IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAWRENCE G. RUPPERT and
THOMAS A. LARSON,
on behalf of themselves and on behalf
of all others similarly situated,

ORDER

Plaintiffs,

08-cv-127-bbc

v.

ALLIANT ENERGY CASH
BALANCE PENSION PLAN,

Defendant.

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This is a class action brought under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, in which plaintiffs challenged defendant Alliant Energy Cash Balance Pension Plan's method of calculating lump sum distributions of plaintiffs' retirement benefits. Judgment has been entered in favor of plaintiffs in the amount of $18,677,671.33. Dkt. #577. In an order dated February 4, 2013, I awarded class counsel $5,790,400 in fees and $640,000 in costs under the common fund doctrine.

Class counsel has filed a 37-page motion for reconsideration in which they argue that they are entitled to no less than $7.4 million in fees and $960,000 in costs, to be subtracted from the judgment. Counsel raise three arguments in their motion: (1) in determining an appropriate award, the court should have included the approximately $10 million that defendant paid out to class members before the judgment was entered; (2) the court should

have applied a lodestar risk multiplier of no less than 2; (3) the court should have awarded all of counsel's requested nontaxable costs. Because I disagree with each of these arguments, I am denying counsel's motion.

With respect to the $10 million defendant paid out to class members before the judgment was entered, defendant had argued in opposition to class counsel's fee petition that the $10 million was irrelevant to any fee award because this lawsuit was not the reason for the pay out. Alternatively, defendant argued that including the $10 million as part of a fee calculation would require use of the "catalyst theory," which is generally not permitted. I did not resolve either of these issues, but I declined to include the $10 million in calculating an appropriate fee because class counsel failed to explain how they intended to recover those fees. In particular, I raised the concern that class members who did not receive any payments before the judgment would bear a disproportionate burden of the fee. Because counsel should have proposed a method in their fee petition, this was the latest of many important issues that counsel had failed to address and the case had been proceeding for almost five years, I declined to delay the resolution of the case even further by giving counsel an opportunity to propose a plan.

In their motion for reconsideration, counsel argue that there will be no unfairness because they can recover their fees by deducting additional amounts from the portion of the judgment that is awarded to class members who received payments before the judgment. However, this proposal simply raises more questions. As counsel have acknowledged, Plts.' Br., dkt. #551-1, at 3-4 & n.4, some members of the plan who received payments in 2011 will not be receiving additional payments from the judgment, but counsel does not explain

how they intend to account for the difference. Taking a larger share from the other plan members would not be a fair result. A related problem would arise with respect to any class member who is receiving a portion of the judgment, but not a large enough amount to cover his or her share of the fee award derived from the $10 million. Again, counsel does not address that issue.

Class counsel are talented lawyers with significant expertise on matters relating to ERISA, but they have failed consistently to provide the court with the information it needs to implement their requested relief. Even now, after the court identified the problem, counsel say that the solution is "simple," dkt. #629 at 9, without providing any details about how their plan would work in practice. Counsel have had enough chances to get it right.

With respect to the lodestar multiplier, counsel argue initially that the court failed to consider what they would have received for their services on the market at the beginning of the case. That is incorrect. In concluding that $5.8 million was an appropriate fee, I noted that the amount represented more than 30% of the judgment. This was consistent with the cases *class counsel* cited in which lawyers in other class actions were awarded between 25% and 33% of the judgment and thus an indication of the rate counsel likely would have received in the market. It was also consistent with counsel's own fee agreement with the class representatives in which counsel promised not to seek fees in excess of 33% of the amount awarded. Gottesdiener Decl., exh. 5, ¶ 3, dkt. #591 ("We promise not to seek fees in excess of 33% of the present value of any settlement or verdict in favor of the proposed class and/or any settlement or verdict of you as an individual.").

Counsel cite a district court case in which the court approved a multiplier of 4.8, but

counsel acknowledges that the fee awarded in that case was 30% of the settlement. In re Household International ERISA Litigation, No. 02 Civ. 7921 (N.D. Ill. Nov. 22, 2004). More important, the mutliplier in this case is consistent with Cook v. Niedert, 142 F.3d 1004, 1010 (7th Cir. 1998), the most recent case from the Court of Appeals for the Seventh Circuit in which the court considered a fee awarded in a class action brought under ERISA. Counsel all but ignore Cook in their motion, limiting their discussion to a footnote in which they say that "the sole argument counsel [in Cook] made was in favor of the percentage-of-recovery method." Counsel's Br., dkt. #629, at 17. The relevance of this argument is not apparent. Regardless what counsel in that case argued, both the district court and the court of appeals devoted significant consideration to this issue and concluded that a 1.5 multiplier was appropriate. Counsel does not point to any factual differences between this case and Cook that would require a different result.

Counsel is correct that the lodestar multiplier is an assessment about the risk counsel took when they agreed to represent the class, Cook, 142 F.3d at 1015, and the order on fees could be construed as reducing the multiplier because of the concerns about the quality of counsel's work and the excessive amount of time they spent on the case. Instead of incorporating those concerns into the multiplier, I should have reduced the amount generated by the lodestar calculation *before* assessing a multiplier. However, that would not change the amount awarded in this case. If I increased the lodestar multiplier, it would mean only that I would decrease the lodestar calculation by a corresponding amount. Accordingly, I see no reason to reconsider that aspect of the opinion.

Finally, counsel argue that they are entitled to all of their requested nontaxable costs,

which amount to $960,000. I reduced the amount in the February 4 order because counsel did not provide any explanation as to how those costs were incurred beyond a one-page exhibit that listed the amount spent on different categories of costs. In their motion for reconsideration, counsel argue that they did not need to be more specific because the court is familiar with the case, but it is difficult to take that argument seriously. Although it is obvious that counsel incurred some of their costs reasonably, the court has no way of assessing the reasonableness of particular charges without assistance from counsel, particularly when counsel's costs were so large. Again, because counsel's failure to provide necessary support for their requests has been a consistent problem in this case, counsel is not entitled to another chance to show that $640,000 is not a sufficient amount.

ORDER

IT IS ORDERED that class counsel's motion for reconsideration, dkt. #629, is DENIED.

Entered this 21st day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge