourth Amendment whenever a police officer restrains his or her freedom to walk or drive away." This instruction stated the law correctly. *See Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985).

[29] Moreover, there was certainly ample evidence from which the jury could infer that Deputy Gardner restrained Broughton's freedom to walk away. Broughton testified that he stayed on the wagon because he believed that Gardner would shoot. When Susan Gardner, the deputy's wife, ordered Broughton off the wagon and into the patrol car, he complied, thinking that she was a police officer as well. Broughton also testified that Susan Gardner forcibly took him by the arm and put him in the patrol car. From this evidence, it is clear that the jury could conclude that Broughton had been illegally seized.

B. Broughton's emotional distress claim

[30] Although Mason County argues that Broughton cannot state a claim for emotional distress because he has not exhibited any objective symptoms of emotional distress, Washington law does not require physical manifestations in order to make an emotional distress claim. *Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 741 n. 2, 565 P.2d 1173, 1176 n. 2 (1977) (quoting *Grimsby v. Samson,* 85 Wash.2d 52, 59, 530 P.2d 291, 295 (1975)).

[31] Further, the jury had to evaluate defendants' behavior in this incident and determine whether it was so outrageous as to go beyond bounds of decency. *Spurrell v. Bloch,* 40 Wash.App. 854, 701 P.2d 529, 535, *review denied,* 104 Wash.2d 1014 (1985). After hearing testimony from Dr. Beaton that Broughton suffered from post-traumatic stress syndrome as a result of seeing his uncle bloodied by the deputies and having a gun pointed at him, the jury decided in the affirmative the fact question of whether the defendants' behavior was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." Having so decided, the jury's verdict should stand.

***1487** *VI. Whether the district court erred in calculating attorneys' fees.*

[32] A district court has broad discretion to grant attorneys' fees and costs. *Thornberry v. Delta Air Lines, Inc.,* 676 F.2d 1240, 1242 (9th Cir.1982), *vacated on other grounds,* 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983). We review its decision only for an abuse of discretion. *Id.* "Due to the trial judge's familiarity with the litigation, review of the trial court's exercise of discretion in awarding attorneys' fees is narrow." *Id.*

Plaintiffs-appellees requested $575,658.13 in attorneys' fees and

$99,201.63 in costs and expenses of litigation pursuant to the Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The district court awarded $4,348.57 in costs pursuant to 28 U.S.C. § 1920, and $249,588.00 in attorneys' fees and $69,623.08 in expenses of litigation under 42 U.S.C. § 1988. Mason County contests the award of expert witness fees, travel expenses, and attorneys' fees.

A. Expert Witness Fees

The district court granted $29,217.18 for plaintiffs' expert witnesses, the largest element of expenses awarded. Mason County argues that payment of expert witness fees as expenses is precluded by the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). *Crawford Fitting* holds that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S. at 439, 107 S.Ct. at 2496. [FN7]

FN7. 28 U.S.C. § 1821(b) limits witness fees to $ 30.00 per day.

Plaintiffs originally contended that 42 U.S.C. § 1988 provides statutory authority for awarding expert witness fees greater than those allowed under 28 U.S.C. § 1821, a question left open in *Crawford Fitting. See* 482 U.S. at 445, 107 S.Ct. at 2499 (Blackmun, J., concurring) ("I join the Court's opinion and its judgment but upon the understanding that it does not reach the question whether, under 42 U.S.C. § 1988, a district court may award fees for an expert witness."). In our opinion filed March 12, 1991, we held that, consistent with the majority of circuit courts to consider the issue, section 1988 allows a prevailing plaintiff to recover reasonable expert witness fees regardless of the limits of 28 U.S.C. §§ 1821 and 1920. [FN8] But after the opinion was filed the Supreme Court in *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (March 19, 1991), reached the opposite conclusion. The Court held that "[42 U.S.C.] § 1988 conveys no authority to shift expert fees." 499 U.S. at ----, 111 S.Ct. at 1148.

FN8. 28 U.S.C. § 1920 reads:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.

[33] In their motion to modify our March 12, 1991 opinion, plaintiffs now concede that, under *Casey,* the district court's award of expert witness fees cannot stand. Under *Casey,* the district court may not use section 1988 as a basis to award expert witness fees in excess of the limits imposed by 28 U.S.C. §§ 1821 and 1920. We remand to the district court with instructions to modify the award of expert witness fees consistent with *Casey.*

***1488** B. Travel Expenses

[34] Mason County contends that costs other than expert witness fees should also be limited to those available under 28 U.S.C. § 1920. The only costs disputed below were travel expenses. Because this court will not consider issues not raised below, our review will be limited to travel expenses. *See Amalgamated Clothing & Textile Workers Union v. Murdock,* 861 F.2d 1406, 1420 (9th Cir.1988).

Mason County fails to see that like the expert witness fees, the travel expenses were not granted as costs under section 1920, but rather as out-of-pocket expenses, compensable under section 1988. Courts have generally held that expenses incurred during the course of litigation which are normally billed to fee-paying clients should be taxed under section 1988. *Dowdell v. City of Apopka,* 698 F.2d 1181, 1190 (11th Cir.1983); *Palmigiano v. Garrahy,* 707 F.2d 636, 637 (1st Cir.1983); *Northcross v. Board of Educ.,* 611 F.2d 624, 639 (6th Cir.1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 3000, 64 L.Ed.2d 862 (1980). As the Eleventh Circuit said in *Dowdell:*

> Reasonable attorneys' fees under the [Attorney's Fees Awards] Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.

698 F.2d at 1190. Thus, following the reasoning adopted in upholding the award of expert witness fees, we also affirm the district court's award of travel expenses pursuant to section 1988.

However, it is unclear why the district court granted $12,845.25 for travel expenses as part of the $249,588.00 attorneys' fees, and $4,135.83 for travel expenses as part of the $69,623.08 award for expenses of litigation. Because the award of travel expenses may have been double-counted, we remand on this issue.

C. Attorneys' fees

Mason County disputes the amount awarded in attorneys' fees. Specifically, they question whether $135/hour accurately reflected the prevailing market rate in Western Washington. Further, they argue that the award should have been adjusted for billing judgment and reduced to the extent plaintiffs did not prevail on their claims for injunctive relief.

[35][36] First, the hourly rate granted was reasonable for the Western District of Washington. Plaintiffs submitted affidavits from the relevant community in support of their hourly fee request. Generally, the relevant community is one in which the district court sits. *Polk v. New York State Dep't. of Correctional Servs.,* 722 F.2d 23, 25 (2d Cir.1983); *Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 140 (8th Cir.1982). Western Washington is the relevant community here, for it is where the court is located and where three of plaintiffs-appellees' attorneys practice. The court did not abuse its discretion in setting the hourly fees based on the prevailing rates there.

[37][38][39] Second, the court did not abuse its discretion in determining the

amount of the award. The trial court used the "lodestar" method of calculation in addition to the twelve-factor analysis. The "lodestar" figure is simply the multiplication of the number of hours reasonably expended by the reasonable hourly rate. *Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir.1987). The twelve factors, as outlined in ***1489***Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974) and in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), include such considerations as the novelty of the case, the experience, reputation and ability of the attorneys, and the skill required to perform the legal service properly. After careful consideration of the twelve factors, the district court granted $249,588.00 in fees. There was no abuse of discretion.

[40] Third, attorneys' fees should not be reduced to the extent that plaintiffs-appellees did not prevail on their claims for injunctive relief. Plaintiffs submitted an affidavit which attested to the minute amount of time actually spent on the injunction claim. Mason County did not produce any evidence in support of their assertion that plaintiffs spent "much of their time" working on the issue of injunctive relief. Moreover, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). There were excellent results in this case. The jury returned verdicts in favor of every plaintiff and against every defendant. Of the twenty basic verdicts in this case, plaintiffs prevailed on eighteen. We affirm the amount awarded in attorneys' fees.

CONCLUSION

A jury found Mason County, its sheriff and several deputies liable under 42 U.S.C. § 1983, and awarded damages to five plaintiffs who were arrested without probable cause, beaten and then subjected to false criminal charges by Mason County deputies. We hold that Mason County's failure to adequately train its officers in the constitutional limits of the use of force constituted deliberate indifference to the safety of its inhabitants as a matter of law. The jury's verdict is sustained. In addition, we remand to the district court to determine the proper accounting of travel expenses for plaintiffs' attorneys and of expert witness fees.

AFFIRMED.

WALLACE, Chief Judge, concurring in part and dissenting in part:

I have no quarrel with the majority opinion, except for its affirming liability against Mason County. In 1959, the Washington legislature enacted a comprehensive civil service system for the employment of sheriffs' deputies, creating a commission with the authority to make personnel policy and review its implementation. Washington courts have since repeatedly held this system superior to any supposed rights of county sheriffs over their personnel.

Nevertheless, from a statute naming the county sheriff its chief law enforcement officer, the majority concludes he is also the final policymaking authority for personnel training. The majority holds the entire civil service system irrelevant by inventing a distinction between "hiring" and "training," a distinction without basis in

controlling Washington state law. I disagree, and because the case against Mason County turns on this point, I respectfully dissent.

I

The jury found that constitutional deprivations had been inflicted under the color of law, *see* 42 U.S.C. § 1983, and held liable the individuals involved. The jury also imposed liability on Mason County. Review of the county's liability, and the erroneous instructions that led to it, is the issue I address. We review jury instructions to determine "whether, considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted v. Kelly,* 858 F.2d 571, 573 (9th Cir.1988).

***1490** Section 1983 does not impose vicarious municipal liability. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 478, 106 S.Ct. 1292, 1297, 89 L.Ed.2d 452 (1986) (*Pembaur*). Direct municipal liability is extremely limited, and applies only "to acts that are, properly speaking, acts of the municipality-that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480, 106 S.Ct. at 1298 (quotation omitted). A municipality is liable only if the tort was committed pursuant to a municipality's official policy. *Id.* at 479, 106 S.Ct. at 1298.

"The official policy requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479-80, 106 S.Ct. at 1298 (quotation omitted) (emphasis in original). The official policy requirement is the focal point for recent cases which have considered the issue. It has been precisely defined by the Supreme Court to maintain appropriate limits on burgeoning municipal liability. The district court, in its instructions to the jury, ran afoul of these appropriate limits. The majority opinion, in its attempt to save these flawed instructions, threatens to blur the precise distinctions required by Supreme Court authority.

The identification of officials whose decisions represent official policy is a question of state law to be determined by the trial judge before the case is submitted to the jury. *Jett v. Dallas Independent School District,* 491 U.S. 701, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989) (*Jett*). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur,* 475 U.S. at 481, 106 S.Ct. at 1299 (plurality opinion); *see also Jett,* 109 S.Ct. at 2723.

Plaintiffs (collectively Davis) proceeded to trial against Mason County on a theory that the county had an official policy to hire, train, and supervise its deputy sheriffs inadequately. Davis argued that the county sheriff was the final policy-making authority for personnel. Consequently, he argued, the sheriff's personnel decisions constituted official county policy, on which Mason County liability could be pegged.

The district court adopted Davis's theory in its jury instructions. "The Sheriff of Mason County is the chief law enforcement officer of that county and a policy-making official for the Mason County Sheriff's Office." The majority has attempted to save this instruction by reference to Wash.Rev.Code Ann. § 36.28.010 (West Supp.1990) ("The sheriff is the chief executive officer and conservator of the peace

of the county."). Relying solely upon this statute, the majority holds that "[a]s chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject." Maj. op. at 1480.

The reality is decidedly more complex. The sheriff may be "chief executive officer and conservator of the peace" but he is profoundly not the final authority for personnel administration. Final authority for personnel administration does not rest with the county sheriff; rather it rests with the civil service commission (Commission), pursuant to Wash.Rev.Code Ann. § 41.14 (West 1964 & Supp.1990). The Commission's extensive powers and duties include the making of rules and regulations about examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges, and which "may also provide for any other matters connected with the general subject of personnel administration." Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990).

"Implicit in the statutory scheme is the legislative intent to circumscribe the county sheriff's previously unbridled discretion in personnel matters." *Fezzey v. Dodge,* 33 Wash.App. 247, 249, 653 P.2d 1359, 1361 (1982). "A full reading of [Wash.Rev.Code Ann. §]41.14 reveals that in its enactment ***1491** the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners,* 92 Wash.2d 844, 847, 601 P.2d 943, 946 (1979) (en banc).

The majority attempts to discount the policymaking authority of this broadly empowered Commission by isolating a portion of Davis's theory at trial and hanging the entire case on it. The majority argues that liability arises solely from a failure of training and not from any other aspect of personnel administration. Maj. op. at 1481. Of course, the majority is entitled to tailor its opinion as it sees fit, but it cannot alter state law or recent Supreme Court authority to match these developed contours.

It appears to me that the majority itself loses sight of its distinction. In a later section of its opinion, the majority simply asserts: "Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim-negligent hiring practices and failure to provide adequate supervision-subjected the County to liability." Maj. op. at 1483 n. 5. In fact, the majority *cannot* so inquire, because to do so would undermine its theory of final policymaking authority, which depends on the absence of these other grounds. A few pages before, this distinction was crucial. Maj. op. at 1480. I have no explanation for this inconsistency.

Washington state law does not suggest a distinction between "hiring" and "training" for the purposes of final policymaking authority. In order to save Davis's case, the majority treats Washington law as if it said "the Commission may make rules and regulations about any matters connected with the general subject of personnel administration, except training." This, I respectfully suggest, it cannot do. Absent a state law basis for its distinction, and the majority does not propose one, both hiring and training are properly included within the "general subject of personnel administration," over which the Commission has final policymaking authority.

Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990).

This is true, even if the sheriff actually hires or even trains his personnel, as recent Supreme Court authority makes clear. In *Pembaur,* two deputy sheriffs forcibly entered Pembaur's clinic to serve subpoenas on clinic employees. The deputies acted at the express direction of the county sheriff and an assistant prosecutor. The Supreme Court reversed the appellate affirmance of the district court's dismissal of Pembaur's section 1983 claim against the county. In doing so, the plurality was careful to distinguish the situation before us.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. *If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.* Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.

475 U.S. at 483 n. 12, 106 S.Ct. at 1300 n. 12 (plurality opinion) (emphasis added). Thus, final authority with regard to law enforcement is irrelevant to a claim alleging a failure of personnel policy. The statement from *Pembaur,* as well as logic and common sense, makes this clear. Moreover, the actual exercise of discretion in hiring or training cannot change the locus of final policymaking authority, which is fixed by state law.

***1492** This last point is poignantly illustrated by another recent Supreme Court case, *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Praprotnik was transferred from one city agency to another and was then laid off. The jury found that the transfer and layoff had been retaliatory for Praprotnik's exercise of his first amendment rights. The jury exonerated the individual defendants and held the city liable.

The Supreme Court reversed the determination of municipal liability. The court of appeals in *Praprotnik,* like the majority here, held that Praprotnik's immediate supervisors had final authority with regard to his employment. *Id.* at 117, 108 S.Ct. at 920. Seven of the eight Justices considering the case disagreed with this contention. "To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty [to consider and determine all personnel matters]." *Id.* at 129, 108 S.Ct. at 927 (O'Connor, J.) (plurality opinion) (bracketed material in place of statutory language); *see also id.* at 132, 108 S.Ct. at 928 (Brennan, J.) (plurality opinion).

Following *Praprotnik,* it matters not whether the sheriff actually hired or even trained his personnel. These acts are irrelevant to the locus of final policymaking authority. As I have already said, the issue turns solely on Washington law, which empowers the Commission with final policymaking authority over the entire subject of personnel administration. *See Jett,* 109 S.Ct. at 2723; Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990). Washing-

ton law does not distinguish between hiring and training, or between training and any other aspect of personnel administration, in its definition of Commission powers.

As directed by *Praprotnik* and *Pembaur,* and required by Washington state law, I would therefore hold that the Mason County sheriff is not a final decisionmaking authority with regard to "hiring" or "training" deputy personnel. This holding would require reversal as to Mason County, eliminating the need to consider the district court's second dispositive error. Since the majority both reaches and erroneously decides this issue, however, my discussion necessarily continues.

II

The district court instructed the jury to find liability against Mason County if the county acted with "thoughtless disregard" or "reckless disregard." This is not the law. *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (*Canton*), holds that a municipality will be liable "only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact." *Id.* 109 S.Ct. at 1204 (emphasis added).

Canton requires the jury to find an element of deliberateness; the district court's instructions did not. Thus, I would hold that the instructions and *Canton* are irreconcilable. The majority nevertheless attempts to save these erroneous instructions by overlooking the differences in language and by contending that, in any event, Mason County waived its objection.

The district court gave its instructions in apparent reliance upon *Bergquist v. County of Cochise,* 806 F.2d 1364 (9th Cir.1986), since *Bergquist* was the law of this circuit at the time those instructions were given. *Bergquist* held that municipal liability for a failure to train required no more than gross negligence. *Id.* at 1370. Subsequent to trial, however, the Supreme Court decided *Canton,* overruling *Bergquist* and requiring no less than a showing of deliberate indifference. *See* 109 S.Ct. at 1204 & n. 7.

The majority contends that by not anticipating *Canton,* and by not objecting to the *Bergquist* instruction at trial, the County waived the *Canton* objection-even though *Canton* was subsequently decided.

"No exception is required when it would not have produced any results in the trial court because 'a solid wall of Circuit authority' then foreclosed the point." ***1493***Robinson v. Heilman,* 563 F.2d 1304, 1307 (9th Cir.1977), *quoting United States v. Scott,* 425 F.2d 55, 57 (9th Cir.1970) (en banc). This rule protects the parties and district court from the burden of countless objections to previously decided points of law on the hope they may someday be changed.

The majority concedes as much. It argues, however, that *Bergquist* is not "a solid wall of Circuit authority." The majority states

> [a]lthough in *Bergquist* we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.' " The Supreme Court subsequently answered this question in *City of Canton.* In *Bergquist,* by saying that

> the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law.

Maj. op. at 1481-82 (citations omitted). My reading of *Bergquist* is different. *Bergquist* observes the question left open by the Supreme Court and then proceeds to decide it. Its decision settled the point for this circuit and for the district courts within it, until overruled by *Canton.*

It is pointless to debate how "settled" the issue was within the circuit. At the time of trial, *Bergquist* was authority directly on point. The argument in this circuit was over. The district court instructions properly conformed to *Bergquist*-an objection would be useless. Thus, the *Canton* objection was not waived.

At best the majority's analysis shows that *Bergquist* was not a solid wall of *Supreme Court* authority. Indeed it was not. But *Robinson* does not require Supreme Court authority, nor should it. *Robinson* specifically refers only to a circuit wall. From the perspective of the district courts, for which the *Robinson* rule was announced, Ninth Circuit precedent is as controlling as that from the Supreme Court.

Should we adopt a rule waiving objections to adverse Supreme Court precedent while requiring those to mere Ninth Circuit precedent? This distinction makes no sense to me. The district court must follow both; an objection to either will be ineffectual at trial. *Robinson* announced a bright-line rule to minimize the delay and confusion of needless trial objections. The majority opinion obliterates it.

Perhaps the majority signals discomfort with its waiver theory by providing an alternative. Assuming the *Canton* objection was not waived, the majority contends that the erroneous instructions were harmless error. This is so, the majority argues, because the county's training policy was inadequate as a matter of law. Maj. op. at 1482. Surprisingly, this contention is unaccompanied by an articulation of the relevant standard of review. Indeed, it is difficult to discern the authority by which it can be made. The majority cites *Canton,* but *Canton* remanded the precise question the majority now keeps for itself. 109 S.Ct. at 1207.

As I have already discussed, *Canton* requires findings that (1) a county official with final decisionmaking authority (2) acted with deliberate indifference in adopting a policy that (3) caused the tort to occur. *Id.* at 1204-06. These elements impose an extraordinarily high burden on Davis, a burden rendered especially unamenable to appellate disposition by *Canton* 's emphasis on its innate fact-dependency. *See id.* at 1206.

The majority nevertheless states that the deputies "received no training in the constitutional limits of the use of force," maj. op. at 1482, and imposes county liability on this basis. Of course the deputies received training; the majority opinion itself recounts the training practices to discount their adequacy. Maj. op. at 1482-83. The majority's attempt to reconcile this contradiction highlights the difficulty with its premise. The majority asserts that while training did occur, it did not cover the "constitutional limits of the use of force." Maj. op. at 1482. This is an interesting way to define the issue, but one on which ***1494** the record is utterly silent; my review of the record reveals absolutely no evidence

at this level of detail, and the majority offers none. The absence of proof cannot be properly charged against the county, as the majority has done. Davis has the burden here. *See Canton,* 109 S.Ct. at 1206.

Ultimately, the entire inquiry misses the mark. Even if the absence of evidence could be properly held against the county, which of course it cannot, it would be irrelevant to the questions of authority and deliberation necessary for a finding of a Mason County policy, and to the question of causation.

> [The] rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy."
>
> . . . . .
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury.

Id. at 1205-06. I have already discussed the elements of authority and deliberation, neither of which is present here. As for causation, the majority addresses this element only long enough to assert that it has been met. Maj. op. at 1483. By what authority does the majority justify this conclusion? No reliance can be placed on the jury's findings, for the jury considered causation in a much broader context. At trial Davis offered to link his injury to inadequate hiring, training, and supervision. Based on the instructions given, the jury might easily have found causation only as to supervision or only as to hiring. On appeal, however, the majority has stripped from this theory both hiring and supervision, leaving only training for which it imposes liability. Whatever else might be said, this much is absolutely clear: We have no jury finding in this case linking Davis's injury to "inadequate training in the constitutional limits of force." Therefore, at the very least, the majority should remand the case for a new trial on this question. As it now stands, the majority apparently finds this fact for itself. This, I suggest, it cannot do.

III

The jury found the conduct of the deputy sheriffs completely unacceptable. It is thus tempting to fashion a theory imputing liability to Mason County, but the law requires we resist this temptation. The allure is to find some sure means of financial recompense for the torts that were committed, but that allure cannot be indulged here consistent with section 1983. The law imposes municipal liability only for torts caused by municipal policies, adopted by persons with final decisionmaking authority, after some element of deliberation. The law requires plaintiffs to prove each of these elements by a preponderance of the evidence.

The jury instructions at issue failed to follow the law. As a consequence, Davis was not required to meet his burden of proof, and the jury was unable to consider properly the claim of Mason County liability.

The majority attempts to save these erroneous instructions by contracting the

scope of Washington's system of civil service and by contending that much of Mason County's case on appeal was waived during trial. The majority then completes its work by deciding the case against the county as a matter of law. For these reasons, I respectfully dissent from the holding affirming liability against the county.

C.A.9 (Wash.),1991.
Davis v. Mason County
927 F.2d 1473, 19 Fed.R.Serv.3d 952, 33 Fed. R. Evid. Serv. 825

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137 F.R.D. 240
(Cite as: 137 F.R.D. 240)

United States District Court,
S.D. Ohio.

ENTERPRISE ENERGY CORP., et al.,
Plaintiffs,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, Defendant.

No. C2-85-1209.
June 18, 1991.

Upon joint motion for final approval of a class action settlement of a suit brought by gas producers against a gas pipeline company, the District Court, George C. Smith, J., held that: (1) settlement of class action was fair, reasonable and adequate and therefore would be approved; settlement provided substantial, immediate economic benefits to all class members and also provided economic and noneconomic benefits for class members in their continuing contractual relationship with gas pipeline company and produced only one objection representing two of the 850 contracts in the class action; (2) class counsel were entitled to attorney fees of $5 million, which was approximately 8.8 percent of the $56.6 million estimated present value of the total settlement or 15.6 percent of the $32 million current cash portion of the settlement; and (3) class representatives were entitled to class representative incentive awards in the amount of $50,000 each.

Order in accordance with opinion.

West Headnotes

[1] Compromise and Settlement 89 56.1

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)

In granting final approval to a class action settlement, court must follow a three-step process: first, court must preliminarily approve proposed settlement, second, members of class must then be given notice of proposed settlement, and third, a hearing must be held, after which court must decide whether proposed settlement is fair, reasonable and adequate. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[2] Compromise and Settlement 89 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Factors to be considered in determining whether a proposed class action settlement is fair, reasonable and adeqate include: plaintiffs' likelihood of ultimate success on the merits balanced against amount and form of relief offered in the settlement, complexity, expense and likely duration of the litigation, stage of the proceedings and the amount of discovery completed, judgment of experienced trial counsel, nature of the negotiations, objections raised by class members, and public interest. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[3] Compromise and Settlement 89 57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases
In determining fairness, adequacy and reasonableness of proposed class action settlement, court need not reach ultimate conclusions of fact regarding merits of the case or decide underlying issues of law. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[4] Compromise and Settlement 89 56.1

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)
Whether settlement of class action is fair, reasonable and adequate must be evaluated by examining settlement in its entirety and not as isolated components. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[5] Compromise and Settlement 89 70

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k70 k. Evidence; Affidavits. Most Cited Cases
Once preliminary approval to a class action settlement has been granted, a settlement is presumptively reasonable and an objector must overcome a heavy burden to prove that the settlement is unreasonable. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[6] Compromise and Settlement 89 58

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k58 k. Opposition or Approval. Most Cited Cases
Approval of class action settlement should not be denied merely because some class members object to it. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[7] Compromise and Settlement 89 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases
Settlement of class action brought by gas producers against gas pipeline company was fair, reasonable and adequate and therefore would be approved; settlement provided substantial, immediate economic benefits to all class members and also provided economic and noneconomic benefits for class members in their continuing contractual relationship with gas pipeline company and produced only one objection representing two of the 850 contracts in the class action. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 2737.2

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

Lawyer who recovers a common fund for benefit of a class of persons in commercial litigation is entitled to reasonable attorney fees and expenses payable from that fund.

[9] Federal Civil Procedure 170A ⚿ 2737.2

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

Factors relevant to an award of attorney fees from a common fund are: value of benefit rendered to the class, society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, whether services were undertaken on a contingent fee basis, value of the services on an hourly basis, complexity of the litigation, and professional skill and standing of all counsel.

[10] Federal Civil Procedure 170A ⚿ 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class counsel, who negotiated settlement of class action brought by gas producers against gas pipeline company, were entitled to attorney fees of $5 million, which was approximately 8.8 percent of the $56.6 million estimated present value of the total settlement or 15.6 percent of the $32 million current cash portion of the settlement.

[11] Federal Civil Procedure 170A ⚿ 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Courts approve incentive awards to representatives of class members where the representatives have earned the awards.

[12] Federal Civil Procedure 170A ⚿ 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Following factors are reviewed when considering a request for a class representative incentive awards: action taken by class representatives to protect interests of class members and others and whether those actions resulted in a substantial benefit to class members, whether class representatives assumed substantial direct and indirect financial risk, and amount of time and effort spent by class representatives in pursuing the litigation.

[13] Federal Civil Procedure 170A ⚿ 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class representatives in class action brought by gas producers against gas pipeline company were entitled to class representative incentive awards in the amount of $50,000 each where they had taken actions which had protected the interests of class members and which resulted in settlement and provided substantial economic and noneconomic benefits for

class members, entered into contingent fee arrangement with class counsel which obligated them to pay class counsel for all expenses incurred in pursuit of the litigation, devoted a substantial amount of time and effort and incurred unreimbursed expenses in pursuing the litigation.

***242** Duke W. Thomas, John C. Elam and James Hedden, Columbus, Ohio, for plaintiffs.

Daniel W. Costello, Columbus, Ohio and John E. Beerbower, New York City, for defendant.

OPINION AND ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

GEORGE C. SMITH, District Judge.

This matter is before the Court pursuant to the Joint Motion for Final Approval of Class Action Settlement under Federal Rule of Civil Procedure 23(e).[FN1] Furthermore, before the Court there is a motion by plaintiffs for an award of attorney's fees and expenses to class counsel and a motion by plaintiffs for an order to granting class representative incentive awards. The Court will address each of these matters *seriatim.*

FN1. Rule 23(e) provides as follows:

> **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FACTS

On July 26, 1985, a class action lawsuit was filed on behalf of gas producers ("Class Members") that had contracts with the defendant Columbia Gas Transmission Corporation ("Columbia Gas"). The contracts between the parties essentially provided the price to be paid for each unit of natural gas (MMBtu) as the maximum lawful price during the month of delivery under the Natural Gas Policy Act of 1978 ("NGPA"). Among the various provisions in the contract allowing for adjustment in price is a the "Cost Recovery Clause" ("CRC"). The clause provides as follows:

> *Cost Recovery.* Notwithstanding any other provisions of this Agreement, if any order, opinion, enactment or regulation of the Federal Energy Regulatory Commission, or any other governmental authority (Federal or State), or of any court, may have the effect, either directly or as a precedent, of preventing Buyer's full recovery of any portion of the Purchase Price paid or to be paid Seller, then Buyer with the next monthly billing cycle after the date of such order, opinion, enactment or regulation, or at such later date as it may elect, may in Buyer's judgment enable Buyer to recover its full costs. In such case, the price provisions applicable to Seller's deliveries of gas to Buyer shall be deemed modified as appropriate to assure Buyer its full-cost recovery. Seller hereunder shall not, however, be liable to Buyer for any overpayment hereunder prior to the date of such order, opinion, enactment or regulation.

***243** Pursuant to the above-cited clause, on July 11, 1985, Columbia Gas sent a letter to all Class Members announcing that it was invoking the CRC and that it would be adjusting the purchase price of the natural gas downward. The letter explained that Columbia Gas believed that two opinions of the Federal Energy Regu-

latory Commission ("FERC"), specifically, nos. 204 and 204-A, would have the effect, either directly or as a precedent, of preventing Columbia Gas' full recovery of a portion of the gas purchase specified in the contracts.

Plaintiffs claimed that these FERC opinions do not have the effect of preventing Columbia Gas' full recovery of the gas purchase price, and as such, the CRC cannot be invoked. Instead, the Class Members interpreted the FERC opinions to permit Columbia Gas to pass through the increased costs to the consumers.

By an Order entered by this Court on February 21, 1986, subsequently amended on March 1, 1991, a class was certified by this Court consisting of "[a]ll owners, operators and producers of natural gas producing wells in the Appalachian region (New York, Pennsylvania, West Virginia, Kentucky, Maryland, Virginia and Ohio) who are parties to gas purchase contracts with Columbia Gas Transmission Corporation entitling them to receive the maximum lawful price or a deregulated price under the NGPA ... and against whom Columbia has invoked a price reduction for amounts due under the contracts". The plaintiff class involved approximately 852 contracts and 2163 Class Members.

The parties, over a period of six years, engaged in substantial discovery, including the use of interrogatories, requests for documents, and depositions. This discovery was then utilized by the respective parties in a variety of motions, including dispositive motions.

Pursuant to a motion for summary judgment filed by the Defendant, the Court, in an Opinion an Order dated September 15, 1989, held that the there existed no genuine issue of material fact as to whether Columbia Gas did in fact invoke the CRC in July of 1985, March of 1987 and September of 1987. This Court further held that there was a "prevailing opinion, order, enactment, or regulation out of FERC ... which Columbia [Gas] could rely upon so as to meet the language prerequisite found within the CRC provision of the contract." In short, the Court found that Columbia Gas could rely upon the 204 and 204-A cases and other decisions, settlements, and FERC regulatory orders existing at the time in the industry to meet the contractual language prerequisite requirement in order to invoke the CRC.

This Court further found, however, that there existed "a genuine issue of material fact as to whether Columbia Gas had objectively acted in good faith in their decision to invoke the 1985 and 1987 CRCs"; whether Columbia Gas had "subjectively and with honesty in fact decided to invoke the CRCs"; whether Columbia Gas had ostensibly utilized the 204 cases and other decisions; and whether the prices set following the invocations were just and reasonable. In making the above findings, the Court had granted in part and denied in part the defendants' motion for summary judgment.

On June 25, 1990, the Plaintiff Class Members filed a motion for partial summary judgment. In an Opinion and Order dated August 30, 1990, the Court denied the dispositive motion. It became apparent at that time that the resolution of the case would only come through a negotiated settlement or a trial.

The issues of liability and damages were bifurcated for trial. Additionally, only a portion of the liability issue has been subject to discovery and was set for trial in

September of 1990. Consequently, substantial litigation and discovery could remain prior to any final determination of the parties' rights.

The parties engaged in a non-binding mediation proceeding during the first half of 1990. Following extensive briefing and preparation, the mediation lasted for almost one week in Columbus during June of 1990. In spite of the participants' efforts, the parties were unable to negotiate a settlement of this lawsuit during the mediation process.

***244** After the mediation, both sides again continued to prepare for an early September 1990 trial. This preparation led to settlement negotiations beginning in September of 1990. These settlement negotiations lasted several months and at the request of both parties included the supervision of the Court.

After almost six months of concerted negotiations by Class Counsel, Class Representatives and Columbia, a Stipulation of Proposed Class Action Settlement (the "Settlement") was reached in late February of 1991. This Settlement was then filed with the Court. This Court preliminarily approved the Settlement on March 15, 1991, and scheduled a fairness hearing for May 23, 1991.

Contemporaneous with its preliminary approval of the proposed Settlement, this Court approved the form of Notice proposed by the parties, and ordered that the Notice be sent by Class Counsel to each Class Member, at the Class Member's last known business address, on or before March 22, 1991.

On March 22, 1991, pursuant to this Court's Order, Class Counsel mailed the Notice concerning the proposed Settlement to the approximately 2,163 Class Members having interests in the 852 Class Member contracts involved in this case. Thereafter, on April 19, 1991, pursuant to the Order and Notice, Class Counsel mailed data concerning each of the 852 contracts to each of the Class Members who had an interest in any such contract. This data set forth the necessary information to enable the Class Member to compute the contract's share of the Settlement monies.

The Order of this Court and the Notice sent to the Class Members provided that if a Class Member wanted to object to any aspect of the Settlement, a Class Member was required to file a Notice of Objection with this Court on or before May 1, 1991, with copies of such Notice of Objection also served upon Class Counsel and defendant's counsel. If a Class Member had any objection or corrections to the accuracy of the data, the Class Member was to advise Class Counsel in writing on or before May 10, 1991.

Twenty (20) Notices of Objection were filed with the Court. All but two of those submissions presented comments on or challenges to the data or calculations concerning the Settlement or objections to the proposed exclusion of all or some part of a Class Member contract from the benefits of the Settlement. As of the date of the hearing on May 23, 1991, there was only one objection (representing two contracts) to the fairness, reasonableness or adequacy of the Settlement.

At the time of the hearing only two substantive objections were voiced. One objection simply related to the amount of attorney's fees requested, and the second related to the entire settlement agreement.

Attorney Richard G. Morgan, representing Seneca Upshur Petroleum Company ("Seneca Upshur"), voiced an objection to the amount of attorney fees requested by Class Counsel. He suggested a fee of $4.5 million would be more appropriate. It was his position that the only funds this Court should consider in determining the reasonableness of the attorney's fees requested by Class Counsel was the $30 million payment. He further suggested that the Court should award Class Counsel 15% of the $30 million. It was from these calculations that he derived the $4.5 million figure.

The second significant objection related to the entire settlement agreement, including the request for attorney's fees and class representative incentive awards. Attorney Brian Peterson appeared before the Court on behalf of his client, Johnson Petroleum Company, ("Johnson Petroleum").[FN2] Johnson Petroleum takes the position that "the proposed settlement is not fair, reasonable and adequate in that it fails to adequately compensate the Class Members ***245** for past claims, ... does not adequately assure the Class Members of reasonable future gas prices, [and] does not adequately assure the Class Members of the availability of transportation, yet extracts from the Class Members substantial contract concessions with respect to certain provisions of contracts which are not the subject matter of this action." See Johnson Petroleum's objection, Doc. 167 at p. 1. [FN3]

FN2. Attorney Peterson's representation includes the class members, Russell V. Johnson, Jr., Russell V. Johnson, Jr., d/b/a Johnson Petroleum Company, Rockwell Petroleum Company, Mark R. Worl, d/b/a Rockwell Petroleum Company and Rockwell Petroleum Company. For clarity, the group will be referenced as "Johnson Petroleum".

FN3. Johnson Petroleum also argues that the Representative Plaintiff's failed to properly notify them, and that the delay in receiving the documentation necessary to make a reasonable and informed decision as to the settlement, deprived them of adequate notice and an opportunity to prepare adequate timely objections.

> The Court addressed this issue at the hearing in conjunction with the motion of Johnson Petroleum for a continuance of the hearing. The Court was not impressed with the eleventh hour filing of the motion for a continuance and skeptical as to any potential notice problems. Accordingly, the Court can see no reason to deviate from the original denial of the continuance.

Johnson Petroleum further argues that the request for attorney's fees is excessive, "because the legal issues to be resolved were not unreasonably complex, because counsel did not assume a high degree of risk and because the settlement does not necessarily have a present value of Fifty-Six Million Dollars ($56,000,000.00) ..." Memorandum in Support, Doc. 167 at p. 3.

The first issue now before this Court is whether to approve or reject the Settlement based upon its fairness, reasonableness and adequacy.

I. JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

A. *The Legal Standard*

Court approval is required in order to settle a class action. Rule 23(e) provides as follows:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[1] In granting final approval to a class action settlement, the Court must follow a three step process: First, the Court must preliminarily approve the proposed settlement; Second, members of the class must then be given notice of the proposed settlement; and Third, a hearing must be held, after which the Court must decide whether the proposed settlement is fair, reasonable and adequate. *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir.1990); *United States v. Jones & Laughlin Steel Corp.,* 804 F.2d 348, 351 (6th Cir.1986); *Williams v. Vukovich,* 720 F.2d 909 (6th Cir.1985); *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir.), *rev'd on other grounds, sub nom. Firefighters Local Union No. 1784 v. Stotts, et al.,* 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1982); *Bronson v. Board of Education of the City School District of the City of Cincinnati,* 604 F.Supp. 68 (S.D.Ohio 1984); *Thompson v. Midwest Foundation Independent Physicians Ass'n,* 124 F.R.D. 154 (S.D.Ohio 1988).

[2] In determining whether a proposed class action settlement is fair, reasonable and adequate, this Circuit has identified several factors to be considered. They include: (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the judgment of experienced trial counsel; (5) the nature of the negotiations; (6) the objections raised by class members; and (7) the public interest. *Vukovich,* 720 F.2d at 922; *Bronson,* 604 F.Supp. at 73; *Thompson,* 124 F.R.D. at 157.

[3][4] In determining the fairness, adequacy and reasonableness of the proposed Settlement, this Court need not reach ultimate conclusions of fact regarding the merits of the case or decide the underlying issues of law. *Williams,* 720 F.2d at 921; *Thompson,* 124 F.R.D. at 157; *Bronson,* 604 F.Supp. at 73-74. Whether a settlement is fair, reasonable and adequate must be evaluated by examining the settlement ***246** in its entirety and not as isolated components. *Thompson,* 124 F.R.D. at 159; *Bronson,* 604 F.Supp. at 78. The Court does not have the power to change the terms of the proposed settlement which it may not like, "only the parties, during arms-length negotiations ... have the power to agree upon changes". *Bronson,* at 73.

[5][6] Once preliminary approval has been granted, a settlement is presumptively reasonable and an objector must overcome a heavy burden to prove that the settlement is unreasonable. *Williams,* 720 F.2d at 921; *Stotts,* 679 F.2d at 551; *In re Dun & Bradstreet Credit Serv. Customer Litig.,* 130 F.R.D. 366, 370 (S.D.Ohio 1990); *Thompson,* 124 F.R.D. at 156; *Bronson,* 604 F.Supp. at 71. In considering objections to a settlement, approval should not be denied "merely because some class members object to it". *Thompson,* 124 F.R.D. at 159; *see also Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir.1975),

cert. denied, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Bronson,* 604 F.Supp. at 73; *cf. Clark Equip. Co. v. International Union, Allied Indus. Workers,* 803 F.2d 878, 880 (6th Cir.1986) (acceptance of settlement over class representative's objection not necessarily abuse of discretion). It should be remembered that a settlement "is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed". *Williams,* 720 F.2d at 922. "Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs' class." *Id.*

The law generally favors and encourages the settlement of class actions. *See Franks v. Kroger Co.,* 649 F.2d 1216, 1224 (6th Cir.1981); *Thompson,* 124 F.R.D. at 157.

B. *Findings and Conclusions Concerning the Settlement*

[7] The Court has already concluded, pursuant to its March 15, 1991 Order granting preliminary approval, that the Settlement was the result of arms-length negotiations and was not collusive or illegal. This Court has personally had an opportunity to administrate, supervise, and offer limited participation in the negotiations which brought about the settlement agreement proposed by the parties. It is apparent from those observations that the Settlement is the by-product of an arm's length negotiation between the parties.

The Notice of the proposed Settlement, the fairness hearing and related matters were completed, are sufficient under Rule 23 of the Federal Rules of Civil Procedure, and allowed Class Members a full and fair opportunity to consider the proposed Settlement and to develop a response.

Vukovich, 720 F.2d at 921.

The Court finds Johnson Petroleum's argument that the necessary information was not before them in a timely fashion, thus they did not have a sufficient amount of time to evaluate the settlement and decide whether to objection, to be unpersuasive. The information was sent to Johnson Petroleum as provided for in this Court's Order preliminarily approving the settlement and setting parameters for notification of the class. The specific additional information requested by Johnson Petroleum was supplied in a timely fashion and the eight days of preparation were more than adequate, especially given Johnson Petroleum's stated position that the instant case is not "unreasonably complex".

This Settlement provides substantial, immediate economic benefits to all Class Members. It also provides economic and non-economic benefits for Class Members in their continuing contractual relationships with Columbia. Although there has been some disagreement as to the magnitude of the future benefits and such benefits are necessarily to some extent speculative, no Class Member has asserted that the changes in future rights under the contracts result in a net detriment to the Class as a whole or to any Class Member, and the Court finds based upon the record that the value of the future benefits provided by the Settlement are substantial.

The Court finds that while this case has already been in litigation for six years, if a ***247** settlement cannot be achieved considerable litigation remains. As such, the Settlement provides immediate value to the Class and minimizes the costs which plaintiffs must otherwise incur in moving forward and potentially obtaining a successful result.

Defendant's motion for summary judgment raised difficult, close questions. Although the Court concluded that there were genuine issues of material fact remaining for trial, there is no assurance that plaintiffs would be able to sustain their burden with respect to those issues. As such, a favorable or successful result is merely a potential and not unequivocal.

This Court would be the ultimate finder of fact if the case went to trial. Furthermore, this Court has had the opportunity to review and rule on dispositive motions pending in this action. As a result, the Court is in a strong position to assess and understand the uncertainties about the ultimate outcome of a trial of all issues.

Based only upon a comparison of the economic and non-economic benefits of the Settlement with the likely outcome of the litigation on the merits and the relief that would be obtained, the Court concludes that this Settlement is fair, reasonable and adequate.

This action has already entailed the expenditure of substantial private and judicial resources. While one segment of the liability issues was set for trial, an even larger portion would need to be tried in the future in addition to any damages issues should the class prevail on liability.

The parties have carefully and fully analyzed the strengths and weaknesses of their positions in light of the extensive discovery already completed.

The attorneys that represent the parties have litigated complex class actions and have had extensive litigation experience. They are able to evaluate the strengths and weaknesses of this case. Counsel for both sides represent to the Court that it is a fair, reasonable and adequate resolution of the present controversy.

The Court finds that although this action was not near a conclusion, extensive discovery and motion practice have already occurred. In addition, the parties and counsel had engaged in a lengthy mediation proceeding in an effort to resolve the dispute. As such, the parties and their counsel, as well as this Court, are in good positions to evaluate the strengths of each side's case and the risks of continued litigation.

The Court concludes that the endorsement of the Settlement by counsel for both sides, in light of the extensive discovery and other pretrial activity, supports the fairness, adequacy and reasonableness of this Settlement. *Williams,* 720 F.2d at 922-23.

In addition, the Class Representatives were knowledgeable, experienced businessmen with significant economic stakes in the litigation. They participated actively in the negotiation of the Settlement and agreed to accept the terms thereof.

The proposed Settlement took almost six months to negotiate. These settlement negotiations were only successful after a week long mediation session and almost six (6) years of litigation. It is clear to this Court from the time and effort involved that this Settlement represents an arms-length, hard bargained settlement. Both parties were confident of their positions and effectively asserted their rights. It was only after repeated efforts that the parties were able to reach this Settlement.

The fact that there is only one objection to the terms of the Settlement (representing two of the 852 contracts in the class action) is a factor that weighs heavily in favor of

approving the proposed Settlement. *See Seagoing Uniforms Corp. v. Texaco, Inc.,* [1989-1990 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94, 791, 1989 WL 129691 (S.D.N.Y.1989). Johnson Petroleum has the burden to demonstrate that the Settlement is unfair, inadequate or unreasonable. *See Stotts,* 679 F.2d at 554; *Bronson,* 604 F.Supp. at 78.

To meet this burden, Johnson Petroleum has essentially forwarded an argument that the case is valued at $115 million and the amount of the settlement merely represents a 26% recovery. Johnson Petroleum ***248** states in a conclusory fashion that the Class should get more. This conclusion is made without the benefit of attending the numerous settlement discussions and makes absolutely no reference to the prior opinions of this Court wherein it was made abundantly clear that there exists a very real potential that the Class could come away from a long expensive trial with nothing. Thus, this Court finds that Johnson Petroleum has failed to carry its burden.

This Court finds that the Settlement serves the public interest. It will avoid a time-consuming and expensive trial. In addition, it will eliminate the possibility of any time-consuming and expensive appeals. The Settlement results in a final and complete resolution of all of the issues raised by the Class Members in the litigation.

The Court concludes that the stage of the proceedings, the amount of discovery completed, the opinion of Class Counsel, the nature of the negotiations, the lack of objections of Class Members and the public interest all support the conclusion that the Settlement taken as a whole is fair, reasonable and adequate.

For all of the foregoing reasons, the Court hereby grants final approval of the Settlement.

II. MOTION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES TO CLASS COUNSEL

In a filing made herein on April 12, 1991, Class Counsel have applied for an award of attorneys' fees to Class Counsel and an award reimbursing Class Counsel for actual expenses incurred in the course of this litigation to be paid from the common fund of over $32 million which has been created for the benefit of the class in this litigation. Class Counsel is requesting $5 million in total attorneys' fees, with $2.5 million of these fees to be paid at the time of final approval of the Settlement, and with the remaining $2.5 million to be paid in March of 1992 from the $15 million to be deposited by Columbia at that time into escrow. Class Counsel has reserved the right to file a supplemental application for attorneys' fees if this order is appealed.

In addition, Class Counsel has requested an award reimbursing them for actual expenses incurred totalling $164,580.05 for the period July 1985 through March 31, 1991, which amount would be paid out of the interest earned on the $17 million deposited into escrow prior to final approval of this Settlement. It is understood that Class Counsel will file one or more additional applications for reimbursement of actual expenses incurred from April 1, 1991 until the final disbursement of Settlement monies is made in 1992.

[8] Class Counsel's application is governed by the legal standards for awards of attorneys' fees and expenses in "common fund" situations. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-79, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980); *Smillie v.*

Park Chemical Co., 710 F.2d 271, 275 (6th Cir.1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697, 699-700 (S.D.Ohio 1986). It is well-settled that a lawyer who recovers a common fund for the benefit of a class of persons in commercial litigation is entitled to reasonable attorneys' fees and expenses payable from that fund. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-79, 100 S.Ct. 745, 749-50, 62 L.Ed.2d 676 (1980); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92, 90 S.Ct. 616, 625-26, 24 L.Ed.2d 593 (1970); *Smillie v. Park Chemical Co.,* 710 F.2d 271, 275 (6th Cir.1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697, 699-700 (S.D.Ohio 1986).

[9] An award of attorneys' fees and expenses lies within the sound discretion of the trial court. *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1196 (6th Cir.1974), *cert. denied,* 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975). The factors relevant to an award of attorneys' fees from a common fund in this Circuit have been clearly established. As the Sixth Circuit stated in *Smillie,* the relevant considerations are:

> (1) the value of the benefit rendered to the class;
>
> (2) society's stake in rewarding attorneys who produce such benefits in ***249** order to maintain an incentive to others;
>
> (3) whether the services were undertaken on a contingent fee basis;
>
> (4) the value of the services on an hourly basis;
>
> (5) the complexity of the litigation; and
>
> (6) the professional skill and standing of all counsel.

710 F.2d at 275; *accord Ramey,* 508 F.2d at 1196; *Basile,* 640 F.Supp. at 700; *see also Thompson v. Midwest Foundation Independent Physicians Ass'n,* 124 F.R.D. 154, 162 (S.D.Ohio 1988). An examination of each of these factors as applied to the present case supports approval of Class Counsel's application.

[10] The value of the benefit rendered to the class has been amply demonstrated in the record. The Settlement provides substantial economic and non-economic benefits to the class. The Settlement includes a common fund in excess of $30 million for the benefit of the class with respect to those claims asserted during the period of approximately July 10, 1985, through January 10, 1991. Class Counsel has also created a common fund of about $2 million for gas produced from January 10, 1991, to May 10, 1991. Class Counsel has obtained future benefits for members of the class in the nature of increased prices for gas to be produced and sold to Columbia as well as reduced transportation and gathering charges concerning the transportation of this gas in the future. Class Counsel has estimated these future benefits as having a present discounted value of approximately $24.65 million. Although the one objector contends that this future benefit value estimate of $24.65 million is too high, and while the Court recognizes that any effort to value future benefits is necessarily somewhat speculative, the Court does conclude that there is substantial value to the class contained in the future benefits provided by the Settlement.

If attorneys are to be encouraged to handle litigation of this nature, attorneys must be awarded fair and reasonable compensation for their efforts. Class Counsel accepted this representation on a contin-

gent fee basis and would not have recovered any fees for their services if they had not been successful. The contingency fee risk of non-payment in this action was significant because the likelihood of a class recovery is far from clear based upon the difficult, close questions raised in defendant's motion for summary judgment.

The "lodestar" amount of hourly charges at current rates incurred by Class Counsel through April 30, 1991 is $1,828,037.90 and Class Counsel estimates that they will incur approximately $220,000 in additional charges implementing the Settlement from and after May 1, 1991-for a total lodestar amount at current rates of approximately $2.05 million. The "lodestar" amount of hourly charges computed on the basis of Class Counsel's rates being charged when the services were rendered totals $1,681,580.15 through April 30, 1991-for a total lodestar value, when the $220,000 estimate is added concerning future charges for implementation of the Settlement, of approximately $1.9 million.

It is clear to this Court that this litigation was extremely complex and vigorously defended. The legal and factual issues were novel, and the subject matter itself was multifarious.

Finally, all counsel, Defense Counsel and Class Counsel alike, exercised the highest degree of skill and competence in this proceeding. It should be noted that the attorneys and their respective law firms enjoy the highest degree of respect in their communities. Furthermore, they have an outstanding reputation both locally and nationally.

As previously stated, only two objections were made to the request for an award of $5 million in Class Counsel fees. One objector, Johnson Petroleum, recommended $4 million as an appropriate award and the other objector, Seneca Upshur, recommended $4.5 million.

Attorney fee awards in common fund cases are often calculated as a percentage of the fund created. The percentages awarded in common fund cases typically range from 20 to 50 percent of the common ***250** fund created. *See, In re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F.Supp. 148, 150 (S.D.Ohio 1986); *In re Warner Communications Securities Litigation,* 618 F.Supp. 735, 749-50 (S.D.N.Y.1985). Here, Class Counsel are applying for an award of fees in the total amount of $5 million, which is approximately 8.8% of the $56.65 million estimated present value of the total Settlement or alternatively, approximately 15.6% of the $32 million current cash portion of the Settlement.

Class Counsel's attorney fee application is well in line with, and in fact is lower than, the percentages of the common fund approved as attorney fee awards in numerous other reported common fund cases in the Sixth Circuit and elsewhere. *See, In re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F.Supp. 148 (S.D.Ohio 1986) (fee of 18% of common fund); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697 (S.D.Ohio 1986) (fee of 26.3% of common fund); *Schwartz v. Novo Industries A/S,* 119 F.R.D. 359 (S.D.N.Y.1988) (25% of common fund); *Kirkorian v. Borelli,* 695 F.Supp. 446 (N.D.Cal.1988) (25% of common fund); *Meyer v. Citizens and Southern National Bank,* 117 F.R.D. 180 (M.D.Ga.1987) (30% of common fund); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.,* 117

F.R.D. 670 (E.D.Cal.1987) (29% of common fund); *Levit v. Filmways, Inc.,* 620 F.Supp. 421 (D.Del.1985) (33 1/3 % of common fund).

Another method for computing an appropriate attorney fee award in a common fund case is to apply a "multiplier" to the "lodestar" amount. In *In re Cenco, Inc. Securities Litigation,* 519 F.Supp. 322 (N.D.Ill.1981), the Court found that a multiplier of four times the "lodestar" amount was appropriate. In *In re Beverly Hills Fire Litigation,* 639 F.Supp. 915 (E.D.Ky.1986) , the Court found that a multiplier of five was appropriate.

In the present case, the total lodestar amount at current rates is approximately $2.05 million and at historic rates is approximately $1.9 million-for a multiplier of 2.4 or 2.6, respectively, concerning Class Counsel's $5 million attorney fee request. This 2.4-2.6 range of multiplier which Class Counsel is requesting in this litigation to support its $5 million attorney fee request is reasonable and conservative when compared to similar cases.

Based upon the foregoing, this Court finds that Class Counsel's application for an attorney fee award of $5 million is fair, reasonable, and warranted.

Class Counsel also seeks an award of $164,580.05 for reimbursement of actual expenses incurred from July 1985 through March 31, 1991, plus reimbursement for all additional expenses incurred during the period from April 1, 1991 until the final distribution of the second Settlement installment is made in 1992. There are no objections to this request. Based upon the undisputed evidence in the record, these expenses are reasonable and Class Counsel is entitled to their full recovery of these expenses from the common fund.

III. MOTION FOR CLASS REPRESENTATIVE INCENTIVE AWARDS

The six Class Representatives in this case (Enterprise Energy Corp., Beldon & Blake Corporation, Allstates Oil and Producing Co., Inc., Energy Development Corp., Edco Drilling and Production, and The Clinton Oil Company) have also applied to this Court for class representative incentive awards in the amount of $50,000 each, for a total of $300,000 of incentive award payments.

[11][12] Courts approve incentive awards to representatives of class members where the representatives have earned the awards. The Courts in this circuit review the following factors when considering a request for class representative incentive awards: (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation.

[13] ***251** In this case, the Class Representatives have taken actions which have protected the interests of the Class Members and which have resulted in a Settlement that provides substantial economic and non-economic benefits for the Class Members.

The Class Representatives entered into a contingent fee arrangement with Class Counsel which obligated them to pay Class Counsel for all expenses incurred in the pursuit of this litigation, which expenses amounted to $164,580.05 through March

31, 1991 and which will exceed this amount before the Settlement is final.

The Class Representatives have devoted a substantial amount of time and effort and have incurred unreimbursed expenses in pursuing this litigation.

Only one objection was made to the request for Class Representative incentive award, by Johnson Petroleum, and they recommended $25,000 for each Class Representative.

The Court finds that the Class Representatives have satisfied the requirements for an award of a class representative incentive fee, and the requested incentive awards in the amount of $50,000 for each of the six Class Representatives, or a total of $300,000 of incentive fee awards, is fair, reasonable and warranted.

Pursuant to the above findings of the Court IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows, that:

a. Class Members, excluding all persons who have been properly excluded from the class, pursuant to Rule 23(c)(2) Federal Rules of Civil Procedure, are:

> All owners, operators and producers of natural gas producing wells in the Appalachian Region (New York, Pennsylvania, West Virginia, Kentucky, Maryland, Virginia and Ohio) who are parties to Gas Purchase Contracts with Columbia Gas Transmission Corporation ("Columbia") entitling them to receive the Maximum Lawful Price ("MLP") or a deregulated price under the Natural Gas Policy Act ("NGPA") with respect to § 102, § 103, § 104, § 105, § 107(c)(4), § 107(c)(5), § 108 and/or § 109 NGPA categories gas, and against whom Columbia has invoked a price reduction for amounts due under the contracts by notice similar to the July 11, 1985, March 5, 1987, August 28, 1987 and/or October 12, 1987 letters from Columbia, at any time during the period commencing on or about July 10, 1985 and ending on or about January 10, 1991.

b. This Court has preliminarily approved the Settlement on March 15, 1991, and Notice to the Class Members required by Rule 23(e) of the Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, was the best notice practicable under the circumstances, and complied in all respects with Rule 23 and due process.

c. The proposed Settlement is in all respects fair, adequate, reasonable and is in the best interests of the Class Members and is hereby finally approved.

d. Class Counsel's application for an award of attorneys' fees in the amount of $5 million and for reimbursement of actual expenses incurred in the amount of $164,580.05 through March 31, 1985 is hereby granted. $2.5 million of the attorneys' fees and $164,580.05 of non-reimbursed expenses shall be paid from the $15 million portion of the common fund deposited in escrow on March 21, 1991 and from the interest thereon as well as from the interest on the approximately $2 million common fund for gas produced from January 10, 1991, to May 10, 1991. The remaining $2.5 million in attorneys' fees and any remaining additional expenses incurred by Class Counsel after March 31, 1991 shall be paid from the second $15 million portion of the common fund to be deposited on March 23, 1992 and when these monies are distributed. Class Counsel is

entitled to seek recovery of its additional expenses incurred after March 31, 1991 from the common fund by filing with this Court an appropriate application(s) for such reimbursement accompanied by an affidavit which outlines the expenses for which reimbursement is sought.

***252** e. The incentive awards requested by the Class Representatives are fair and reasonable and the incentive award application in the total amount of $300,000 is hereby granted. Each Class Representative (i.e. Enterprise Energy Corp., Beldon & Blake Corporation, Allstates Oil and Producing Co., Inc., Energy Development Corp., Edco Drilling and Production, and The Clinton Oil Company) shall receive $50,000. These awards shall be payable from the first $15 million deposited in escrow on March 21, 1991.

f. Named plaintiffs, Class Members and defendant shall now consummate and be bound by the Settlement.

g. Except for claims arising under the Settlement on behalf of Class Members or Columbia, and at such time as this Order of the Court approving the Settlement as final is non-appealable, named plaintiffs and all Class Members and their heirs, executors, assigns and any one who may claim through them, shall be deemed to release and forever discharge the defendant, its predecessors and successors-in-interest, and each past or present parent, subsidiary, related or otherwise affiliated entity, partner, principal, director, officer, employee, agent, representative or assign, from any and all claims of the type asserted in this litigation relating to defendant's exercise of the cost recovery clause contained in the Class Members' gas purchase contracts at any time during the period commencing on or about July 10, 1985 and ending on or about July 10, 1991.

h. Jurisdiction is hereby retained as to matters related to the interpretation, administration and consummation of the Settlement as approved in this Order.

i. There is no reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the District Court is directed to enter this judgment. Certification under Rule 54(b) will not result in any unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would not have to decide the same issues more than once.

j. The court costs concerning this litigation shall be paid from the common fund.

IT IS SO ORDERED.

S.D.Ohio,1991.
Enterprise Energy Corp. v. Columbia Gas Transmission Corp.
137 F.R.D. 240

END OF DOCUMENT

3

130 F.R.D. 366, 16 Fed.R.Serv.3d 409
(Cite as: 130 F.R.D. 366)

United States District Court, S.D. Ohio,
Western Division.
In re DUN & BRADSTREET CREDIT SERVICES CUSTOMER LITIGATION.

Civ. A. Nos. C-1-89-026, C-1-89-051, 89-2245, 89-3994, and C-1-89-408.
Feb. 23, 1990.

Class action lawsuit was brought against credit reporting service alleging that service fraudulently sold credit information. Parties entered into proposed settlement agreement. The District Court, Herman J. Weber, J., held that: (1) proposed settlement agreement which established $18 million settlement fund was fair, reasonable and adequate; (2) representatives of plaintiff class were entitled to award of attorney fees and expenses in amount equal to 15% of settlement fund; and (3) representatives of plaintiff class were entitled to incentive awards ranging from $35,000 to $55,000.

So ordered.

West Headnotes

[1] Compromise and Settlement 89 56.1

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)

Upon settlement by the parties of a class action lawsuit, the court must preliminary approve the proposed settlement, members of the class must be given notice of the proposed settlement, and a hearing must be held, after which the court must decide whether the proposed settlement is fair, reasonable and adequate. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[2] Compromise and Settlement 89 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

"Preliminary approval" of a proposed settlement in a class action lawsuit is based upon the court's familiarity with the issues and evidence, as well as the arms-length nature of the negotiations prior to the proposed settlement, ensuring that the proposed settlement is not illegal or collusive. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[3] Compromise and Settlement 89 58

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k58 k. Opposition or Approval. Most Cited Cases

Once a court has given preliminary approval to a proposed settlement in a class action lawsuit, an agreement is presumptively reasonable, and an individual who objects has a heavy burden of demonstrating that the decree is unreasonable. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[4] Compromise and Settlement 89

68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

Notice to the members of a class, in a class action lawsuit, both of proposed settlement and that a hearing would be held to determine whether the settlement was fair, adequate and reasonable, is required. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

[5] Compromise and Settlement 89 68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

Notice of proposed settlement agreement and fairness hearing, in class action lawsuit, was complete and sufficient under Rules of Federal Procedure, where the notice allowed members of the class a full and fair opportunity to consider the proposed settlement, and to develop a response. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] Compromise and Settlement 89 56.1

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)

In determining whether a proposed settlement of a class action lawsuit is fair and reasonable, court considers numerous factors, including plaintiff's likelihood of ultimate success on the merits balanced against amount and form of relief offered in the settlement; complexity, expense and likely duration of the litigation; stage of the proceedings and amount of discovery completed; judgment of experienced trial counsel; nature of the negotiations; objections raised by class members; public interest; and court keeps in mind that law generally favors and encourages settlement of class actions. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[7] Compromise and Settlement 89 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Plaintiffs' likelihood of success on merits in class action lawsuit brought against credit reporting service alleging that service fraudulently sold credit information, balanced against relief offered by proposed settlement agreement of the lawsuit, indicated that proposed settlement was fair, reasonable and adequate; plaintiffs faced risks in continuing with litigation, in that defendants continuously denied their culpability; defendants had motions to dismiss and to deny certification pending before court; trial on merits would have required resolution of numerous complex issues of fact and law; even if plaintiffs prevailed lengthy appeals might be forthcoming; and balanced against risks was immediate relief offered by proposed settlement agreement, in which counsel for plaintiffs estimated that claims to date were less than settlement fund created. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[8] Compromise and Settlement 89 ⚿ 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Complexity, expense and likely duration of litigation of class action lawsuit brought against credit reporting service, alleging that service fraudulently sold credit information, indicated that proposed settlement of lawsuit was fair, reasonable and adequate; plaintiffs had submitted affidavits representing time valued in excess of $1 million for attorney, paralegal, law clerk and administrative services expended; additional legal fees and expenses to bring the case to trial would be substantial; and proposed settlement would expedite compensation to class members suffering damages and allow for immediate remedial restructuring. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[9] Compromise and Settlement 89 ⚿ 58

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k58 k. Opposition or Approval. Most Cited Cases

The fact that no timely objection was raised by any class member to proposed settlement of class action lawsuit brought against credit reporting service alleging that service fraudulently sold credit information, that less than 5% of all class members had chosen to opt out of the settlement, and that no objection was raised at the fairness hearing, was given substantial weight by court in approving the proposed settlement. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[10] Compromise and Settlement 89 ⚿ 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Proposed settlement of class action lawsuit brought against credit reporting service alleging that service fraudulently sold credit information was fair, adequate and reasonable, where proposed settlement served public interest, no timely objection to settlement was raised by class members, proposed settlement was result of intense and arms-length negotiations, all counsel in matter were of opinion that proposed settlement was fair, case was complex and expensive, and plaintiff's likelihood of ultimate success on merits balanced against relief offered by proposed settlement agreement indicated that settlement was fair, reasonable and adequate. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚿ 2737.2

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

An attorney who recovers a common fund for the benefit of a class of persons in commercial litigation is entitled to reasonable attorney fees and expenses payable from that fund.

[12] Federal Civil Procedure 170A ⚿

2737.2

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

Factors relevant to an award of attorney fees from the common fund recovered for the benefit of a class of persons in commercial litigation are value of benefit rendered to class, society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, whether the services were undertaken on a contingent fee basis, value of services on an hourly basis, complexity of litigation, and professional skill and standing of all counsel.

[13] Federal Civil Procedure 170A 2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases

Value of services provided by an attorney on an hourly basis, or "lodestar figure," is relevant to fee determination of attorney's fees recoverable in a common fund case.

[14] Federal Civil Procedure 170A 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Substantial enhancement of "lodestar figure," value of services provided by an attorney on an hourly basis, was appropriate to adequately compensate class counsel following court's approval of proposed settlement agreement in class action lawsuit brought against credit reporting service alleging that service fraudulently sold credit information; value of monetary and non-monetary benefits conferred upon class members as a result of the settlement and contingent nature of the case were factors indicating enhancement.

[15] Federal Civil Procedure 170A 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class counsel were entitled to award of attorney fees and expenses in amount equal to 15% of settlement fund, in class action lawsuit brought against credit reporting service alleging that service fraudulently sold credit information, including interest, available at time of distribution of the fund; counsel spent a good deal of time and effort in the case, case was complex both factually and legally, and counsel spent their time efficiently and with great expertise.

[16] Federal Civil Procedure 170A 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Representatives of plaintiff class in an action concerning a credit reporting service's alleged fraudulent sale of credit information were entitled to incentive awards ranging from $35,000 to $55,000 for services that resulted in the establishment of

an $18 million settlement fund.

***368** Gregory A. Ruehlmann,William H. Blessing, Cincinnati, Ohio, Duke W. Thomas, Columbus, Ohio for Interbank Leasing Corp.

Louis F. Gilligan, Richard L. Creighton, Jr. , Cincinnati, Ohio, for W.M. Hershman, Inc.

W. Stuart Dornette, Joan A. Hefferman, Taft, Stettinius & Hollister, Cincinnati, Ohio, David L. Grove, David H. Marion, Dennis P. Lynch, Montgomery, McCracken, Walker and Rhoads, Philadelphia, Pa., for Dun & Bradstreet.

Thomas R. Meites, Chicago, Ill., for Fed. Deposit Ins. Corp. & Resolution Trust.

Deborah R. Gross, Bernard M. Gross, Gross, Sklar & Metzger, P.C., Philadelphia, Pa., for Frank Sussman Co.

Howard J. Sedran, David Berger, Harold Berger, Philadelphia, Pa., for Le Damor, Inc.

ORDER

HERMAN J. WEBER, District Judge.

This matter is before the Court for determination of settlement approval pursuant ***369** to Fed.R.Civ.P. 23(e). The Court makes the following findings of fact and conclusions of law:

Background

1. On January 12, 1989, a class action complaint was filed in the action *Interbank Leasing Corporation v. Dun & Bradstreet Corp. and Dun & Bradstreet, Inc.,* Civil Action No. C-1-89-026 (S.D.Ohio). Subsequently, additional class action complaints were filed in this Court and in the Eastern District of Pennsylvania. *W.M. Hershman, Inc. v. Dun & Bradstreet Inc. and Dun & Bradstreet Corp.,* Civil Action No. C-1-89-051 (S.D.Ohio, filed January 23, 1989); *LeDamor, Inc. v. Dun & Bradstreet,* Civil Action No. 89-2245 (E. D.Pa., filed March 29, 1989); *Frank Sussman Co. v. Dun & Bradstreet, Inc.,* Civil Action No. 89-3994 (E.D.Pa., filed May 19, 1989); *Mutual Mfg. & Supply Co. v. Dun & Bradstreet Corp. and Dun & Bradstreet, Inc.,* Civil Action No. C-1-89-408 (S.D.Ohio, filed June 6, 1989). All of the class action complaints centered upon allegations that Defendants engaged in a nationwide scheme fraudulently to sell credit information to its customers, in violation of federal racketeering laws and the common law. The *Hershman* action additionally alleged violations of federal antitrust laws. Defendants responded, denying all allegations.

2. Following institution of the suits, all parties engaged in discovery, including the taking of depositions, extensive document production, and transfer of Dun & Bradstreet computer database information.

3. Defendants filed motions to dismiss the complaints in all but the *Mutual* action, where a motion would have been filed if the time period for response had not been extended. Defendants also opposed class certification motions in the *Interbank, Hershman* and *LeDamor* actions. The pleadings and other proceedings in these actions have revealed the existence of sharply contested issues of fact and law, including issues as to whether: (a) any class could be certified; (b) plaintiffs could establish the liability of Defendants; and (c) plaintiffs have sustained any recoverable damages.

4. From April to August, 1989, the parties engaged in settlement discussions. On August 9, 1989, the parties entered into the proposed settlement agreement which

has led to the present proceeding.

5. On August 9, 1989, the Court preliminarily approved the proposed settlement, certifying for the limited purpose of the Stipulation of Settlement a class consisting of the following:

> All proprietorships, firms, corporations and other entities who purchased one or more regular or special domestic contracts in excess of 100 Regular Units in any contract year from Dun & Bradstreet, Inc. for credit reporting services (also known as "business information services") commencing from January 1, 1983 through June 30, 1988 ("the Class").

On August 23, 1989, the Court entered an order consolidating for the purposes of settlement the five federal actions, under the consolidated caption "In Re Dun & Bradstreet Credit Services Customer Litigation." On February 5, 1990, plaintiffs filed a "Second Consolidated Amended Complaint." On February 13, 1990, Defendant filed an Answer to the Second Consolidated Amended Complaint denying the material allegations and interposing a number of defenses to the claims asserted.

Requirements For Class Action Settlement

6. In order to settle a class action lawsuit, court approval is required, pursuant to Fed.R.Civ.P. 23(e). Rule 23(e) provides:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[1] 7. There are three steps that must be taken by the court: 1) the court must preliminarily approve the proposed settlement; 2) members of the class must then be given notice of the proposed settlement; 3) a hearing must be held, after which the ***370** Court must decide whether the proposed settlement is fair, reasonable and adequate. *Williams v. Vukovich,* 720 F.2d 909 (6th Cir.1983); *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir.1982), *reversed on other grounds, sub nom Firefighters Local Union No. 1784 v. Stotts, et al.,* 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483; *Bronson v. Board of Education of the City School District of the City of Cincinnati,* 604 F.Supp. 68 (S.D.Ohio 1984); *Thompson v. Midwest Foundation Independent Physicians Ass'n,* 124 F.R.D. 154 (S.D.Ohio 1988).

Preliminary Approval

[2][3] 8. Preliminary approval of a proposed settlement is based upon the court's familiarity with the issues and evidence, as well as the arms-length nature of the negotiations prior to the proposed settlement, ensuring that the proposed settlement is not illegal or collusive. *Bronson,* 604 F.Supp. at 71; *Stotts,* 679 F.2d at 551; *United States v. City of Miami,* 614 F.2d 1322, 1330-31 (5th Cir.1980), *modified on reh'g,* 664 F.2d 435 (5th Cir.1981). Once the court has given preliminary approval, an agreement is presumptively reasonable, and an individual who objects has a heavy burden of demonstrating that the decree is unreasonable. *Vukovich,* 720 F.2d at 921; *Bronson,* 604 F.Supp. at 71; *Stotts,* 679 F.2d at 551; *Miami,* 614 F.2d at 1333.

9. On August 9, 1989, after a hearing was held, this Court preliminarily approved the proposed settlement agreement. This Court based its preliminary approval on its familiarity with the problems and issues

presented in these cases, and the character of the negotiations. This Court concluded that the proposed settlement agreement was neither illegal nor collusive, and that it was the product of arms-length negotiations.

Notice Of The Proposed Settlement

[4] 10. Notice to the members of the class, both of proposed settlement and that a hearing would be held to determine whether the settlement was fair, adequate and reasonable, is required. *Vukovich,* 720 F.2d at 921; *Bronson,* 604 F.Supp. at 71; *Stotts,* 679 F.2d at 551.

11. Contemporaneous with its preliminary approval of the proposed settlement, this Court approved the form of notice proposed by the parties, and ordered that on or before September 30, 1989, the approved form of notice be sent by Defendants to each class member, at the class member's last known business address appearing in Dun & Bradstreet Credit Services' computerized customer records. In addition, provision was made for notice by two separate publications in the *Wall Street Journal,* to take place by October 20, 1989. Moreover, this litigation generated great public interest, and was covered in depth by local, as well as national media.

[5] 12. The notice of the proposed settlement agreement and fairness hearing scheduled for February 14, 1990 was complete and sufficient under Rule 23, Fed.R.Civ.P., as it allowed members of the class a full and fair opportunity to consider the proposed settlement, and to develop a response. *Vukovich,* 720 F.2d at 921.

13. The Court held a hearing on this matter on February 14, 1990 and received at the hearing and in advance thereof written and oral presentations of counsel for the respective parties as to the issue of compliance with this Court's Order dated August 9, 1989. As a result thereof this Court finds that the parties have carried out all of the requirements of its order.

The Fairness, Reasonableness And Adequacy Of The Proposed Settlement

14. On February 14, 1990, the Court held a hearing in order that the parties and class members could comment on the proposed settlement agreement. The Court permitted anyone present to be heard and three of the class representatives made statements to the Court in addition to counsel for all parties. Based upon the testimony adduced at that hearing, the evidence before it, and the Court's familiarity with this matter, the Court finds that the proposed settlement agreement is fair, reasonable and adequate.

***371** [6] 15. The Court has considered the following factors in arriving at its conclusion: 1) the Plaintiff's likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; 2) the complexity, expense and likely duration of the litigation; 3) the stage of the proceedings and the amount of discovery completed; 4) the judgment of experienced trial counsel; 5) the nature of the negotiations; 6) the objections raised by class members; and 7) the public interest. *Vukovich,* 720 F.2d at 922; *Bronson,* 604 F.Supp. at 73; *Thompson,* 124 F.R.D. at 157. In addition, this Court has kept in mind that the law generally favors and encourages the settlement of class actions. *Franks v. Kroger Co.,* 649 F.2d 1216, 1224 (6th Cir.1981), *vacated on other grounds and modified,* 670 F.2d 71 (6th Cir.1982); *Thompson,* 124 F.R.D. at 157.

Plaintiffs' Likelihood Of Ultimate Success On The Merits Balanced Against The Relief Offered By The Proposed Settlement

Agreement

[7] 16. Plaintiffs face risks in continuing forward with this litigation. Defendants have continuously and emphatically denied their culpability. Defendants' motions to dismiss, and to deny certification, are pending before the Court. Should Defendants prevail on their motions to dismiss or should the class not be certified, many of the class members may effectively be left without a remedy, because their individual claims would be too small to litigate.

17. Even should Plaintiffs survive Defendants' motions for dismissal and to deny class certification, and survive potential future motions for summary judgment, a trial on the merits would require resolution of numerous complex issues of law and fact. Each of the foregoing issues would be fully and actively contested by Defendants during trial.

18. Even if Plaintiffs ultimately prevail at trial and are awarded damages, lengthy appeals might be forthcoming due to the significant and complex legal issues presented in this case.

19. Balanced against the above possibilities is the immediate relief offered by the proposed settlement agreement. Part of the relief would provide for immediate money payments to thousands of Class Members. As of February 14, 1990, counsel for Plaintiffs estimated that the claims to date were less than the approximately $18 million settlement fund created, which would allow for full payment of valid claims. In addition, the settlement affords significant non-monetary relief directed at averting the conditions that Plaintiffs claim led to the damages they suffered. This non-monetary relief provides a benefit to all Class Members.

20. Balanced against the risks posed to Plaintiffs by the continuation of the litigation, the proposed settlement is fair, reasonable and adequate.

The Complexity, Expense And Likely Duration Of The Litigation

[8] 21. Despite its relatively short duration, this has already been a complex and expensive case. Plaintiffs have submitted affidavits representing that time valued in excess of one million dollars for attorney, paralegal, law clerk and administrative services has been expended, and that Plaintiffs have already incurred costs and expenses of over $100,000, exclusive of attorney time. The additional legal fees and expenses to bring this case to trial would be substantial and trial would be extremely time-consuming and costly for all parties.

22. The proposed settlement will expedite compensation to Class Members suffering damages and will allow for immediate remedial restructuring, and will further Class Members' interests in a timely and cost-effective manner. These factors indicate that the proposed settlement is fair, reasonable and adequate.

The Stage Of The Proceedings, And The Amount Of Discovery Completed

23. Fairly extensive discovery has been completed and the parties now face the issues raised by motions for dismissal, and for class certification, discussed above. The discovery completed includes production ***372** of thousands of documents by Defendants, depositions of a number of Defendants' personnel, and transmittal and analysis of Defendants' computer database information. The parties are fully knowledgeable about the facts and legal issues involved, as well as the strengths and weaknesses of their positions.

Judgment Of Experienced Trial Counsel

24. Counsel in this matter have extensive experience in complex class action litigation. The Court pays particular attention to the opinion of all counsel that the proposed settlement agreement is fair, adequate and reasonable.

The Nature Of The Negotiations

25. The proposed settlement was the result of intense, arms-length negotiations between the parties. The proposed settlement agreement suggests no bias, collusion or coercion in favor of any party or subgroup of class members.

Objections Raised By Class Members

[9] 26. No timely objection was raised by any Class Member to the proposed settlement, and less than 5% of all Class Members have chosen to opt out. One untimely objection, improper in other regards, was filed and subsequently withdrawn prior to the fairness hearing. No objection was raised at the fairness hearing. The Court gives these factors substantial weight in approving the proposed settlement. *See Seagoing Uniform Corp. v. Texaco, Inc.,* [Current] Fed.Sec.L.Rep. (CCH) paragraph 94,791, 1989 WL 129691 (S.D.N.Y.1989).

Defendants' Right To Withdraw

27. The Defendants acknowledged in open court that, based upon the facts known to date, the right to withdraw under paragraph 28 of the settlement agreement has become moot.

The Public Interest

28. The proposed settlement serves the public interest. Expeditious resolution of this case allows Defendants to implement remedial procedures as well as compensate Class Members for their contested damages now, rather than prolonging implementation until after a trial and appeal, if at all. Time-consuming and expensive litigation will be avoided, the dispute will be resolved, and resolved in a manner which does its best to ensure that Defendants can continue to provide valuable service to Class Members in an atmosphere that will foster trust and confidence.

Conclusions Of Law And Findings Regarding Proposed Settlement

[10] 29. In light of the foregoing requisite factors, the Court concludes that the proposed settlement is a fair, adequate and reasonable settlement of the plaintiff Class Members' claims against the Defendants. Further, based upon the facts known to date, the right of Defendants to withdraw from the settlement is moot.

[11] 30. This case involves a fee application under the "common fund" doctrine. It is well-settled that an attorney who recovers a common fund for the benefit of a class of persons in commercial litigation is entitled to reasonable attorneys' fees and expenses payable from that fund. *Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 1550 n. 16, 79 L.Ed.2d 891 (1984); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-79, 100 S.Ct. 745, 749-50, 62 L.Ed.2d 676 (1980); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92, 90 S.Ct. 616, 625-26, 24 L.Ed.2d 593 (1970); *Smillie v. Park Chemical Co.,* 710 F.2d 271, 275 (6th Cir.1983); *Basile v. Merrill, Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697, 699-700 (S.D.Ohio 1986).

31. Fee awards in common fund cases generally are calculated as a percentage of the fund created, with the percentages awarded typically ranging from 20 to 50 percent of the common fund created. *See In Re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F.Supp. 148, 150 (S.D.Ohio 1986); *In Re Warner Commu-*

nications Securities Litigation, 618 F.Supp. 735, 749-50 (S.D.N.Y.1985). In this case, class counsel applied for an award of attorneys'***373** fees and expenses in an amount equal to 15% of the settlement fund, including interest, available at the time of distribution.

[12] 32. The factors relevant to an award of attorneys' fees from a common fund in this Circuit are: 1) the value of the benefit rendered to the class; 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; 3) whether the services were undertaken on a contingent fee basis; 4) the value of the services on an hourly basis; 5) the complexity of the litigation; and 6) the professional skill and standing of all counsel. *Smillie v. Park Chemical Co.,* 710 F.2d at 275. *Accord Basile,* 640 F.Supp. at 700; *see also Thompson,* 124 F.R.D. at 162.

33. Class counsel have rendered a substantial benefit to the class in this case. Counsel have obtained a monetary fund that will amount to over $19 million at the date of distribution. Based upon the claims to date, this could pay 100% of all valid claims without proration. In addition, class counsel obtained significant non-monetary benefits, requiring important changes in the operating procedures of D & B, that will unquestionably aid and financially benefit all Class Members in their future business dealings with D & B. Society has an interest in rewarding attorneys such as Class counsel, who have provided benefits of the nature encompassed in this settlement.

34. Class counsel undertook their representation upon a fully contingent basis, entailing a risk of over a million dollars of attorney time, and over one hundred thousand dollars of costs. Class counsel undertook a substantial risk of absolute nonpayment in prosecuting this action, for which they should be adequately compensated. *See Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 638 (6th Cir.1979).

[13][14] 35. The value of the services provided on an hourly basis, or "lodestar" figure, is relevant to the fee determination in a common fund case. *See Smillie,* 710 F.2d at 275. After determining this lodestar figure the district court may adjust the award in order to reflect factors such as the economic benefit conferred upon class members. *Id.* In conjunction with their application for a fee award, Class counsel have submitted fee affidavits that evidence work performed with an hourly value in excess of $1.163 million, and costs of approximately $113,732.71. In consideration of the contingent nature of the case, and the value of the monetary and non-monetary benefits conferred upon the Class Members as a result of the settlement, substantial enhancement of the lodestar figure is appropriate to adequately compensate class counsel. Class counsel will incur additional expenses and counsel time in the ultimate resolution of this case.

[15] 36. It is clear from both the time records submitted and the Court's observation that Class counsel spent a great deal of time and effort in a case that was complex both factually and legally, and did so both efficiently and with great expertise, warranting a substantial fee award. *See Smillie,* 710 F.2d at 275.

37. The Court has heard counsel on behalf of the plaintiffs and counsel on behalf of the defendants, and all other persons desiring to be heard, and having reviewed all of the submissions presented with respect to the Application For and Memorandum in

Support of An Award of Attorneys' Fees and Expenses to Class Counsel, and having reviewed the affidavits, schedules and exhibits submitted in support thereof, the Court finds that the payment of attorneys' fees, costs and expenses to the Class counsel pursuant to the Application is appropriate.

[16] 38. The Class Representatives, comprised of the five companies who were plaintiffs in the original federal actions, have applied to this Court for incentive awards. *Application for Class Representative Incentive Award and Memorandum in Support.*

39. Numerous courts have not hesitated to grant incentive awards to representative plaintiffs who have been able to effect substantial relief for classes they represent. ***374** *See Wolfson v. Riley,* 94 F.R.D. 243 (N.D.Ohio 1981); *Bogosian v. Gulf Oil Corp.,* 621 F.Supp. 27, 32 (E.D.Pa.1985); *In re Minolta Camera Products Antitrust Litigation,* 666 F.Supp. 750, 752 (D.Md.1987), sub-captioned *Trancelliti v. Minolta Corp.,* No. 86-3848. Moreover, a differentiation among class representatives based upon the role each played may be proper in given circumstances. *See In Re Jackson Lockdown/MCO Cases,* 107 F.R.D. 703, 710 (E.D.Mich.1985).

40. All of the class representatives in filing suit against D & B took action to protect the interests of the Class Members and others, incurring substantial direct and indirect financial risks in attempting to vindicate the rights of others. In addition, all of the class representatives spent a good deal of time and effort in this case, as reflected in the supporting affidavits they filed. Two of the class representatives, Interbank and Hershman, are particularly worthy of note, in that: 1) they were the first to file cases; 2) they spent a great deal of time and were very active in reviewing the case and acting as advisors to Class counsel in the prosecution and settlement of this case; 3) and their businesses were disrupted and their time was expended by responding to discovery, including undergoing depositions.

41. The Court having heard argument, and having reviewed the Application for Class Representative Incentive Award and the affidavits in support thereof, the Court finds that the following additional payments shall be made from the settlement fund at the time of its distribution to Class Members, as incentive awards to the class representatives for their time and expenses: Fifty-five Thousand ($55,000) Dollars to Interbank, Fifty-Five Thousand ($55,000) Dollars to Hershman, Thirty-Five Thousand ($35,000) Dollars to LeDamor, Thirty-Five Thousand ($35,000) Dollars to Sussman, and Thirty-Five Thousand ($35,000) Dollars to Mutual.

42. The Court finds that there is no reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the District Court is directed to enter this judgment. Certification under Rule 54(b) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellant court would not have to decide the same issues more than once.

Order

By order dated August 9, 1989, this court, for purposes of settlement only, conditionally certified named Plaintiffs as representatives of settlement class, which includes as Class Members all proprietor-

ships, firms, corporations, and other entities purchasing one or more regular or special domestic contracts in excess of 100 Regular Units in any contact year from Dun & Bradstreet, Inc. for credit reporting services (also known as "business information services") commencing from January 1, 1983 through June 30, 1988 ("Class Period"). Named Plaintiffs, acting on behalf of themselves and the Class Members, have entered into a Stipulation of Settlement dated August 9, 1989 (the "Stipulation") with Defendants The Dun & Bradstreet Corporation and Dun & Bradstreet, Inc. ("Defendants") in settlement of the above-captioned actions (the "Litigation"). Plaintiffs and Defendants have applied to this Court for approval of the stipulation and the terms thereof pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

On August 9, 1989, an Order with Respect to Class Action Certification, Notice, Settlement Hearing and Administration was entered by this Court directing that notice be given to the Class Members of the class certification, of the proposed Settlement, and of a hearing to determine whether the proposed Settlement should be approved as fair, adequate and reasonable, and to hear any objections thereto. Such a hearing was held, as noticed, on February 14, 1990. Prior to the hearing, proof of notice, as directed in said Order, was presented and filed. Class Members were given the opportunity to file a Request for Exclusion from the Class on or before November 28, 1989 and, for certain specified ***375** Class Members, the time within which they were required to file a Request for Exclusion was extended by order of this Court. Class Members were also notified of their right to appear at the hearing in support of or in opposition to the proposed Settlement. No Class Member appeared or filed papers to oppose the proposed settlement.

Class Members were also notified that counsel for the named Plaintiffs would apply for an award of attorneys' fees and expenses in an amount equal to 15% of the total settlement fund including interest created by the proposed Settlement, that the named Plaintiffs would each apply for an incentive award for their efforts on behalf of the class, and that both of these applications would be considered at the hearing on the proposed Settlement. Prior to the hearing, the applications for attorneys' fees and expenses and incentive awards were made. No Class Member appeared or filed papers to oppose the applications.

The Court, having heard counsel on behalf of the parties and all other persons who desired to be heard, having reviewed all of the submissions presented with respect to the proposed Settlement, attorneys' fees and expenses, and incentive awards, having determined that the Settlement is fair, adequate and reasonable, that the application for attorneys' fees and expenses in the amount of 15% of the settlement fund, including interest, is appropriate and reasonable, and that incentive awards to the named Plaintiffs are warranted, and Defendants having acknowledged that their right to elect to withdraw from the Settlement as provided in paragraph 28 of the Stipulation of Settlement, based upon the facts known to date, is moot, all of which is set forth in the Findings of Fact and Conclusions of Law filed of even date herewith, it is hereby ORDERED, ADJUDGED AND DECREED THAT:

1. "Class Members" are as described above, excluding all entities who timely filed a request to be excluded from the Class, pursuant to Rule 23(c)(2) Federal

Rules of Civil Procedure. A list of all entities that have timely filed a Request for Exclusion shall be filed with the Court under seal on or before March 30, 1990. The entities on this list shall not participate in any portion of the Settlement fund.

2. The proposed Settlement (as set forth in the Stipulation of Settlement dated August 9, 1989) ("Stipulation") is in all respects, fair, adequate, reasonable and proper and in the best interests of the Class Members and is approved.

3. Notice to the Class Members required by Rule 23(e) Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, was the best notice practicable under the circumstances, complying in all respects with such Rule and due process, including, but not limited to, the form of notice and the methods of identifying and giving notice to the Class Members.

4. Named Plaintiffs, Class Members and Defendants shall consummate and be bound by the Settlement.

5. These actions are dismissed with prejudice and on the merits and without costs, and all claims, rights, demands and causes of action for, by reason of, arising from or in any way relating to contracts for the purchase of Units commencing during the Class Period, which the named Plaintiffs and Class Members or any of them have or may have, or which have been or could have been asserted against Defendants in connection with, arising out of, or in any way related to any acts, failures to act, omissions, misrepresentations, facts, events, transactions, occurrences or other matters set forth, alleged, embraced or otherwise referred to in the Litigation, including, without limitation, in the Second Consolidated Amended Complaint filed pursuant to the Stipulation, including all claims for violations of federal, state, common or other law, are discharged and extinguished.

6. Upon this Order of the Court approving the Settlement described in the Stipulation becoming final and non-appealable (on the "Settlement Effective Date" as defined in paragraph 15(k) of the Stipulation), Plaintiffs and all Settlement Class Members and their respective heirs, executors, ***376** administrators, representatives, agents, successors and assigns, shall be deemed to release and forever discharge the Defendants and their present and former officers, directors, shareholders, employees, agents, successors and assigns of and from all claims which arise out of or relate to contracts for the purchase of Units (as defined in Paragraph 15.1 of the Stipulation of Settlement) commencing during the Class Period including, any and all manner of actions and causes of actions, suits, obligations, claims, debts, demands, agreements, promises, covenants, contracts, liabilities, controversies, costs, expenses and attorneys' fees, or any nature whatsoever, in law or in equity, whether known or unknown, foreseen or unforeseen, matured or unmatured, accrued or not accrued, direct or indirect, which the Plaintiff and the Settlement Class Members, or any of them, ever had, now have or can have, or shall or may hereafter have against any person or entity, either alone or in combination with others, for, by reason, arising from or in any way relating to contracts for the purchase of Units commencing during the Class Period, involving, any one or more of the following:

(i) alleged fraud, misrepresentations, or omissions in connection with the purchases of Units from Dun & Bradstreet, Inc.

("DBI");

(ii) alleged misrepresentations, fraud, or omissions in connection with negotiations and renewals of credit-reporting contracts with DBI;

(iii) alleged misrepresentations, fraud, or omissions by Defendants employees, sales representatives, support personnel, officers, directors or agents;

(iv) alleged fraud, misrepresentations, or omissions with respect to calculations, charges or inquiries;

(v) all claims which are asserted in the Second Consolidated Amended Complaint or which in any way relate to or arise from the facts, transactions, matters, occurrences or events surrounding, or which are set forth in, the Second Consolidated Amended Complaint; and

(vi) all claims or causes of action relating to or arising from any fact, transaction, matter, occurrence or event which in whole or in part formed the subject matter of the Litigation, or relating to or arising from any purchase of credit reporting services from DBI.

Nothing contained herein is intended to release claims relating to payments allegedly made to and not properly credited by Dun & Bradstreet.

7. Plaintiffs and each and every Class Member not excluded from the Class are permanently barred, either directly, derivatively, or representatively, from asserting against any persons or entities any actions and causes of action, suits, obligations, claims, debts, demands, agreements, promises, covenants, contracts liabilities, controversies, costs, expenses, and attorney fees for, by reason of, arising from or in any way relating to contracts for the purchase of Units commencing during the Class Period, or any nature whatsoever, in law or in equity, whether known or unknown, foreseen or unforeseen, matured or unmatured, accrued or not accrued, direct or indirect, arising during the Class Period, which Plaintiffs and the Settlement Class Members, or any of them, ever had, now has or can, shall or may hereafter have for, by reason of, arising from or in any way relating to or involving any or all of those matters described in (i)-(vi) of paragraph 6.

8. The application of Plaintiffs' class counsel for an award of attorneys' fees and expenses in an amount equal to 15% of the settlement fund, including interest, available for distribution to the class of the date of distribution is hereby granted. Payment shall be made at the time of final distribution, upon and subject to final approval of this Court.

9. The application for incentive awards to compensate the named Plaintiffs and class representatives for all time, risk and expenses is hereby granted in the following amounts: W.M. Hershman, Inc., $55,000; Interbank Leasing Corp., $55,000; The Mutual Mfg. & Supply Co., $35,000; Frank Sussman Co., $35,000 and; LaDamor, Inc. $35,000. Payment shall be made at the *377 time of final distribution, upon the subject to final approval of this Court.

10. Jurisdiction is hereby retained as to matters related to administration and consummation of the Settlement hereby approved.

11. The Court finds that there is no reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the District Court is directed to enter this judg-

ment. Certification under Rule 54(b) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellant court would not have to decide the same issues more than once.

IT IS SO ORDERED.

S.D.Ohio,1990.
In re Dun & Bradstreet Credit Services Customer Litigation
130 F.R.D. 366, 16 Fed.R.Serv.3d 409

END OF DOCUMENT

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67 F.3d 1470, 69 Fair Empl.Prac.Cas. (BNA) 48, 67 Empl. Prac. Dec. P 43,752, 95 Cal. Daily Op. Serv. 8118, 95 Daily Journal D.A.R. 13,962
(Cite as: 67 F.3d 1470)

▷

United States Court of Appeals,
Ninth Circuit.
Arthur MANGOLD; Maurice F. Crommie, Plaintiffs-Appellees,
v.
CALIFORNIA PUBLIC UTILITIES COMMISSION; William Ahern; Jeff O'Donnell; Catherine Yap; Ed Texeira; David Morse; Terry Murray; Mark Ziering; Doug Long; Wes Franklin; Jim Pretti; Leona Fong; and Sandy Barsell, and Does 1 through 20, inclusive, Defendants-Appellants.

Nos. 94-15287, 94-15696.
Argued and Submitted Aug. 17, 1995.
Decided Oct. 17, 1995.

In consolidated cases, employees brought suit against the California Public Utilities Commission (PUC) and various PUC managers, asserting age discrimination claims under the Age Discrimination in Employment Act (ADEA), the California Fair Employment and Housing Act (FEHA), and California common law. Jury found PUC liable for age discrimination under the ADEA and the FEHA, and found individual defendants liable under FEHA. Jury also found that PUC and individual defendants violated state public policy for failure to promote. Plaintiffs were awarded damages for loss of earnings, liquidated damages, and emotional distress. The United States District Court for the Northern District of California, Barbara A. Caulfield, J., 840 F.Supp. 719, awarded attorney fees under state law, after applying contingency fee multiplier of two. PUC and individual defendants appealed from judgment, and PUC also appealed from attorney fee award. The Court of Appeals, Samuel P. King, District Judge, sitting by designation, held that: (1) combining disparate treatment and disparate impact theories in jury interrogatory was not reversible error; (2) court did not err in admitting statistical evidence to prove intentional discrimination under "pattern and practice" disparate treatment theory; (3) "stray remarks" by nondefendant PUC officials indicating preference for younger employees were relevant and admissible; (4) state law controlled method of calculating attorney fees awarded under state law, and thus district court did not err in applying contingency fee multiplier permissible under state law, but prohibited under federal law; and (5) district court erred in awarding postjudgment interest from date of verdict, rather than from date of final judgment.

Affirmed; remanded for determination of postjudgment interest.

West Headnotes

[1] Federal Courts 170B ⇐776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Federal Courts 170B ⇐908.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk908 Instructions
170Bk908.1 k. In General. Most Cited Cases

Failure to submit proper jury instruction is question of law reviewable de novo, but error in instructing jury in a civil case does not require reversal if it is more probably than not

harmless.

[2] Federal Civil Procedure 170A ⚿2213

170A Federal Civil Procedure
170AXV Trial
170AXV(I) Interrogatories Accompanying Forms for General Verdict
170Ak2212 Necessity and Propriety
170Ak2213 k. Discretion of Court in General. Most Cited Cases

Federal Civil Procedure 170A ⚿2236

170A Federal Civil Procedure
170AXV Trial
170AXV(J) Special Verdict
170Ak2236 k. Form and Sufficiency of Questions Submitted. Most Cited Cases
Trial court's complete discretion as to whether a special or general verdict is to be returned extends to determining the form of verdict and interrogatories, provided that questions asked are adequate to obtain jury determination of all factual issues essential to judgment.

[3] Federal Civil Procedure 170A ⚿2173.1(1)

170A Federal Civil Procedure
170AXV Trial
170AXV(G) Instructions
170Ak2173.1 Form, Requisites, and Sufficiency
170Ak2173.1(1) k. In General. Most Cited Cases

Federal Civil Procedure 170A ⚿2182.1

170A Federal Civil Procedure
170AXV Trial
170AXV(G) Instructions
170Ak2182 Construction and Effect of Charge as a Whole
170Ak2182.1 k. In General. Most Cited Cases

Federal Civil Procedure 170A ⚿2236

170A Federal Civil Procedure
170AXV Trial
170AXV(J) Special Verdict
170Ak2236 k. Form and Sufficiency of Questions Submitted. Most Cited Cases
Taken as a whole, instructions and interrogatories must fairly present issues to jury; if issues are fairly presented, district court has broad discretion regarding precise wording of instructions and interrogatories.

[4] Federal Courts 170B ⚿908.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk908 Instructions
170Bk908.1 k. In General. Most Cited Cases
Combining theories of disparate treatment and disparate impact in jury interrogatory in age discrimination suit was not reversible error; although it was preferable not to combine theories, taking verdict form and instructions together, discrimination issue was fairly presented to jury, and additional specific interrogatories made clear which theory jury was applying.

[5] Civil Rights 78 ⚿1545

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1545 k. Prima Facie Case. Most Cited Cases
(Formerly 78k383)
Statistics may be used to establish a prima facie case of discrimination under disparate treatment theory.

[6] Civil Rights 78 ⚿1542

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1542 k. Admissibility of Evidence; Statistical Evidence. Most Cited Cases
(Formerly 78k381)
Statistics correlating age with promotion were relevant and admissible in age discrimination suit to prove intentional discrimination under "pattern and practice" disparate treatment theory, despite employer's contention that statistics only correlated age with promotion, and did not isolate protected class; expert's assumptions and composition of promotion pools went toward weight, not admissibility, of the evidence.

[7] Civil Rights 78 ⚿1542

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1542 k. Admissibility of Evidence; Statistical Evidence. Most Cited Cases
(Formerly 78k381)
"Stray remarks" by president of the California Public Utilities Commission (PUC) and PUC division directors indicating preference for younger employees were relevant and admissible in age discrimination suit against the PUC, notwithstanding contention that remarks were irrelevant to show intent because they were made by nondefendants; remarks were statements made during scope of employment by senior decisionmakers regarding assignments, promotions or policies, and, along with other substantial evidence, created strong inference of intentional discrimination.

[8] Municipal Corporations 268 ⚿741.20

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.20 k. Requirement as Mandatory or Condition Precedent. Most Cited Cases
California Tort Claims Act requires, as a condition precedent to suit against a public entity, timely presentation of a written claim and rejection of the claim in whole or in part. West's Ann.Cal.Gov.Code § 900 et seq.

[9] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews de novo legal question whether state or federal law applies in diversity action.

[10] Federal Courts 170B ⚿382.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk382 Court Rendering Decision
170Bk382.1 k. In General. Most Cited Cases
In construing state law, Court of Appeals follows decisions of state's highest court.

[11] Federal Courts 170B ⚿371

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk371 k. Nature and Extent of Authority. Most Cited Cases
Erie principles apply equally in the context of pendent jurisdiction.

67 F.3d 1470, 69 Fair Empl.Prac.Cas. (BNA) 48, 67 Empl. Prac. Dec. P 43,752, 95 Cal. Daily Op. Serv. 8118, 95 Daily Journal D.A.R. 13,962
(Cite as: 67 F.3d 1470)

[12] Federal Courts 170B ⚿415

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk415 k. Damages, Interest, Costs and Fees. Most Cited Cases
Under *Erie* analysis, district court did not err in applying state law to calculate attorney fees available under state law, and in using contingency-fee multiplier available under state law to enhance award to plaintiffs who succeeded on both federal and state statutory grounds in age discrimination suit, despite employer's contention that method of calculating fees is procedural and governed by federal law which prohibits contingency-fee multipliers; calculation of amount of fee is bound up in substantive state right, and to hold that multiplier would be available in state court, but not in federal court, would likely lead to forum shopping. West's Ann.Cal.C.C.P. § 1021.5; West's Ann.Cal.Gov.Code § 12965(b).

[13] Costs 102 ⚿194.18

102 Costs
102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
Under California law, trial court did not err in applying contingency fee multiplier to award of attorney fees for pursuing attorney fees.

[14] Interest 219 ⚿39(1)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(1) k. In General. Most Cited Cases

Interest 219 ⚿39(3)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(3) k. Interest from Date of Judgment or Decree. Most Cited Cases
Under federal statute governing award of postjudgment interest, trial court in age discrimination suit erred when it awarded postjudgment interest from date verdict was entered, rather than date of entry of final judgment. 28 U.S.C.A. § 1961.

***1472** Andrea G. Asaro,Rosen, Bien & Asaro, San Francisco, California (Sanford Jay Rosen and Tom Nolan, on the briefs) (merits counsel) and Elliot L. Bien, Law Offices of Elliot L. Bien, San Francisco, California (special attorneys' fees counsel), for defendants-appellants.

Richard Rogers, Mayo & Rogers, San Francisco, California, (Madeleine Tress, with him on the brief) and Richard M. Pearl, San Francisco, California, for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of California.

Before: D.W. NELSON and T.G. NELSON, Circuit Judges, and KING, [FN*]District Judge.

FN* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SAMUEL P. KING, District Judge:
Defendants/appellants the California Public Utilities Commission and various individual employees (collectively "the PUC") appeal from judgment after a jury verdict awarding (1) plaintiff/appellee Maurice Crommie $151,920 plus 10% interest and costs, and (2) plaintiff/appellee Arthur Mangold $164,052

plus 10% interest and costs against the PUC for violating the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq. (ADEA), the California Fair Employment and Housing Act, Cal.Gov.Code §§ 12940, et seq. (FEHA), and California common law. The PUC also appeals from the award of $724,380 in attorneys' fees. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the judgment and fee award, but remand for recomputation of post-judgment interest.

FACTUAL BACKGROUND

These two consolidated cases arise from allegations of age discrimination in promotions by the PUC from the mid-1980s to the early-1990s. Mr. Crommie filed his action in state court October 12, 1989; Mr. Mangold, on February 21, 1989. After the cases were removed, Plaintiffs filed amended complaints, and the cases were consolidated. Meanwhile, the EEOC filed class action suits against the PUC on behalf of 43 other PUC workers who were denied promotion opportunities.

Both plaintiffs are engineers. Mr. Crommie had applied for, and was denied, promotion to various regulatory analyst positions from 1983 until 1990 or 1991. Mr. Mangold had applied for, and was denied, supervisor positions from 1986 until 1990. Mr. Crommie began work at the PUC in 1981 at age 54, after extensive experience in the aerospace industry. He has an engineering***1473** undergraduate degree, three master's degrees, and has completed all course work for two doctorate programs. Mr. Mangold has a Bachelor of Science degree with graduate work in engineering, economics and business administration. He spent his entire career at the PUC.

Plaintiffs alleged that, beginning as early as 1983, the PUC had a policy and practice of discrimination against older workers for promotions. The discrimination charges were based on promotional examinations that favored younger employees. The promotional process consisted of several steps. After a position was announced, the employee would apply by submitting a self-evaluation. The applicant's supervisor would comment on the self-evaluation and rate the applicant on a five-point scale. The next-level supervisor would concur or disagree. A promotional readiness examination followed. At issue here are several examinations from 1986 through 1990.

The promotional readiness examinations generally consisted of oral examinations conducted by panels of three or four directors or assistant directors. The questions were subjective. The PUC has argued throughout that the Plaintiffs were not qualified for promotions based on their performance during the examinations. On the other hand, the Plaintiffs' theory at trial was that the examinations were "fixed" because (1) the subjective questions were based on certain "high profile" assignments or positions that were given to younger employees, (2) they were denied access to these high-profile jobs, (3) supervisor evaluations of older employees were lowered so as to rank younger employees higher, (4) the subjective, "consensus" scoring method was biased, (5) standards and entry requirements were lowered for certain positions to allow younger employees to qualify, and (6) the examination panels were staffed with directors for whom younger employees worked.

After Plaintiffs administratively appealed the promotional decisions, the EEOC investigated and issued determinations of reasonable cause in June of 1989 and April of 1991. In addition to witness testimony and documentary evidence, the EEOC relied on statistics of various examinations showing that the older an employee, the lower the examination score. The EEOC also took issue with some of the questions being asked on the examinations.

The matter was tried before a jury in Feb-

ruary and March of 1993. At trial, the Plaintiffs' evidence consisted of witness testimony, documentary evidence, and statistical evidence of an economics expert, Dr. Betty Blecha. The jury found the PUC itself liable for age discrimination under the ADEA and the California FEHA; found retaliation in violation of the ADEA; found individual defendants William Ahern, Catherine Yap, Jeff O'Donnell, and Ed Texeira liable under FEHA; and found that the PUC and the individuals violated state public policy for failure to promote, and for conspiracy to fail to promote. It awarded damages for loss of earnings, liquidated damages, and emotional distress. The court later awarded attorneys' fees under state law. The fees totalled $724,380 after applying a contingent-fee multiplier of two. These appeals followed.

DISCUSSION

A. *Liability for discrimination under federal law.*

[1] The PUC asserts that the trial court prejudicially erred by allowing the Plaintiffs to proceed on a disparate impact theory of discrimination. [FN1] Although disparate impact is an appropriate theory under Title VII, the PUC contends it is inappropriate in an age discrimination context. "A failure to submit a proper jury instruction is a question of law reviewable de novo, but an error in instructing the jury in a civil case does not require reversal if it is more probably than not harmless." *Benigni v. City of Hemet,* 879 F.2d 473, 479 (9th Cir.1988) (citations omitted).

> FN1. The PUC does not challenge the finding of retaliation in violation of 29 U.S.C. § 623(d).

"A plaintiff alleging discrimination under ADEA may proceed under two theories of liability: disparate treatment or disparate impact." *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1421 (9th Cir.1990) (citing *Palmer v. United States,* 794 F.2d 534, 536 (9th Cir.1986)).

> ***1474** "Disparate treatment" is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, or other protected characteristics. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> Claims that stress "disparate impact" by contrast involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate-impact theory.
>
> *Hazen Paper Company v. Biggins,* 507 U.S. 604, ----, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993) (citations, brackets and ellipses omitted).

Although the Supreme Court applies disparate treatment to the ADEA, the Court acknowledged in *Hazen Paper* that it has "never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." 507 U.S. at ----, 113 S.Ct. at 1706 (citation omitted). Further, there is some indication that the theory should not apply. *Id.* at ----, 113 S.Ct. at 1710 (Kennedy, J., concurring) ("nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII ... and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.").

Here, the PUC argues that disparate impact is improper in light of *Hazen Paper.* At least

one circuit appears to have so held. *See EEOC v. Francis W. Parker School,* 41 F.3d 1073 (7th Cir.1994), *cert. denied,* 515 U.S. 1142, 115 S.Ct. 2577, 132 L.Ed.2d 828 (1995).[FN2] However, existing Ninth Circuit precedent approves of a disparate impact theory under the ADEA. *E.g., Rose,* 902 F.2d at 1421; *see also EEOC v. Local 350,* 998 F.2d 641, 648 n. 2 (9th Cir.1993) ("in this circuit a plaintiff may challenge age discrimination under a disparate impact analysis").

> FN2. *See also Martincic v. Urban Redev. Auth.,* 844 F.Supp. 1073, 1078 (W.D.Pa.1994) (disparate impact not applicable under ADEA).

We need not address here whether disparate impact is a proper theory under the ADEA because the jury found intentional discrimination under a disparate treatment theory.[FN3] True, the verdict form combined two theories into one interrogatory: "Using the disparate treatment or disparate impact theory of age discrimination, did the [PUC] violate the ADEA federal law and/or the FEHA state law by discriminating against plaintiffs on the basis of age?" However, the jury also found that the plaintiffs' ages were motivating factors in the PUC's employment decisions. It found that the PUC would not have made the same employment decisions regardless of plaintiffs' ages. It found retaliation. It found that some individual defendants violated FEHA by aiding, abetting, inciting, compelling, or coercing an act forbidden by FEHA. It found that the PUC violated fundamental public policy under state law. It found that certain individuals conspired to fail to promote plaintiffs. And it awarded liquidated damages under the ADEA to both plaintiffs. An award of liquidated damages means the jury found that the violation was intentional because the court instructed:

> FN3. Thus, we need not address other issues raised by the PUC regarding the retroactive effect of the 1991 Civil Rights Act on *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

> If you find that the PUC violated the ADEA federal law and you have calculated plaintiffs' damages, you must then decide whether the violation was willful. *The PUC acted willfully if it intentionally and voluntarily denied promotions to plaintiffs because of age.* ... If the PUC willfully violated the law, plaintiffs are entitled to have their damages doubled. This means that you should award them the damages you calculated and add an equal amount of money as liquidated damages under the law. (emphasis added).

Substantial evidence supports the jury's findings. For example, Mr. Crommie testified that a PUC director told him "Maurice, you know we want fresh young blood in this group." After he informed her that he had ***1475** completed certain graduate courses, she said "You're still too old." A former supervisor of Mr. Mangold testified that duty statements and the examination process were altered to allow younger people to be placed on promotion lists. Another former supervisor of Mr. Mangold testified that high profile assignments were given to younger employees. A memorandum of August 4, 1992 from "Division Directors" stated: "The CPUC's overall effort should be to keep as many of our younger, talented staff employed within the constraints of civil service rules." Previous raters of Mr. Mangold testified that other review committee members pressured them to lower Mr. Mangold's ratings after submission. Similar testimony was elicited regarding Mr. Crommie. One rater admitted hat he was asked to lower the evaluation of Mr. Crommie, while raising the evaluation of a younger employee.

There was ample similar testimony from plaintiffs, coworkers and other raters. There

was testimony that the subjective oral examinations consisted of questions that could only be answered correctly by those who held certain positions given to younger people. There was additional testimony that performance evaluations of older workers had been changed to influence promotion ratings. Further, the jury was entitled to draw reasonable inferences from Exh. 126, a letter from the PUC President/Executive Director Weisser to Mr. Mangold responding to a complaint of age discrimination. [FN4] The letter resulted from a speech to the PUC, where, according to Mr. Crommie, Weisser said "We're going into a bright new future in which we have an excellent staff of young professional people who will be able to carry us into this bright new future by virtue of their superb education and training." In response to a question, Weisser allegedly responded with words to the effect of "The older employees, unfortunately, don't take advantage of all the opportunities that are offered to them." In sum, substantial evidence supports the jury's verdict of age discrimination under a disparate treatment theory.

FN4. The letter reads in part:

> ... all of us should emulate the enthusiasm, tenacity and creativity with which many of our newer employees attack and solve problems. I find it admirable that people newly arrived to an assignment often are willing and able to look at problems from more than one perspective-not simply the one that has worked before.... I believe, as do many others, that employees new to a job tend to be less inhibited by traditional methodologies than those who have been on the same assignment for a long time.
>
> . . . . .
>
> .... We cannot afford to overlook any talent among the staff regardless of age. We know that it is our experienced employees-people who have been here for a while and know what it takes to get things done-that are the ... backbone of this organization. We also believe that fresh vistas can invigorate people who have become jaded after years of doing the same thing.

B. *The verdict form.*

As noted earlier, the first question on the verdict form combined the two theories: "Using the disparate treatment or disparate impact theory of age discrimination, did the [PUC] violate the ADEA federal law and/or the FEHA state law by discriminating against the plaintiffs on the basis of age?" The PUC argues that the trial court erred by combining the theories.

[2][3] "[T]he trial court's complete discretion as to whether a special or general verdict is to be returned extends to determining the form of the verdict and interrogatories, provided that the questions asked are adequate to obtain a jury determination of all factual issues essential to judgement." *In re Hawaii Federal Asbestos Cases,* 871 F.2d 891, 894 (9th Cir.1989). "Taken as a whole, the instructions and interrogatories must fairly present the issues to the jury. If the issues are fairly presented, the district court has broad discretion regarding the precise wording of the instructions and interrogatories." *Carvalho v. Raybestos-Manhattan Inc.,* 794 F.2d 454, 455 (9th Cir.1986) (citations omitted).

***1476** [4] Combining theories in the interrogatory (as distinguished from alleged error in the substantive jury instructions) is alone not reversible error. The jury instructions clearly explained that Plaintiffs were proceeding on both state and federal law. The court explained that state and federal law recognize two theories of discrimination; it detailed the

elements and burdens of proof in separate instructions. Although it is preferable not to combine theories,[FN5] taking the verdict form and instructions together, the discrimination issue was fairly presented to the jury. The additional specific interrogatories made clear which theory the jury was applying. Here, we need not speculate whether the jury's verdict was predicated on an invalid claim. *See Richards v. Michelin Tire Corp.,* 21 F.3d 1048, 1055 (11th Cir.1994), *cert. denied,* 513 U.S. 1111, 115 S.Ct. 902, 130 L.Ed.2d 786 (1995).

> FN5. *See* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure:* Civil 2d § 2508, at 189 (1995) ("Care should be taken to avoid questions that combine two issues disjunctively because a 'yes' or 'no' answer may be construed as referring to either issue.").

[5] The PUC argues that the error was prejudicial because the Plaintiffs used disparate impact as an evidentiary vehicle to introduce statistical evidence. However, "[s]tatistics also may be used to establish a prima facie case of discrimination under the disparate treatment theory." *Palmer v. United States,* 794 F.2d 534, 539 (9th Cir.1986) (citing *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1363 (9th Cir.1985)). Thus, because the statistics would have been admissible under either theory, the PUC's claim of undue prejudice fails.

C. *The statistical evidence.*

[6] The PUC also contends that Dr. Blecha's statistical evidence was unreliable and insufficient to create a prima facie disparate impact case as required by *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994-995, 108 S.Ct. 2777, 2788-2789, 101 L.Ed.2d 827 (1988). *See also Shutt v. Sandoz Crop Protection Corp.,* 944 F.2d 1431, 1433 (9th Cir.1991) , *cert. denied,* 503 U.S. 937, 112 S.Ct. 1477, 117 L.Ed.2d 620 (1992). (The EEOC relied on similar statistics in making its determination of reasonable cause). The PUC argues that Dr. Blecha's statistics only correlated age with promotion, and did not isolate protected class. The statistics tended to show that the older an employee was, the lower the score on the subjective promotion exams. The statistics did not, however, analyze specifically between age 40-or-older versus under-40. The PUC also points out that the statistics did not factor out "repeaters." The PUC reasons that if people fail but continue to retake an exam, the statistics will eventually show higher failure rates for older persons.

However, merely because the statistics did not isolate a 40-and-above category does not render the statistics irrelevant. Part of a prima facie case is to discriminate in favor of "a substantially younger employee with equal or inferior qualifications." *Wallis,* 26 F.3d at 891. The favored people need not necessarily be below age 40. The statistics measured scores on relevant promotional examinations and included the entire pool of test-takers. Dr. Blecha's assumptions and the composition of the promotion pools went towards the weight, not the admissibility, of the statistical evidence. The PUC cross-examined Dr. Blecha fully on these points. Even if the statistical disparities were not so substantial so as to infer causation from the statistics *alone, Watson,* 487 U.S. at 994-95, 108 S.Ct. at 2788-89, the Plaintiffs stress that the statistics were used as evidence to prove intentional discrimination under a "pattern and practice" disparate treatment theory. *See Hazelwood School District v. United States,* 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1854-55, 52 L.Ed.2d 396 (1977). The statistics were relevant and the court did not err in admitting them.

[7] The PUC also argues that the court erred in admitting "stray remarks." Specifically, it points to remarks by Ms. Barkovich ("Maurice, you know we want fresh young blood in this group"), Mr. Weisser ("We're going into a bright new future in which we have an excellent staff of young professional people" and "older employees, unfortunately, don't take advantage of all the opportunities that are offered to them"), and "Division ***1477** Directors" in a draft memorandum ("The CPUC's overall effort should be to keep as many of our younger, talented staff employed within the constraints of civil service rules").

The PUC cites *Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1438 (9th Cir.1990); *Rose,* 902 F.2d at 1423; and *Selby v. Pepsico, Inc.,* 784 F.Supp. 750, 757-58 (N.D.Cal.1991), *aff'd sub nom., Nesbit v. Pepsico., Inc.,* 994 F.2d 703, 705 (9th Cir.1993), contending that the "stray" remarks were irrelevant to show intent because they were made by nondefendants.

All three cases are distinguishable. In both *Merrick* (referring to a younger selectee as "a bright, intelligent, knowledgeable young man") and *Rose* (referring to senior employees as "part of an old-boy network") the remarks alone were insufficient to withstand summary judgment. Here, on the other hand, there is other evidence in addition to the remarks. *Pepsico* is similarly distinguishable because the remarks there ("Pepsi didn't necessarily like gray hair" and "we don't want a unpromotable fifty-year-olds around") were not tied to the employment decisions. Here, the remarks were by division directors, or by the President of the PUC. The statements were made during the scope of employment by senior decision-makers regarding assignments, promotions, or policies. Even if the remarks *alone* might have been insufficient to withstand summary judgment, however, the remarks were certainly relevant and, along with other substantial evidence, created a strong inference of intentional discrimination. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989) ("[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision ... [although] stereotyped remarks can certainly be *evidence* that gender played a part") (emphasis in original).

D. *Jurisdictional Requirements of the California Tort Claims Act.*

The PUC next argues that the Plaintiffs' state tort claim for violation of public policy [FN6] should have been barred because the Plaintiffs failed to comply with notice provisions of the California Tort Claims Act, Cal.Gov't Code §§ 900 et seq. The PUC contends that the Plaintiffs used the state tort claim to introduce prejudicial emotional distress evidence, and points out that the jury awarded compensatory damages for loss of earnings and for emotional distress for violation of public policy.

> FN6. *See, e.g., Rojo v. Kliger,* 52 Cal.3d 65, 276 Cal.Rptr. 130, 801 P.2d 373 (1990).

[8] The California Tort Claims Act requires, as a condition precedent to suit against a public entity, the timely presentation of a written claim and the rejection of the claim in whole or in part. *Snipes v. City of Bakersfield,* 145 Cal.App.3d 861, 193 Cal.Rptr. 760, 762 (Cal.App.1983). "Where compliance with the Tort Claims Act is required, the plaintiff must allege compliance or circumstances excusing compliance, or the complaint is subject to general demurrer." *Id.* Although compliance with the Tort Claims Act is not required for state law FEHA claims, *Id.* 193 Cal.Rptr. at 765-66, the PUC contends that compliance is required

for the public policy tort. The PUC attempted to dismiss the tort claim before trial, but the court ruled that it waited too long to assert the ground for dismissal.

This issue is moot. The jury awarded damages as follows:

ADEA Federal Law Damages:	
Mr. Crommie	
Loss of earnings and Benefits:	$63,460
Liquidated Damages:	$63,460
Mr. Mangold	
Loss of earnings and Benefits:	$65,462
Liquidated Damages:	$65,462
FEHA State Law Damages:	
Mr. Crommie	
Loss of earnings and Benefits:	$63,460
Emotional Distress:	$25,000
Mr. Mangold	
Loss of earnings and Benefits:	$68,590
Emotional Distress:	$30,000
California Law, Wrongful Employment Action in Violation of Public Policy:	
Mr. Crommie	
Loss of earnings and Benefits:	$63,460
Emotional Distress:	$25,000
Mr. Mangold	
Loss of earnings and Benefits:	$68,590
Emotional Distress:	$30,000

However, since the Plaintiffs could not obtain double recovery, the court entered judgment in favor of Mr. Crommie for $88,460

($63,460 loss of earnings plus $25,000 emotional distress*1478 under FEHA) and $63,460 liquidated damages under ADEA. Similarly, it awarded Mr. Mangold $98,590 ($68,590 loss of earnings plus $30,000 emotional distress under FEHA) and $65,462 liquidated damages under ADEA. Thus, the state tort award for violation of public policy was redundant. Likewise, there was no prejudice in allowing testimony on emotional distress because emotional distress is allowable for the *statutory* FEHA claim. *See, e.g., Peralta Community College District v. Fair Employment and Housing Commission,* 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357 (Cal.1990). Thus, we need not address whether the public policy tort should have been barred.

E. *Contingent Fee Multiplier Under State Law.*

The next issue concerns whether state or federal law controls the method of *calculating* an attorneys' fee awarded under state law. The issue arises because in *City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), the Supreme Court held that contingency-fee multipliers are unavailable under federal fee-shifting statutes. California law permits such enhancements under state fee-shifting statutes. *See, e.g., Serrano v. Priest,* 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977); *City of Oakland v. Oakland Raiders,* 203 Cal.App.3d 78, 249 Cal.Rptr. 606 (1988). Given that Plaintiffs succeeded on both federal and state statutory grounds (which both provide for fee awards to prevailing parties), the trial court awarded fees based on the state law, Cal.Code Civ.P. § 1021.5 and Cal.Gov't Code § 12965(b). Applying state law, the court enhanced by a multiplier of 2.0, and awarded fees of $637,440.[FN7] *See Crommie v. California PUC,* 840 F.Supp. 719 (N.D.Cal.1994).

FN7. The court later awarded additional fees for defending a motion for reconsideration, and also multiplied those fees by 2.0, for a supplemental award of $86,940.

The PUC asserts that, although the right to a fee is a matter of state substantive law, the method of calculating that fee is procedural. Under an *Erie* analysis, the PUC contends that the court erred by applying the multiplier.

[9][10][11] "We review *de novo* the legal question whether state or federal law applies in a diversity action. In construing a state law, we follow the decisions of the state's highest court." *Harvey's Wagon Wheel, Inc. v. Van Blitter,* 959 F.2d 153, 154 (9th Cir.1992) (citation omitted). The *Erie* principles apply equally in the context of pendent jurisdiction. *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.,* 234 F.2d 538, 540 n. 1 (2d Cir.1956).

[12] The PUC's argument fails. Existing Ninth Circuit precedent has applied state law in determining not only the right to fees, but also in the method of calculating the fees. *See, e.g., Kern Oil and Refining Co. v. Tenneco Oil Co.,* 792 F.2d 1380 (9th Cir.1986), *cert. denied,* 480 U.S. 906, 107 S.Ct. 1349, 94 L.Ed.2d 520 (1987). *Shakey's Inc. v. Covalt,* 704 F.2d 426 (9th Cir.1983), cited by the PUC, is not to the contrary. In *Shakey's,* the court held that state substantive law governs the award of fees in diversity actions, but the decision whether to hold an evidentiary hearing in deciding the fee question is procedural. 704 F.2d at 435. Whether to hold a hearing is a matter of court administration, whereas calculation of the amount of the fee is bound up in the substantive state right.

Further, we follow other circuits that apply state law in calculating the fee. *E.g., Northern Heel Corp. v. Compo Industries,* 851 F.2d 456, 475 (1st Cir.1988); *Riordan v. Nationwide Mut. Fire Ins. Co.,* 977 F.2d 47, 53 (2d

Cir.1992). One circuit has done so in the same context as here where a multiplier was used under state law because *Dague* precluded it under federal law. *Davis v. Mutual Life Ins. Co. of New York,* 6 F.3d 367, 382-83 (6th Cir.1993), *cert. denied,* 510 U.S. 1193, 114 S.Ct. 1298, 127 L.Ed.2d 650 (1994).

The PUC maintains that no case of this circuit has analyzed and considered the *Erie* issue regarding calculating the fee. The PUC also argues that in *Dague* the Supreme Court established a "rule of federal practice" regarding fee-shifting jurisprudence. As a federal rule, the PUC asserts that the practice falls within the holding of ***1479***Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). The PUC's position is that, as a "federal rule," *Dague* must be applied unless it abridges, enlarges, or modifies a state substantive right. *Hanna,* 380 U.S. at 471-73, 85 S.Ct. at 1144-45. These arguments fail. *Dague* is decisional law (not a federal rule) interpreting procedures under federal statutes. *Dague*'s applicability to a federal court's application of state fee-shifting statutes should be analyzed, if at all, under "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the law." *Hanna,* 380 U.S. at 468, 85 S.Ct. at 1142.

Applying *Hanna,* the availability of a multiplier for fees in state court, but not in federal court, would likely lead to forum-shopping. As this case illustrates, if a multiplier is procedural, a significant difference in fees would be available in state court but not in federal court-an "inequitable administration of the law." The method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial policy of the state. *Cf. Chambers v. NASCO,* 501 U.S. 32, 51-55, 111 S.Ct. 2123, 2136-38, 115 L.Ed.2d 27 (1991). The trial court did not err in applying state law to calculate the fees available under state law.

The PUC also argues that we should predict California law and find that, in light of *Dague,* the California Supreme Court will no longer allow contingent-fee enhancements. The California Supreme Court approved of such enhancements in *Serrano v. Priest,* 141 Cal.Rptr. at 329, 569 P.2d at 1317, and has continued to allow enhancements since then. *See, e.g., Maria P. v. Riles,* 43 Cal.3d 1281, 240 Cal.Rptr. 872, 743 P.2d 932 (1987).

Generally, California courts follow federal precedent in interpreting FEHA. *Nesbit v. Pepsico,* 994 F.2d at 704. However, although *Dague* arguably calls into question California's continued reliance on *Serrano,* we cannot decide that the California Supreme Court will necessarily adopt *Dague* as California law for its fee-shifting statutes. Only if there is no precedent or "convincing evidence that the highest court of the state would decide differently," *Andrade v. City of Phoenix,* 692 F.2d 557, 559 (9th Cir.1982) (citation omitted), would we need to predict state law. "The ... duty of the federal court is to ascertain and apply the existing California law, not to predict that California may change its law...." *Klingebiel v. Lockheed Aircraft Corp.,* 494 F.2d 345, 346 (9th Cir.1974) (footnote omitted). We apply existing California precedent and affirm the use of a multiplier.

F. *Multiplier for Fees on Fees.*

[13] Next, the PUC argues that the trial court erred in assessing a multiplier to its award of fees for pursuing fees. It cites *King v. Palmer,* 906 F.2d 762, 769 (D.C.Cir.1990), *superseded en banc on other grounds,* 950 F.2d 771 (D.C.Cir.1991), *cert. denied,* 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992) ("we doubt that lawyers require special incentives to pursue their own compensation"); *see also Clark v. City of Los Angeles,* 803 F.2d 987, 992 (9th Cir.1986). State law, however,

applies to this question, and California authority allows multipliers for fee-on-fee awards. *Downey Cares v. Downey Community Dev. Comm'n.*, 196 Cal.App.3d 983, 242 Cal.Rptr. 272, 280 (1987). Accordingly, the trial court did not err in applying the multiplier here.

G. *Post-Judgment Interest Rate.*

[14] Finally, the PUC points out (and the Plaintiffs concede) that the trial court erred when it awarded post-judgment interest at a 10% rate, payable from the date the verdict (rather than the judgment) was entered. "Post-judgment interest is determined by federal law." *Northrop Corp. v. Triad Intern. Marketing S.A.*, 842 F.2d 1154, 1155 (9th Cir.1988). In this regard, 28 U.S.C. § 1961 provides in pertinent part:

> interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

Thus, we remand for a determination of the correct interest rate payable from date of entry of final judgment, and entry of a corrected judgment.

***1480** *CONCLUSION*

We remand on the post-judgment interest issue, but affirm in all other respects.

C.A.9 (Cal.),1995.
Mangold v. California Public Utilities Com'n
67 F.3d 1470, 69 Fair Empl.Prac.Cas. (BNA) 48, 67 Empl. Prac. Dec. P 43,752, 95 Cal. Daily Op. Serv. 8118, 95 Daily Journal D.A.R. 13,962

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901 F.Supp. 294
(Cite as: 901 F.Supp. 294)

United States District Court,
N.D. California.

Don VAN VRANKEN, on behalf of himself and all others similarly situated, and Lew & Ted's Service, Inc., Plaintiffs,
v.
ATLANTIC RICHFIELD COMPANY, Defendant.

Civ. No. 79-0627 SW.
Aug. 16, 1995.

Following the settlement of class action in which oil company was found to have failed to comply with regulations governing import fees and duties, class counsel filed application for attorney fees, reimbursement for litigation expenses, and incentive award to named class representative. The District Court, Spencer Williams, J., held that proper percentage award under percentage of fund method was 25 percent, given the $76 million size of the common fund; (2) lodestar method confirmed such an award would be equitable given lack of success on major claim; and (3) appropriate award to named class representative would be $50,000.

Awarded accordingly.

West Headnotes

[1] Attorney and Client 45 ⚿155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Federal Civil Procedure 170A ⚿2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases
In class action, it is within discretion of district court whether to employ percentage of fund method or lodestar method when awarding attorney fees.

[2] Attorney and Client 45 ⚿155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Federal Civil Procedure 170A ⚿2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases
In awarding attorney fees in class action, court would first calculate rough estimate of appropriate fee by employing the percentage of the fund method, and then use lodestar method to verify that the awarded fee was equitable.

[3] Attorney and Client 45 ⚿155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases
"Benchmark" of 25 percent is used for awards of attorney fees in common fund cases in the Ninth Circuit, but this percentage can be adjusted upwards or downwards to account for special or unusual circumstances.

[4] Attorney and Client 45 ⚿155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

In determining appropriate attorney fees for plaintiffs' counsel in class action under percentage of fund method, appropriate percentage was 25 percent rather than 40 percent requested, though class counsel made commendable efforts during lengthy and complicated case; 40 percent fee would be excessive where the amount of the fund was $76 million.

[5] Federal Civil Procedure 170A ⚿ 2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases

Under the lodestar method of awarding attorney fees, court first calculates "lodestar" by multiplying reasonable hours expended by reasonable hourly rate, then enhances lodestar with "multiplier," if necessary, by considering factors including: time and labor required; novelty and difficulty of questions involved; requisite legal skill necessary; preclusion of other employment; customary fee; whether fee is fixed or contingent; time limitations imposed; amount in controversy and results obtained; experience, reputation and ability of attorneys; undesirability of case; nature and length of professional relationship with client; and awards in similar cases.

[6] Attorney and Client 45 ⚿155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Federal Civil Procedure 170A ⚿ 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

In class action in which plaintiffs recovered from oil company for noncompliance with regulations governing import fees and duties, lodestar method of determining attorney fees confirmed that award of $19,180,803.07, arrived at under the percentage of fund method based on 25 percent of the total fund, would be equitable, though based on claimed 38,760 hours spent on the case this would result in relatively low multiplier of approximately 1.8, where 90 percent of damage request was pursuant to losing claim and, considering complexity of that claim, it was reasonable to assume that class counsel spent at least half of their time on that claim, resulting in multiplier of at least 3.6 for successful claim, which is within acceptable range for fee awards in complicated class action litigation.

[7] Federal Civil Procedure 170A ⚿ 2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.4 k. Amount and Elements. Most Cited Cases

In cases where class counsel's efforts meet with only partial or limited success, they are not entitled to collect attorney fees for all billable hours and expenses incurred during the litigation.

[8] Federal Civil Procedure 170A ⚿

2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Named class representative may be awarded incentive award for efforts during litigation, considering criteria including: risk to class representative in commencing suit, both financial and otherwise; notoriety and personal difficulties encountered by class representative; amount of time and effort spent by class representative; duration of litigation; and personal benefit or lack thereof enjoyed by class representative as result of the litigation.

[9] Federal Civil Procedure 170A 2737.13

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class representative in action against oil company leading to award of $22,800,000 in damages plus pre and postjudgment interest for noncompliance with regulations governing import fees and duties would be given incentive award of $50,000 rather than $100,000 requested, though participation lasted through many years of litigation and testimony at trial was key in rebutting "good faith" defense, and though representative would not receive great personal benefit, where he did not quantify how many hours he spent on the litigation or when he spent them.

***295** Cooper & Kirkham, Josef Cooper, Tracy Kirkham, San Francisco, CA, Howrey & Simon, J. Michael Hennigan, Los Angeles, CA, Sommer & Barnard, William Barnard, Edward Harris, Indianapolis, IN, for plaintiffs.

Morrison & Foerster, F. Bruce Dodge, San Francisco, CA, Steptoe & Johnson, David Roll, Alfred Mamlet, George Peirce, Washington, DC, for defendant.

ORDER GRANTING ATTORNEYS' FEES, EXPENSES, AND AN INCENTIVE AWARD TO THE NAMED CLASS REPRESENTATIVE

SPENCER WILLIAMS, District Judge.

Plaintiffs brought this class action against Defendant Atlantic Richfield Company ("ARCO") alleging violations of § 201 of the Economic Stabilization Act ("ESA") based on ARCO's interaffiliate pricing policies and noncompliance with regulations governing import fees and duties. After trial and various appeals, the parties agreed to a settlement which this Court approved in February of 1994. Class Counsel now move for: 1) an award of attorneys fees; 2) reimbursement of expenses and; 3) an incentive award to the named class representative. Based on the following, the Court GRANTS Class Counsel $19,180,803.07 in fees and $2,406,606.90 in expenses. The Court also GRANTS Don Van Vranken, the named class representative, $50,000 for his efforts during this litigation.

BACKGROUND

Plaintiffs commenced this case on March 23, 1979, although the litigation did not begin in earnest until Plaintiffs filed their Second Amended Complaint in 1985 following the Court's lifting of the stay imposed during Department of Energy ("DOE") compliance proceedings. The Second Amended Complaint alleged four causes of action based on ARCO's interaffiliate pricing policies and violations***296**

of DOE regulations governing import fees and costs.

After many years of litigation, the case finally went to trial in June of 1992. The jury found for ARCO on the interaffiliate pricing claim, but for Plaintiffs on the import fees and duties claims. The jury awarded Plaintiffs $22,800,000 in damages. After the Court added pre and post-judgment interest, the total award amounted to $67,548,713.26.

ARCO appealed the verdict to both the Ninth and Federal Circuit Courts of Appeal. Soon thereafter, Class Counsel petitioned for statutory fees under section 210(b) of the ESA. While the appeals and fee petition were still pending, the parties agreed to settle the case.

Under the terms of the settlement, ARCO agreed to pay the class the full amount of the judgment, $67,548,713.26, plus taxable costs of $49,500. In addition, ARCO added $9,125,000 to the fund as settlement for Class Counsel's statutory fee application. Thus, the total settlement fund became $76,723,213.26. In exchange, ARCO received a reverter of up to $9,000,000 of any unclaimed money left in the fund after distribution to Class Counsel and to class members. The Court granted its preliminary approval for this settlement in December of 1994 and final approval in February of 1995.

Now, Class Counsel has filed an application for attorneys' fees seeking an award of 40 percent of the fund, or $30,689,285.30, as compensation for their efforts during this case. Class Counsel also requests $2,406,606.90 as reimbursement for litigation expenses and $100,000 as an incentive award to Don Van Vranken, the named class representative.

The Court has received numerous oppositions to Class Counsel's fee application, both from attorneys representing groups of class members, as well as from individual class members themselves.

DISCUSSION

I. *ATTORNEYS' FEES*

Class Counsel characterizes its proposed 40 percent fee as "reasonable compensation" for its efforts in a case that "taxed [their] personnel and economic resources almost to the breaking point." In response, various class members and their attorneys have labelled Class Counsel's requested fee as "astounding," "unreasonable," "clearly excessive" and "way too much." *See* Objection of Class Member Thrifty Oil Co. To Class Counsel's Motion for an Aggregate Award of Attorneys' Fees; Memorandum in Support of the Notice of Opposition of the Class Members Comprising the ARCO Jobbers Group; Letter from Class Member Pellett Petroleum, Inc.; Letter from Class Members G. and Elaine Swank.

In considering Class Counsel's fee application, the Court must first determine which method to employ in calculating the appropriate fees, the lodestar method or the percentage of the fund method. Thereafter, the Court must evaluate the specific circumstances of this case to determine what amount of fees should be awarded.

A. *Method of Calculating Fees*

[1] In common fund cases such as this, the Ninth Circuit allows a district court to employ either the percentage of the fund method or the lodestar method when awarding fees. *In re Washington Pub. Power Supply System Securities Litigation,* 19 F.3d 1291, 1294 n. 2 (9th Cir.1994). The Ninth Circuit has not expressed any explicit preference for either method so

long as the ultimate fee award is reasonable under the circumstances. *Id.* at 1296; *Florida v. Dunne,* 915 F.2d 542, 545 (9th Cir.1990). The decision of which method to employ is within the sound discretion of the district court. *See In re Washington Public Power,* 19 F.3d at 1296 ("in common fund cases, no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other").

[2] Here, the Court will employ both methods to arrive at a reasonable fee under the circumstances. First, the Court will calculate a rough estimate of an appropriate fee by employing the percentage of the fund method. Thereafter, the Court will use the ***297** lodestar method to verify that the awarded fee is equitable.

1. *The Percentage of the Fund Method*

[3] Under the percentage of the fund method, the Court simply awards class counsel a certain portion of the fund as compensation for their efforts. In setting a common fund fee, the court's role is essentially to take the place of the face-to-face negotiations that otherwise would have occurred between class counsel and class members had they retained attorneys individually.

The Ninth Circuit has established a "benchmark" of 25 percent for awards of attorneys' fees in common fund cases. *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). This percentage can be adjusted upwards or downwards to account for special or unusual circumstances. *Id.* The Ninth Circuit has not clearly defined what sort of factors constitute unusual circumstances other than to state they must "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. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990).

[4] Here, Class Counsel request a fee award of $30,689,285.30, representing 40 percent of the settlement fund. Class Counsel assert that such a percentage is within the proper range for attorney's fees in common fund cases as set out by the Ninth Circuit. Although Class Counsel admit that 40 percent is on the high end of this purported range, they claim that such an award is justified by the unusual circumstances of this case, such as the length of litigation, the complexity of issues, and so forth.

Class Counsel cite numerous cases that they claim establish a range of permissible fee percentages extending from 20-50 percent of the fund. *See, e.g., In re Warner Communications Securities Litigation,* 618 F.Supp. 735, 749 (S.D.N.Y.1985) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions"); *In re Dun & Bradstreet Credit Services Customer Litigation,* 130 F.R.D. 366, 372 (S.D.Ohio 1990) ("Fee awards in common fund cases generally are calculated as a percentage of the fund created, with the percentages awarded typically ranging from 20 to 50 percent of the common fund created"). Class Counsel have also cited 73 district court opinions in which fees in the range of 30-50 percent of the common fund were awarded. *See, e.g., In re Ampicillin Antitrust Litigation,* 526 F.Supp. 494, 503 (D.D.C.1981) (awarding 40.4 percent of $7.3 million fund); *Van Gemert v. Boeing Co.,* 516 F.Supp. 412, 420 (S.D.N.Y.1981) (awarding 36 percent of $8.9 million fund); *In re Control Data Corp. Securities Litig.,* No. 3-85-1311 (D.Minn. Sept. 21, 1994) (awarding 37 percent of $8 million fund).

After reviewing the authority Class Counsel has submitted, the Court finds their requested 40 percent fee to be excessive under the circumstances of this case. There is no doubt that Class Counsel's commendable efforts during this lengthy and complicated case should be rewarded. However, Class Counsel's request for a 40 percent fee fails to account for the size of the $76 million common fund. *See In re Washington Pub. Power,* 19 F.3d at 1296 (affirming district court's decision to award $32 million in fees representing only 4.7 percent of the fund where the $687 million fund was so large that a $171.75 benchmark award of 25 percent would have been excessive compared to the time and efforts expended by class counsel); *In re Domestic Air Transp. Antitrust Litigation,* 148 F.R.D. 297, 350 (N.D.Ga.1993) ("percentage awards tend to decline as the size of the recovery increases").

Most of the cases Class Counsel have cited in which high percentages such as 30-50 percent of the fund were awarded involved relatively smaller funds of less than $10 million. *See, In re Ampicillin,* 526 F.Supp. at 503; *Van Gemert,* 516 F.Supp. at 420; *In re Control Data Corp. Securities Litig.,* No. 3-85-1311. By contrast, in cases where common funds are in the range of $51-75 million, fees most often fall in the 13-20 percent range. *In re Domestic Air Transp.,* 148 F.R.D. at 350-51; *See, e.g., In re Gypsum Cases,* 386 F.Supp. 959 (N.D.Cal.1974) (awarding 12.35 percent of $75 million fund), ***298** *aff'd* 565 F.2d 1123 (9th Cir.1977); *Brown v. Phillips Petroleum Co.,* 838 F.2d 451 (10th Cir.1988) (awarding 16.5 percent of $75 million fund), *cert. denied,* 488 U.S. 822, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988). Moreover, in megafund cases with class recoveries of $75-$200 million, courts are even more stringent, and fees in the 6-10 percent range and lower are common. *In re Domestic Air Transp.,* 148 F.R.D. at 351; *See, e.g., In re Folding Carton Antitrust Litig.,* 84 F.R.D. 245 (N.D.Ill.1979) (awarding fees amounting to 6.6 percent of $200 million fund); *Sioux Nation of Indians v. U.S.,* 650 F.2d 244, 227 Ct.Cl. 404 (1981) (awarding 10 percent of $106 million fund); *In re MGM Grand Hotel Fire Litigation,* 660 F.Supp. 522 (D.Nev.1987) (awarding 7 percent of more than $200 million fund).

Therefore, after balancing Class Counsel's efforts during this litigation against the large size of the common fund, the Court finds that a benchmark award of 25 percent, or $19,180,803.07, is warranted under the circumstances.

2. *The Lodestar Method*

To verify the reasonableness of a 25 percent fee award, the Court will also employ the lodestar method, and examine Class Counsel's time cards and billing records submitted to support their request for fees.

[5] Under the lodestar method, the Court first calculates the "lodestar" by multiplying the reasonable hours expended by a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). The court may then enhance the lodestar with a "multiplier", if necessary, to arrive at a reasonable fee in light of all the circumstances of the case. The factors that may be relevant to a lodestar/multiplier analysis include: 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the requisite legal skill necessary; 4) the preclusion of other employment due to acceptance of the case; 5) the

customary fee; 6) whether the fee is fixed or contingent; 7) the time limitations imposed by the client or the circumstances; 8) the amount at controversy 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 v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation. *See Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 549 (S.D.Fla.1988) (awarding multiplier of 3 and commenting that "[t]he range of lodestar multiples in large and complicated class actions runs from a low of 2.26 to a high of 4.5"); *Keith v. Volpe,* 86 F.R.D. 565, 575-77 (C.D.Cal.1980) (awarding multiplier of 3.5).

[6] Here, Class Counsel states that they have spent 38,768 hours on this case, amounting to a total expenditure of $10,692,067.25. Using Class Counsel's numbers, if the Court awards $19,180,803.07 in fees representing 25 percent of the common fund, the multiplier would be approximately 1.8 ($19,180,803.07 / $10,692,067.25). This would be a relatively low multiplier.

[7] However, these calculations are undermined by Class Counsel's failure to account for their lack of success on the class's interaffiliate pricing claim. In cases where class counsel's efforts meet with only "partial or limited success," they are not entitled to collect attorneys' fees for all the billable hours and expenses incurred during the litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 435-37, 103 S.Ct. 1933, 1940-41, 76 L.Ed.2d 40 (1983); *Thorne v. City of El Segundo,* 802 F.2d 1131, 1141 (9th Cir.1986). Here, Plaintiffs sought and were denied more than $200 million on their interaffiliate pricing claim, compared to a recovery after trial of slightly more than $22 million on their other three claims. The Court must take this into consideration when awarding fees.

The Court acknowledges that the claims in this case overlap to a large degree, making it difficult to determine how many hours Class Counsel spent on their losing claim. Nonetheless, it is possible to compute a reasonable estimate of these hours based on the number ***299** and complexity of the claims and the damages sought for each claim.

If the claims were of equal complexity and the damages sought for each claim were the same, computing an estimate would be a relatively easy task. Under those circumstances, it would be reasonable to assume that Class Counsel allocated their time equally to each of the four claims. If that assumption was accurate, it would be appropriate to compensate Class Counsel for 75 percent of their billable hours. Were the Court to award Class Counsel 25 percent of the common fund using this formula, the multiplier would be 2.4 ($19,180,803.07 / (.75 x $10,692,067.25)).

However, given that more than 90 percent of Plaintiffs' damage request was pursuant to their losing claim and that claim was far more complex than the others, it is very likely that Class Counsel allocated more than 25 percent of their time to that claim. The question then becomes: how much more? Based on the amount of damages Plaintiffs requested pursuant to their

losing claim and its complexity, it is reasonable to assume that Class Counsel spent at least half of their time on that claim. If Class Counsel's compensation is based on these assumptions, the multiplier would be at least 3.6 ($19,180.803.07 / (.5 x $10,692,067.25)), which is well within the acceptable range for fee awards in complicated class action litigation such as this.

Based on the foregoing, the lodestar method confirms the reasonableness of a 25 percent benchmark award in this case.

II. *REIMBURSEMENT OF EXPENSES*

Class Counsel also requests $2,406,606.90 as reimbursement for litigation expenses. None of the class members have opposed this request.

After reviewing the documentation Class Counsel has submitted, the Court finds Class Counsel's request for reimbursement of expenses to be reasonable. Their reimbursement request is supported by a detailed accounting and by declarations from independent counsel Jerome Braun and Bruce MacLeod. Therefore, the Court GRANTS Class Counsel's request for $2,406,606.90 in reimbursement of expenses.

III. *AWARD OF $100,000 TO THE NAMED CLASS REPRESENTATIVE*

Lastly, Class Counsel requests that the Court award Don Van Vranken, the named class representative, an incentive award of $100,000 for his efforts during this litigation. None of the class members have opposed this award.

[8] Whether to reward Mr. Van Vranken for his efforts is within the Court's discretion. *See, e.g., In re Domestic Air Transp.,* 148 F.R.D. at 357-58 (awarding $142,500 to class representatives out of $50 million fund); *In re Dun & Bradstreet,* 130 F.R.D. at 373-74 (awarding $215,000 to several class representatives out of an $18 million fund). The criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, 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. *See* Richard Greenfield, "Rewarding the Class Representative: An Idea Whose Time Has Come," 9 *Class Action Reports* 4 (1986); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 250 (S.D.Ohio 1991).

[9] Here, several of the above factors support Van Vranken's request for an incentive award. Van Vranken's participation lasted through many years of litigation. Furthermore, according to Class Counsel, Van Vranken's testimony at trial was key in rebutting ARCO's "good faith" defense. In exchange for his participation, Van Vranken will not receive great personal benefit. He owns a moderately sized truck stop and his claim makes up only a tiny fraction of the common fund.

However, after reviewing the actual time that Van Vranken spent on the case, the ***300** Court finds that a $100,000 award would be excessive. In his declaration, Van Vranken does not quantify how many hours he spent on the litigation or when he spent them. He merely states that he participated in 49 telephone conferences and five meetings with Class Counsel, attended three pre-trial hearings, had his deposition

taken twice, and testified at trial. He further asserts that he made various unspecified out-of-pocket expenditures for gas, occasional meals, and wear and tear on his car during his travels from Fresno to San Francisco, San Jose, and Los Angeles.

After evaluating the time Van Vranken committed to this case, the Court finds that an incentive award of $50,000 is just and reasonable under the circumstances.

CONCLUSION

For the foregoing reasons, the Court awards Class Counsel the following:

1) $19,180,803.07 in attorneys fees, plus any interest earned thereon since the date judgment was entered.

2) $2,406,606.90 in reimbursement of expenses.

Class Counsel shall place these fees and expenses in a trust account separate from the rest of the settlement funds. Class Counsel may withdraw half of this money immediately, and the other half after the Court has determined that the claims process is completed.

In addition, the Court awards Don Van Vranken $50,000 for his efforts during this litigation. Class Counsel shall disburse this award to Van Vranken immediately.

IT IS SO ORDERED.

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