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,

OPINION and ORDER

Plaintiffs,

08-cv-127-bbc

v.

ALLIANT ENERGY CASH
BALANCE PENSION PLAN,

Defendant.

- -

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.

Now before the court are motions by plaintiffs and plaintiffs' counsel for fees and costs. Dkt. #587. For the reasons discussed below, I am denying plaintiffs' motion for fees and costs under 29 U.S.C. § 1132(g)(1), but I am awarding counsel for plaintiffs $5,790,400 in fees and $640,000 in costs under the common fund doctrine.

OPINION

A threshold question is what standard the court should use in evaluating plaintiffs' fee petition. Plaintiffs propose a combination of two approaches. First, plaintiffs argue that they are entitled to approximately $4.3 million from defendant under ERISA's fee-shifting provision. 29 U.S.C. § 1132(g)(1). Plaintiffs say this amount reflects a 10% reduction of the amount of hours reasonably expended multiplied by a reasonably hourly rate, which is commonly called the "lodestar method" of calculating a reasonable fee and is the standard used almost uniformly in fee shifting cases. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

In addition, plaintiffs' counsel seek a portion of the judgment, for a combined total of $8.6 million in fees. Counsel describes this part of the request alternatively as a lodestar multiplier of two or as the sum of 1/3 of the $18.7 million judgment and 24% of the approximately $10 million defendant paid to class members before judgment was entered. To the extent the court concludes that plaintiffs may recover anything less than the full amount requested under the fee-shifting provision, they argue that the amount of fees awarded from the judgment should increase by the same amount.

Plaintiffs' counsel argue that an award from the judgment is appropriate under the "common fund" doctrine. "When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund." Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560, 563 (7th Cir. 1994).

In their reply brief, plaintiffs reduce their request under § 1132(g)(1) to $4.1 million in response to some of defendant's objections. In particular, plaintiffs have deducted approximately $133,000 for "clerical tasks," $20,000 for an unauthorized reply brief and $16,000 for "typographical adjustments." Counsel do not say whether they believe the reduction in the amount requested from defendant should lead to an increase in the amount taken from the common fund, so that issue is waived.

In addition to their fees, plaintiffs originally sought approximately $95,000 in costs from defendant. In their reply brief, they reduced this amount to approximately $53,000, primarily in response to defendant's objection to plaintiffs' request for reimbursement for fees to the special master. Under the common fund doctrine, plaintiffs' counsel seek approximately $960,000 in nontaxable costs, such as expert witness fees. Again, counsel does not explain whether any reductions in their request for costs from defendant should be absorbed by the common fund, so that issue is waived.

Despite a 79-page opening brief and an 80-page reply brief (both littered with long footnotes), counsel devote little space in either brief to justifying the approach they have taken, following an unfortunate pattern in this case of failing to develop issues that the court must address to resolve their motions. In one paragraph, counsel acknowledges that common fund awards "most often arise from class actions that settle," Plts.' Br., dkt. #592, at 2, but they cite Boeing Co. v. Van Gemert, 444 U.S. 472, 479 (1980), as an example of a case in which the Supreme Court affirmed the application of the common fund doctrine in a class action that ended in a judgment in the plaintiffs' favor. They cite Florin for the

proposition that "the district court's authority [to award fees from a common fund] is not altered by the existence of a statutory fee provision." Plts.' Br., dkt. #592, at 2.

What counsel do not acknowledge is that Boeing involved a claim that did not have a fee-shifting statute, and that, although Florin was an ERISA case, it ended with a settlement rather than a judgment, so the plaintiffs could not rely on the fee-shifting provision. In multiple passages of the opinion in Florin, the court relied on the fact that the case had settled in concluding that a common fund award was appropriate. E.g., Florin, 34 F.3d at 563 ("[T]he terms of ERISA's fee-shifting provision do not purport to control fee awards in cases *settled* with the creation of a common fund.") (emphasis added); id. at 564 ("[A]n award of fees from the settlement fund comports with the fee-shifting policy of enabling meritorious plaintiffs who would not otherwise be able to afford to bring a lawsuit under ERISA, to pursue their claims."); id. ("[C]ommon fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund."). Thus, one reading of Boeing and Florin is that a common fund award is a substitute for fee-shifting, not a supplement as counsel suggests.

Plaintiffs' counsel do not cite any cases in which a court considered whether it was appropriate to award fees from the judgment even though the plaintiff might be entitled to fee shifting. The reason for counsel's silence may be that the case law is not in their favor. I uncovered one case in this circuit in which the court questioned whether counsel for plaintiffs in a class action could recover fees from the judgment for a claim that permitted fee shifting. Evans v. City of Evanston, 941 F.2d 473, 478 (7th Cir. 1991). Although the

court did not resolve the question whether the common fund doctrine ever could apply in such a case, it upheld the district court's decision to rely solely on fees obtained under the fee-shifting statute. Id. at 479. In two other cases, one of which involved an ERISA claim, the court upheld the district court's use of the lodestar method over a percentage even though the cases settled. Cook v. Niedert, 142 F.3d 1004, 1010 (7th Cir. 1998); Harman v. Lyphomed, Inc., 945 F.2d 969, 974-75 (7th Cir. 1991).

There seems to be almost universal skepticism among the courts that have considered this issue against awarding fees under both a fee-shifting provision and from a common fund. The leading case is Brytus v. Spang & Co., 203 F.3d 238, 241 (3d Cir. 2000), which, like this case, was brought under ERISA and ended with a judgment in the plaintiffs' favor. Also like this case, the plaintiffs sought a fee award from the defendant under § 1132(g)(1) and counsel sought fees from the judgment under the common fund doctrine. The district court limited fees to those that could be obtained from the defendant under § 1132(g)(1) using the lodestar method.

In reviewing the district court's decision, the court of appeals rejected counsel's argument that the common fund doctrine should apply in every class action in which a common fund is created. Id. at 243. The court of appeals also declined to hold that "the common fund doctrine may never be applied in a case for which there is a statutory fee provision and which goes to judgment." Id. at 247. Instead, the court stated that the key question was "whether the circumstances of th[e] case present an inequity that needs redress, which is the typical situation for application of the common fund doctrine." Id. at 245. For

example, a common fund award might be appropriate if the defendant was unable to pay a fee award or if plaintiffs made "a showing that competent counsel could not have been obtained for that case" without a larger fee than would be awarded under the lodestar method. Id. at 247. Because the plaintiffs had not made such a showing or otherwise shown that a fee using the lodestar method was unreasonable, the court upheld the award. It rejected counsel's argument that an additional fee from the common fund was necessary "to account for the contingent nature of the undertaking and the result achieved." Id. at 243.

An approach similar to that in Brytus has been adopted by a number of other courts. Like the court in Brytus, these courts have declined to hold that counsel never may obtain both statutory fees and fees from the judgment, but they have found statutory fees to be sufficient under the facts of that case. E.g., Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 858-60 (S.D. Tex. 2011); Briggs v. United States, 2010 WL 1759457, *8-10 (N.D. Cal. 2010); West v. AK Steel Corp. Retirement Accumulation Pension Plan, 657 F. Supp. 2d 914, 935-38 (S.D. Ohio 2009); Sherman v. Gateway Electronic Medical Management Systems, Inc., 2009 WL 48150, *4 (S.D. Ind. 2009) (Hamilton, J.); Johnson v. Mutual Savings Life Insurance Co., 2004 WL 3715479, *1 (N.D. Ala. 2004); Carrabba v. Randalls Food Markets, Inc., 191 F. Supp. 2d 815, 826 (N.D. Tex. 2002); Bowen v. SouthTrust Bank of Alabama, 760 F. Supp. 889, 895 (M.D. Ala. 1991). See also Nilsen v. York County, 400 F. Supp. 2d 266, 271 (D. Me. 2005) ("If this case had proceeded to judgment, I would be bound to use the lodestar in determining any fee award against the defendant York County, as it is the strongly preferred method in fee-shifting cases, and a

court shuns this tried-and-true approach at its peril.") (internal quotations omitted); 10 Moore's Federal Practice § 54.17[2][a][iii] (3d ed.) ("In the majority of . . . class actions, resort to the common fund doctrine is unnecessary. If a class action is brought under a federal statute that expressly authorizes fee shifting and the case is litigated to judgment, the plaintiff class can recover fees from the litigation opponent directly under the statute."). In fact, I did not uncover any cases in which a court awarded fees under both a fee-shifting statute and the common fund doctrine.

In light of this authority and the absence of any argument to the contrary from plaintiffs' counsel, I will follow the lead of these courts and consider first whether plaintiffs are entitled to fees under § 1132(g)(1).

A. Fees and Costs to Be Paid by Defendant

1. Fees

In a case brought under ERISA, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Supreme Court has interpreted this provision to mean that a party must have "some degree of success on the merits" before a court may award fees. Hardt v. Reliance Standard Life Insurance Co., 130 S. Ct. 2149, 2152 (2010). Because I entered judgment in favor of plaintiffs on most of their claims, there is no question that they have satisfied that standard.

For many years, the Court of the Appeals for the Seventh Circuit has applied other factors in determining whether fee shifting is appropriate under § 1132(g)(1). As has been

noted in many cases, the court has articulated its test in two ways. One test includes five factors: (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees; (3) whether an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions. Janowski v. International Brotherhood of Teamsters, 673 F.2d 931, 940 (7th Cir. 1982). The other test asks more simply whether the losing party's position was "substantially justified." Bittner v. Sadoff & Rudoy Industries, 728 F.2d 820, 831 (7th Cir. 1984).

Although the court has questioned whether it is appropriate to have two tests for the same issue, Sullivan v. William A. Randolph, Inc., 504 F.3d 665, 671-72 (7th Cir. 2007), the court repeatedly has refused to choose between them on the ground that the central question is the same under both: "was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" Kolbe & Kolbe Health & Welfare Benefit Plan v. Medical College of Wisconsin, Inc., 657 F.3d 496, 506 (7th Cir. 2011); Quinn v. Blue Cross and Blue Shield Association, 161 F.3d 472, 478 (7th Cir. 1998). Even this formulation may be overstating the requirements because the court of appeals held in Loomis v. Exelon Corp., 658 F.3d 667, 675 (7th Cir. 2011), that a "district judge need not find that the party ordered to pay fees has engaged in harassment or otherwise litigated in bad faith." In other cases, the court of appeals has stated that the purpose of the five-factor test is to "structure or implement" the substantial justification test,

Lowe v. McGraw-Hill Companies, Inc., 361 F.3d 335, 339 (7th Cir. 2004), or to provide "a checklist of factors for the district judge to consider to make sure he hasn't overlooked anything that might be relevant to the appropriateness or size of the award." Sullivan, 504 F.3d at 671-72.

In a footnote, plaintiffs argue that Hardt implicitly overruled all of the cases applying the substantial justification test and they cite Loomis for the proposition that "the Seventh Circuit recently recognized that the Bittner formulation may not survive Hardt." Plts.' Br., dkt. #592, at 7 n.6. It is not clear whether plaintiffs believe that the five-factor test is now the controlling standard (even though the court of appeals has stated that the two tests are essentially the same) or simply that all prevailing plaintiffs are entitled to fees under § 1132(g). Regardless, plaintiffs' reliance on Hardt is disingenuous because the Supreme Court declined expressly to decide whether courts may rely on additional factors after determining that a party obtained some success in deciding motions for attorney fees. Hardt, 130 S. Ct. at 2158 n.8.

Similarly, plaintiffs' citation to Loomis is misleading. Although the court of appeals stated in a parenthetical that it could "avoid" deciding whether the substantial justification test "survived Hardt," Loomis, 658 F.3d at 675, in a more recent case, the court concluded that it was "error" for a district court to disregard that test because "[w]e have not retracted the substantial justification test. Nor have we yet disavowed the five-factor test that courts use to implement the same basic analysis." Raybourne v. Cigna Life Insurance Co. of New York, 700 F.3d 1076, 1090 (7th Cir. 2012). Accordingly, I conclude that I must apply the

substantial justification test in this case.

A second preliminary question is which side has the burden of proof on this issue. As plaintiffs point out, the court of appeals has stated that there is a presumption that the prevailing party is entitled to fees. Jackman Financial Corp. v. Humana Insurance Co., 641 F.3d 860, 866 (7th Cir. 2011). Although the presumption is "modest" and "rebuttable" as defendant argues, id., this still means that it is defendant's burden to overcome the presumption. Black's Legal Dictionary 1223 (8th ed. 2004) ("Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.").

Defendant makes little effort to show that it was substantially justified in deciding to use the 30–year Treasury rate to calculate the future interest credits. Its only argument in its brief is that it relied "on a reputable actuarial firm." Dft.'s Br., dkt. #616, at 11. However, in light of the holding in Loomis that an award of fees is not contingent on a showing of bad faith, defendant's subjective beliefs are not relevant. Because defendant does not point to any objective grounds supporting its decision, I conclude that its decision to use the 30-year Treasury rate was not substantially justified.

Defendant's stronger argument is its statute of limitations defense. In light of Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc., 651 F.3d 600 (7th Cir. 2011), I agree with defendant that this defense was substantially justified. Thompson involved similar facts and a similar question. Like this case, Thompson involved

former members of a pension plan who contended that the plan violated their rights under ERISA by voiding their future interest credits when they elected to take a lump sum payment of their benefits. The court stated that, generally, a claim to recover benefits under ERISA "accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." Id. at 604. The court concluded that the statute of limitations began running when the plan participants received their benefits. Although the court rejected the defendant's arguments that various earlier communications were sufficient to give the plaintiffs notice of their claims, the court noted that "it is a very close question." Id. at 605.

Defendant raised a similar defense in this case, arguing that some class members' claims were barred because they received their lump sump benefit outside the statute of limitations period and that others were barred because they received notice of their claim through other communications from defendant, similar to those communications at issue in Thompson. Plaintiffs note that I rejected defendant's statute of limitations on summary judgment, but I did so without the benefit of Thompson. Even if I assume that plaintiffs are correct that the facts in Thompson are not on all fours with this one, the differences are not so great to allow me to say that defendant was not substantially justified in its position.

In the summary judgment opinion, I suggested that a few class members might have timely claims even if I accepted all of defendant's arguments. Dkt. #316 at 39. However, plaintiffs do not argue in their fee petition that I should consider that possibility in determining whether fee shifting is appropriate, so that argument is waived.

Plaintiffs argue instead that defendant mooted its statute of limitations defense in May 2011 by adopting a new plan, but that has nothing to do with the validity of the defense when defendant raised it. Most of the proceedings were complete by May 2011 and defendant was no longer arguing that it could calculate future interest credits using the 30-year Treasury rate. Instead, defendant's position was that it should be using a five year rolling average. Although I disagreed with that position, it was approved by the Internal Revenue Service, so I cannot say that it was not substantially justified. In addition, in Thompson, the court briefly discussed this issue in a way that is favorable to defendant:

> This is not to say that we perceive any problem with the five-year average methodology the district court adopted. It seems a great deal more administrable than the plaintiffs' probabilistic "stochastic" method, and more closely tied to the Plans' actual interest crediting method (which is based on investment returns) than is the defendants' interest rate-based "spread" method. Although we do not decide the question, we note that Treasury "safe harbor" regulations and several precedents support the use of such an average.

Thompson, 651 F.3d at 610.

Accordingly, I conclude that defendant was substantially justified in defending this lawsuit. Because the parties do not raise any significant new arguments under the five-factor test, I decline to shift fees in this case.

2. Costs

As noted above, plaintiffs seek approximately $53,000 in costs from defendant. In particular, plaintiffs ask for $650 for filing the case and obtaining pro hac vice status for counsel; $1347 for serving the complaint and subpoena; $41,357 for transcript fees (reduced

from $46,859); $2032 in witness fees; and $7813 for copying and printing. Gottesdiener Decl. ¶ 10, dkt. #591; Plts.' Rep. Br., exh. A, dkt. #626-1.

In their opening brief, plaintiffs asked for costs under Fed. R. Civ. P. 54(d), under which certain costs are shifted as a matter of course to the prevailing party. Mother and Father v. Cassidy, 338 F.3d 704, 710 (7th Cir. 2003). In its opposition brief, defendant argues that, in an ERISA case, costs are shifted under the same standard as fees, which means that plaintiffs are not entitled to cost-shifting. It notes that ERISA's fee-shifting provision refers to costs as well. 29 U.S.C. § 1132(g)(1) ("[T]he court in its discretion may allow a reasonable attorney's fee *and costs* of action to either party.") (Emphasis added.) It also cites Rule 54(d), which provides the standard for cost shifting "[u]nless a federal statute . . . provides otherwise." Although it acknowledges that the court of appeals has not yet resolved the question whether § 1132(g)(1) supplants Rule 54(d), Loomis, 658 F.3d at 675, it cites numerous district court cases in which courts have held that § 1132(g)(1), not Rule 54, provides the standard for award costs in an ERISA case. Dkt. #616 at 41.

Plaintiffs' response to this argument is silence. In their reply brief, plaintiffs say nothing about the question whether they should be awarded costs as a matter of course under Rule 54 or whether defendant may avoid cost-shifting if its position was substantially justified under § 1132(g)(1). I decline to make the argument for plaintiffs. Accordingly, this argument is waived and I will not shift costs.

B. Common Fund

The conclusion that plaintiffs are not entitled to fee shifting under § 1132(g)(1) creates what seems to be an unusual situation. As noted by plaintiffs, there are many cases under ERISA in which courts have awarded attorney fees from a common fund when a class action settled. As I discussed above, there are a number of ERISA cases in which courts have awarded fees under § 1132(g)(1) in a class action that ended with a judgment in plaintiffs' favor. However, I am not aware of any cases in which a court determined an appropriate fee award in a case in which the plaintiffs prevailed but were not entitled to fee shifting.

Although the parties do not address this issue, I conclude that I retain authority to award fees from the common fund, despite the existence of the fee-shifting statute. I agree with the court in Brytus, 203 F.3d at 245, that the key question under the common fund doctrine is "whether the circumstances of th[e] case present an inequity that needs redress." Because there is no question that counsel devoted a substantial amount of time and resources to the case, it would be inequitable to allow them to go uncompensated. Particularly because counsel obtained such a large judgment for the class, it is only fair that the class members contribute to the costs, which is the purpose behind the common fund doctrine. Boeing Co., 444 U.S. at 478 ("[A] litigant or 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. . . [P]ersons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"); Florin, 34 F.3d at 563 ("The common fund doctrine is based on the notion that not one

plaintiff, but all those who have benefitted from litigation should share its costs.") (internal quotations omitted).

A threshold question is whether the $10 million defendant paid out to class members before the judgment should be considered in determining a reasonable common fund award. Plaintiffs' counsel say that it should because their efforts were at least one cause for defendant's decision to pay out that money. Defendant denies this, citing the declaration of the lawyer who led the negotiations with the IRS to determine the new rate. Renz Decl. ¶ 15, dkt. #612 ("[T]he Ruppert litigation was neither the proximate cause of nor an important catalyst for, nor the reason for, nor the cause of Alliant's settlement with the IRS."). Even if counsel could prove causation, defendant says that considering the $10 million in determining an appropriate fee award would require use of the "catalyst theory," which is generally not permitted. Bingham v. New Berlin School District, 550 F.3d 601, 603 (7th Cir. 2008) (catalyst theory "posits that, for purposes of determining an award of attorneys' fees, a plaintiff prevails if he achieves the desired outcome of litigation even if it results from a voluntary change in the defendant's conduct"); Kenseth v. Dean Health Plan, Inc., 784 F. Supp. 2d 1081, 1095 (W.D. Wis. 2011) ("The Supreme Court has rejected the catalyst theory with respect to fee-shifting statutes using the 'prevailing party' standard. . . . It is not immediately apparent why a different rule would apply to § 1132(g)(1).").

Even if defendant is wrong about both of these questions, I decline to include the $10 million in calculating an appropriate fee because counsel have failed to address an obvious and important question. In particular, plaintiffs' counsel say nothing in either of their briefs

about the logistics of including the $10 million in the common fund. As counsel well know, defendant already has paid the $10 million to the relevant class members, but counsel identify no method for recovering their requested portion of that amount. Although one potential option would be simply to increase the amount taken from the $18.7 million judgment, counsel acknowledge that there are "many hundreds" of class members who did not receive any of the $10 million, Plts.' Rep. Br., dkt. #616, at 79, so that option would impose a disproportionate burden on those class members. Because plaintiffs' counsel should have anticipated this question, I will not delay the resolution of this case even further by giving counsel an opportunity to propose a plan. Thus, the relevant common fund will be limited to the $18.7 million judgment.

The next question is what method the court should use in determining a reasonable fee. Plaintiffs' counsel proposes that the court first determine the fee that would be generated using the lodestar method and then determine an appropriate enhancement. This proposal is consistent with an approach the court of appeals has approved in other cases. Harman, 945 F.2d at 974 ("After establishing the lodestar and multipler, the judge may find it useful to compare the percentage of the fund to contingent arrangements negotiated in other cases of the same type."). Because neither defendant nor any of the class members object to this approach, that is what I will do.

As noted above, the lodestar amount is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. In assessing the reasonableness of counsel's rate and hours, I will consider the objections

defendant raised in the context of plaintiffs' request for fee-shifting. Although defendant does not have standing to challenge counsel's fee request as it relates to the common fund, its arguments still may provide a helpful framework for evaluating counsel's request. Some of the class members raised general objections to counsel's requested fee as "excessive," e.g., dkt. ## 594-95, 599-600 and 603-06, but none of them raised specific objections to rates or the time expended, so defendant's objections are the only adversarial check on the amount claimed by counsel.

With respect to the hourly rate, counsel seeks $650 for lead counsel, $400 for three senior associates, $325 for a fourth associate, $225 for five other associates, $200 for a law clerk, $175 for two senior paralegals and $125 for two other paralegals. Dkt. #591-2. I am persuaded that lead counsel's hourly rate is reasonable. Counsel have submitted evidence in the form of affidavits from other lawyers in the field, dkt. #588-90, that lead counsel is one of only a small number of lawyers who has the expertise and resources necessary to try ERISA class actions such as this one and that his rate is comparable to what other lawyers of "similar ability and experience in the community charge their paying clients for the type of work in question." Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 555 (7th Cir. 1999); Pickett v. Sheridan Health Care Center, 664 F.3d 632, 641-42 (7th Cir. 2011) ("[A] fee applicant need only offer third party affidavits attesting to billing rates that truly are comparable to meet her burden."). I agree with counsel that the relevant "community" is lawyers bringing ERISA class actions around the country because "the subject matter of th[is] litigation is one where the attorneys practicing it are highly specialized and the market

for legal services in that area is a national market." Jeffboat, LLC v. Director, Office of Workers' Compensation Programs, 553 F.3d 487, 490 (7th Cir. 2009). In addition, counsel have cited numerous cases in which courts have approved a comparable rate in similar cases. Plts.' Br., dkt. #592, at 33, 35-36.

Defendant's only argument against lead counsel's hourly rate is that it is higher than defense counsel's hourly rate. However, because the relevant question is the prevailing rates in the community rather than the rates of opposing counsel, that argument is not compelling, particularly because defendant cites no authority to support it. Defendant does not challenge the $225 hourly rate for associates or the rates for law clerks or paralegals and I agree that the rates are reasonable. Defendant challenges the $325 and $400 hourly rates for two associates, but I am satisfied with counsel's detailed explanation that heightened rates were appropriate in those instances because of the quality and complexity of the associates' work. Plts.' Br., dkt. #626, at 19-21. See also Gusman v. Unisys Corp., 986 F.2d 1146, 1150 (7th Cir. 1993) (recognizing that different fee rates may be appropriate for higher quality work).

With respect to the number of hours, counsel claims a total of 13,860 hours. Defendant raises numerous objections that counsel's billings entries were too vague; they included multiple tasks in the context of one time entry (otherwise known as "block billing"); they billed for too many hours in a single day; they billed in blocks of 15 minutes rather than ten or six; their briefs were too long; they used multiple lawyers for the same task and they are seeking fees for numerous "clerical" tasks. As noted above, counsel reduced its

fee request by approximately $170,000 in response to some of these objections. I am persuaded that additional reductions are not required for these issues. Cintas Corp. v. Perry, 517 F.3d 459, 469 (7th Cir. 2008) ("block billing" permitted if entries are "sufficiently detailed to permit adequate review of the time billed to specific tasks"); Gautreaux v. Chicago Housing Authority, 491 F.3d 649, 661 (7th Cir. 2007) ("Use of one or more lawyer is a common practice, primarily because it often results in a more efficient distribution of work."); Gibson ex rel. C.E. v. Astrue, 2013 WL 250668, *4 (N.D. Ill. 2013) ("Courts have frequently found that quarter-hour billing increments are allowable if they are reasonably applied.") (internal quotations omitted).

A larger concern is the amount of inefficiency in this case, which was filed almost five years ago. Although it is understandable that the proceedings would take longer than usual because of the complexity of the case, five years is extreme. It is rare for any case in this court to be pending for that length of time, particularly when the case was never stayed. Plaintiffs' counsel likely would argue that defendant caused the delay, but that is only part of the story.

A consistent problem throughout this case has been the failure of counsel for both sides to address issues properly in the first instance, requiring what sometimes seemed to be an endless cycle of briefing the same issue. At almost every important decision point in this case, I directed the parties to try again because their submissions were not helpful in resolving disputed issues. This occurred first with the issue of notice in the context of plaintiffs' motion for class certification, which required several rounds of briefing. Dkt. #67

at 21; Dkt. #91 at 3. At summary judgment, plaintiffs limited important arguments about the preretirement mortality discount to a footnote, dkt. #333 at 3, and then failed to clarify the issue at trial, which led to another round of briefing that issue. Dkt. #373 at 1-2. The same problem occurred in the context of calculating damages, which required multiple rounds of briefing as well as a hearing. Dkt. #380 at 42; dkt. #396 at 1-2; dkt. #459-60; dkt. #463. In the context of the second round of summary judgment motions, I had to direct the parties several times to re-address issues that they had failed to develop properly. E.g., Dkt. #496 at 2 ("Despite extensive briefing . . . , the parties failed to develop arguments on several key issues."); dkt. #504 at 7 (scheduling issues); dkt. #554 at 13 (proposed judgment).

A related problem was that counsel for plaintiffs belabored many issues, seeking permission to file many additional briefs and filing many motions for reconsideration. Most of these briefs and motions would not have been needed if counsel had addressed the issues properly the first time.

For example, plaintiffs sought permission to file a surreply brief in opposition to defendant's motion to dismiss, dkt. #24, and then filed a second brief in support of their motion to file a surreply brief, dkt. #26, so that they filed a total of three briefs instead of just the one they should have. The court declined to consider either of the additional briefs. Dkt. #27.

As another example, eight months after the summary judgment decision, plaintiffs filed a motion to reconsider my conclusions regarding prejudgment interest, a motion I

denied in large part, dkt. #425, which then led to *another* motion for reconsideration, which I denied. Dkt. #427. Although I granted the first motion for reconsideration in part, even that part related to issues that plaintiffs should have developed more fully the first time around. Dkt. #425 at 3-6. See also dkt. #420 (denying plaintiffs' "Motion for Order Directing Defendant to Cooperate in the Calculation of Annuitant Damages Based on the Parties Agreed Methodology Presented at Trial and Precluding Defendant from Attempting to Relitigate the Issue via Submission of an Untimely Supplemental Expert Report" after plaintiffs submitted a brief, dkt. #406, and three uninvited supplemental briefs, dkt. ##416, 417 and 419); dkt. #392 (denying plaintiffs' motion for reconsideration regarding use of word "windfall" in opinion).

Finally, I agree with defendant that a significant amount of time was wasted by counsel making arguments when they should have been focusing on developing the facts. This occurred in the context of each of plaintiffs' complaints, which read more like briefs. Dkt. #28 at 2 ("Plaintiff's first amended complaint is the operative complaint and an odd duck. Were it not labeled as an amended complaint, one would think it was a brief."). It occurred again in plaintiffs' proposed findings of fact that they filed in support of their motion for summary judgment, which included much unhelpful legal argument. Dkt. #316 at 12-13 (court rules regarding proposed findings of fact "seem to be basic ones," but "they have not been followed in this case, and many proposed findings of fact and responses include irrelevant legal argument or characterization of facts").

Counsel's argumentative style became an even bigger problem during the examining

of witnesses both at depositions and during trial. As defendant's many citations to the record indicate, these proceedings would have gone much faster if plaintiffs' counsel had focused on asking questions rather than arguing with the witnesses.

This is not to say that plaintiffs' counsel did not provide quality representation or anything less than an excellent result to the class members. However, it would be an understatement to say that the manner in which this case proceeded should not be used as a model in future litigation. The inefficient manner in which counsel tried the case should be a factor in determining an appropriate award.

As noted above, counsel seek $8.6 million in fees, which they describe alternatively as (1) the amount of plaintiffs' original request under the lodestar method with a multiplier of two; or (2) approximately 1/3 of the $18.7 million judgment and 24% of the approximately $10 million defendant paid out before I entered judgment. I conclude that an appropriate fee award is $5,790,400 million, which is the amount of counsel's reduced lodestar amount of $4,136,000 million with a multiplier of 1.4. It represents more than 30% of the $18.7 million judgment.

This award provides adequate compensation to counsel while taking into account the risk of nonpayment and insuring that class members retain a fair share of the judgment. In addition, the award is consistent with fee awards in cases using a "percentage of the judgment" approach, Plts.' Br., dkt. #592, at 51-52 (citing numerous cases in courts approved awards between 25%-33%), as well as ERISA common fund cases using the lodestar method. Cook, 142 F.3d at 1013 (approving fee award equaling 1.5 times lodestar

amount). Finally, it is consistent with the fee agreement between counsel and the class representatives. 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."). Although counsel asks for a multiplier of two, I conclude that the reduction is necessary to address the concerns discussed above.

2. Costs

Counsel seek $960,000 in nontaxable costs from the common fund. These include: (a) $20,047 for the costs of notice; (b) $885,029 for expert witnesses; (c) $10,412 for e-discovery consultants; (d) $27,929 for travel; and (e) $16,305.53 for online legal research, messenger services, postage, express mail and next day delivery, long distance telephone and facsimile expenses and other incidental expenses.

In considering a request for costs, district courts must exercise their discretion to "disallow particular expenses that are unreasonable whether because excessive in amount or because they should not have been incurred at all." Zabkowicz v. W. Bend Co., Division of Dart Industries, Inc., 789 F.2d 540, 553 (7th Cir. 1986) (quoting Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir. 1984)). See also In re Fidelity/Micron Securities Litigation, 167 F.3d 735, 736–37 (1st Cir. 1999) (in "common fund" cases, district court acts as "quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class") (citing Cook, 142 F.3d at 1011). In this case, counsel have failed to show that their request

for costs is reasonable. In their brief, they simply list their costs, cite a declaration from lead counsel and state that their costs are reasonable. Dkt. #592 at 54. In the declaration, counsel simply refers to a one-page exhibit that lists the costs in general terms without providing any explanation as to how they were incurred. Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 600 (N.D. Ill. 2011) (rejecting request for costs when class counsel "provided insufficient itemization and back-up documentation of the expenses so to allow the Court to make a meaningful assessment").

Although I have no doubt that some portion of counsel's costs were necessary and reasonable, I note that they are significantly higher than other recent common fund cases, both in terms of the raw amount and as a percentage of the common fund, which in this case is more than 5%. Silverman v. Motorola, Inc., 2012 WL 1597388, *4 (N.D. Ill. 2012) (awarding costs in amount of 2.4% of common fund); Baptista v. Mutual of Omaha Insurance Co., 859 F. Supp. 2d 236, 244 (D.R.I. 2012) (approving costs of $11,500 in ERISA case with common fund of $1.9 million); Anwar v. Fairfield Greenwich Ltd., 2012 WL 1981505, *3 (S.D.N.Y. 2012) (awarding costs of $114,100.05 in case with common fund of $2.6 million); Sewell v. Bovis Lend Lease, Inc., 2012 WL 1320124, *13-14 (S.D.N.Y. 2012) ("Expenses and costs in class action settlements total approximately 2.8 percent of total recovery nationwide, which in the instant case would be $65,800."); Will v. General Dynamics Corp., 2010 WL 4818174, *1 (S.D. Ill. 2010) (awarding costs of $692,979.50 in ERISA case with judgment $15.15 million); In re Lawnmower Engine Horsepower Marketing & Sales Practices Litigation, 733 F. Supp. 2d 997, 1013 (E.D. Wis.

2010) (awarding costs of $576,391.19 in case with common fund of $65 million). Because counsel have not provided any justification for the higher amount, I am reducing their request by 1/3 to bring it in line with similar cases.

C. Incentive Award

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." Cook, 142 F.3d at 1016 (approving $25,000 incentive award for named plaintiff). In this case, counsel has averred that

> the prospect of a separate incentive award was necessary to induce [Ruppert and Larson] to participate as named plaintiffs. They performed valuable service to the Class. They were required to respond to discovery requests, produce documents, and undergo depositions. They have both stayed abreast of the litigation throughout the 4-1/2 years it has been pending and both attended some of the June 2010 trial.

Gottesdiener Decl. ¶ 14, dkt. #591. Accordingly, I conclude that incentive awards of $7500 for the two named plaintiffs are appropriate in this case.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for attorney fees and costs under 11 U.S.C. § 1132(g)(1) is DENIED.

2. Counsel for plaintiffs' motion for attorney fees, costs and incentive awards under the common fund doctrine is GRANTED IN PART. Counsel is AWARDED $5,790,400

in fees and $640,000 in costs; plaintiffs Lawrence Ruppert and Thomas Larson are each AWARDED $7500. The share of each class member receiving an award under the judgment shall be reduced proportionately.

Entered this 4th day of February, 2013.

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