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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 ⇐

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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.

[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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