UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Gordon Stevens, individually and as the representative of a class of similarly situated persons, and on behalf of the SEI Capital Accumulation Plan,

Plaintiff,

v.

SEI Investments Company, SEI Investments Management Corporation, SEI Capital Accumulation Plan Design Committee, SEI Capital Accumulation Plan Investment Committee, SEI Capital Accumulation Plan Administration Committee, and John Does 1-30,

Defendants.

Case No. 2:18-cv-04205-NIQA

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARD

INTRODUCTION

Plaintiff and his counsel ("Class Counsel") have moved the Court for final approval of a $6.8 million settlement of this class action lawsuit involving ERISA claims on behalf of more than 5,700 class members who participated in the SEI Capital Accumulation Plan ("Plan"). Although no class members have objected to the Settlement, one class member, Laura Salminen, has lodged an objection against the requested attorneys' fees of one-third of the Settlement Fund, requesting instead that the Court award less than $100,000 based on Class Counsel's lodestar. *See Declaration of Kai H. Richter in Support of Motion for Final Approval of Class Action Settlement ("Third Richter Decl."), ECF No. 42-02, Ex. 2 (ECF No. 42-04).* Class Counsel submits this supplemental memorandum to respond to this objection. As discussed below, the objection is inconsistent with the economic realities of contingent-fee class action litigation and the well-developed case law favoring attorneys' fees based on a percentage of the Settlement Fund. The requested attorneys' fees are reasonable, as evidenced by the Independent Fiduciary's report and the response from the majority of the Class, and Class Counsel therefore asks that this Court overrule the objection and approve the requested attorneys' fees.

THE OBJECTION

Prior to the November 20, 2019 deadline for objections to the Settlement, class member Laura L. Salminen submitted a letter objecting to Class Counsel's requested attorneys' fees. *Third Richter Decl. Ex. 2*. In her letter, Ms. Salminen states that she does not wish to "terminate or change the settlement," and objects solely to the requested attorneys' fees. *Id. at 1, 6*. Ms. Salminen argues that the requested attorneys' fees are unreasonable because: (1) Class Counsel should have calculated damages per class member, (2) the requested attorneys' fees result in an unreasonable hourly rate for the number of hours billed on the case, (3) "Class members are not responsible for

the risk Class Counsel assumes" in taking on a complex ERISA class action, (4) routinely awarding a one-third fee in ERISA settlements is comparable to "price fixing," and (5) the Class Representative was not entitled to negotiate attorneys' fees on behalf of the Plan. *Id.* Ms. Salminen requests that the Court reduce Class Counsel's fee to $71,730 ($100 per hour billed plus benefits), a "bonus" of the average class member award ($700-$1,200), an additional sum for fees incurred in obtaining approval of the settlement not to exceed 20% of the $71,730, and one-third of the requested Class Representative award ($3,333), together totaling less than $100,000. *Id. at 5.* Ms. Salminen "shared [her] thoughts with a few class members" and obtained 77 signatures to a petition objecting to the requested attorneys' fees. *Id. at 5-6, 10.*

ARGUMENT

For the reasons previously explained in Plaintiff's Memorandum in Support of Motion for Approval of Attorneys' Fees and Expenses, *ECF No. 41-01* ("Initial Memo"), the compensation sought by Class Counsel is reasonable and appropriate. Indeed, after a careful review of Plaintiffs' request for attorneys' fees, the Independent Fiduciary charged with reviewing the Settlement found the requested fees are reasonable "[i]n light of the work performed, the result achieved, and the litigation risk assumed by Plaintiff's counsel." *Third Richter Decl., Ex. 1 at 7.*

Ms. Salminen primarily challenges the proposed method of determining Class Counsel's attorneys' fees, but as explained in detail in Class Counsel's Initial Memo, the proposed method is customary and appropriate in complex ERISA class action settlements. Ms. Salminen's belief that Class Counsel's fee should be based on the hours billed or "lodestar" (at a significantly reduced rate), rather than as a percentage of the Settlement Fund, ignores the substantial risk and complexity of ERISA contingent-fee class action litigation and the Third Circuit's long-favored percentage-of-recovery method for calculating attorneys' fees in common fund cases such as this.

Class Counsel assumes significant risks by taking on complex ERISA class actions on a contingent-fee basis. This risk is not merely hypothetical; in the past two years, Class Counsel have absorbed two adverse trial judgments in similar ERISA class actions. *Initial Memo at 13-14.*[1] Moreover, even successful cases can take a decade to resolve, *id. at 14*, with counsel advancing significant expert costs and time while the litigation is pending. Given these risks and financial burdens, and the complexity of ERISA litigation, "[v]ery few plaintiff's firms" have the wherewithal to prosecute cases such as this. *Id. at 12* (citing *Savani v. URS Prof. Solutions LLC*, 121 F. Supp. 3d 564, 573 (D.S.C. 2015)). If Class Counsel were limited to recovering the lodestar value of their time (i.e., breaking even) in successful cases, while recovering nothing in unsuccessful cases, it would not be financially feasible for counsel to represent class members in these types of cases.[2]

The Third Circuit has consistently held that "[t]he percentage-of-recovery method is generally favored in cases involving a common fund[.]"*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998); *see Initial Memo at 9-10*. This method benefits class members because it "rewards counsel for success and penalizes it for failure," *Perry v. FleetBoston Fin. Corp.*, 220 F.R.D. 105, 119 (E.D. Pa. 2005) (quoting *In re Rite Aid Sec. Litig.*, 396 F. 3d 294, 300 (3d Cir. 2005)), and encourages efficiency in litigation. *See*

[1] Class Counsel here (Nichols Kaster, PLLP) also served as class counsel in *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019) and *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361, at *12 (D. Mass. June 19, 2017), *vacated in part*, 907 F.3d 17 (1st Cir. 2018), *mandate stayed pending pet. for cert.* (1st Cir. Oct. 29, 2018).

[2] It is important to "motivate capable counsel to undertake these actions." *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). The Secretary of Labor "depends in part on private litigation to ensure compliance with the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009). Indeed, suits like this are one of the reasons why fees in 401(k) plans have dropped in recent years. *See 401(k) Fees Continue To Drop*, FORBES (Aug. 20, 2015) ("In part in response to 401(k) fee litigation, employers have been aggressively negotiating fees and changing investment fund line-ups to include low-cost funds.").

Initial Memo at 10. By contrast, the lodestar method "arguably encourages lawyers to run up their billable hours" and discourages settlement. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citation omitted).

Ms. Salminen's arguments that the Court should not take into account ERISA-specific considerations, including the complexity, risk of nonpayment, and amount routinely awarded in similar ERISA cases, are directly contrary to law. Indeed, all three considerations are factors courts in the Third Circuit consider in approving percentage-of-recovery attorneys' fees in a common fund case. *In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009); *see Fee Memo at 10.*

Ms. Salminen's argument that attorneys' fees should depend upon the recovery of each individual class member is also flawed. In common fund cases, courts look at the recovery of the class as a whole rather than the recovery of individual class members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund *as a whole*.") (emphasis added); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 886 F. Supp. 445, 460 (E.D. Pa. 1995) ("[A] common fund is itself the measure of success.") (quoting Herbert P. Newberg, Newberg on Class Actions, § 14.03 at 186 (1985)). Based on this reasoning, attorneys' fees of one-third of the settlement fund are routinely approved in ERISA cases. *See, e.g., High St. Rehab., LLC, et. al, v. Am. Specialty Health, Inc., et. al.*, 2019 WL 4140784, at *13 (E.D. Pa. Aug. 29, 2019) (Quiñones-Alejandro, J.) ("In complex ERISA cases, courts in this Circuit and others [] routinely award attorneys' fees in the amount of one-third of the total settlement fund."); *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this."); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) ("In

such cases, courts have consistently awarded one-third contingent fees."). This is not "price fixing"; it is what numerous courts, including this court, have approved in similar cases.[3]

There is no reason to depart from the standard one-third fee here, given that the recovery for the class in this case compares favorably with similar ERISA settlements on both a percentage-of-assets and per-participant basis. *Initial Memo at 10-11; Declaration of Kai Richter in Support of Preliminary Approval of Class Action Settlement ("First Richter Decl."), ¶ 6.* Nor was it in any way improper for Plaintiff to agree to this standard contingency fee. This is especially so, given that the agreed-upon fee was independently reviewed and approved by the Independent Fiduciary, *see Third Richter Decl., Ex. 1 at 7,* and the Settlement Agreement left the ultimate determination of the fee to the Court. *See Settlement Agreement, ECF No. 39-3, at ¶ 8.2* ("The appropriate amount of any such award[] shall be determined by the Court in its discretion. This Settlement Agreement does not purport to establish a presumptively reasonable amount ….").

Finally, despite Ms. Salminen's best efforts, the vast majority of the more than 5,700 class members declined to object to the requested attorneys' fees; indeed, no other objections have been received to any aspect of the Settlement. Courts in this district have overruled objections in these circumstances. *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir.1990) (holding that "only" 29 objections in 281-member class "strongly favors settlement"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 234-35 (3d Cir. 2001) (holding that class reaction favored approval "as the number of objectors was quite small in light of the number of notices sent and claims filed"); *accord Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-04 (N.D. Ill. 2015) (approving attorneys' fees of 36% in a pre-discovery settlement over several objections based on the market rate for similar cases and the risks involved in continuing the litigation).

[3] *Accord In re Fasteners Antitrust Litig.*, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) (stating that a 33% fee is "consistent with attorney's fees awards generally granted in this Circuit").

CONCLUSION

For the above reasons, Class Counsel respectfully requests that the Court overrule the objection and approve the requested attorneys' fees.

Dated: December 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, a true and correct copy of the foregoing *Supplemental Memorandum of Law in Support of Plaintiff's Motion for Attorney's Fees, Expenses, and Class Representative Service Award* was served by CM/ECF to the Parties registered to the Court's CM/ECF system.

Dated: December 4, 2019

/s/Kai Richter
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