IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

---

PHYLLIS JOHNSON, *et al.*, on behalf of themselves and all others similarly situated

Plaintiffs,

v.

MERITER HEALTH SERVICES EMPLOYEE RETIREMENT PLAN and MERITER HEALTH SERVICES, INC.,

Defendants.

OPINION AND ORDER

10-cv-426-wmc

---

The parties in this case have agreed to settle this class action lawsuit on the terms and conditions set forth in the Settlement Agreement previously filed with the court. (Mot. for Prelim. Approval, Ex. A (dkt. #457-1).) On September 17, 2014, the court preliminarily approved the settlement, including the plan of allocation, and directed the approved notice be distributed to class members. (9/17/14 Order (dkt. #461).) On January 5, 2015, the court held a fairness hearing on this settlement at which all parties appeared by counsel. In addition, three written objections were filed, of which two have since been withdrawn. Before the court is plaintiffs' motion for final approval of the settlement, plan of allocation and an award of attorneys' fees and costs (dkt. #471), which the court will grant.

## BACKGROUND

### A. Overview of Settlement Agreement

The Class consists of 11 classes or subclasses, which are each defined in the court's order certifying the class and further modified by the order preliminarily approving the class. (4/25/13 Order (dkt. #245); 9/17/14 Order (dkt. #461).) The settlement agreement creates a settlement fund of $82 million for the approximately 5,800 member class. After deductions for the fees, expenses and named plaintiff incentive awards, this will effectively mean an average payment of $14,000 for the 4,200 class members having more than nominal damages claims arising from under the First Amended Complaint. The remaining 1,600 class members with nominal damages will also receive a minimum payment of $250 under the settlement.

### B. Plan of Allocation

With the help of an expert, class counsel developed a plan of allocation, which allocates the net settlement proceeds on an individualized basis through a formula that takes into account the relative value of each claim in light of litigation risks and distributes the net settlement on a *pro rata* basis in proportion to each individual's determined value of his or her claim. (Declaration of Lawrence Deutsch ("Deutsch Decl.") (dkt. #474) ¶ 8.) As described in more detail in plaintiffs' expert declaration, plaintiffs devised three different favorable scenarios covering plaintiffs' seven claims, and assigned varying risks to those three scenarios. (*Id.* at ¶¶ 10-12.) Plaintiffs then applied

a second risk factor based on when the individual entered the plan and when the benefit was paid. (*Id.* at ¶ 13.)

**C. Notice Process**

The court previously approved a notice of the proposed settlement and of the fairness hearing, directing that it be distributed to all class members. The notice administrator avers that the notice and election forms were mailed to approximately 5,800 class members, with only 211 returned as undeliverable. (Declaration of Risa Neiman (dkt. #475) ¶ 2.) Of those 211, approximately half have since been mailed to an updated address. (*Id.*) In addition the approved publication notice was published in the *Wisconsin State Journal* and *USA Today*. (*Id.* at ¶ 9.)

**D. Objections**

The notice provided class members until December 8, 2014, to send objections to the court. By that date (and through the date of the final approval hearing on January 5, 2015), the court received three objections, although as already noted, two of those objections have since been withdrawn. The first objector contends that Meriter should pay for the attorney's fees above the settlement amount. (Dkt. #468.) The second individual objected to the proposed plan of allocation, suggesting a more straight-forward approach simply based on years worked at Meriter. (Dkt. #469.) The third objector raised three concerns: (1) the attorney's fee request as a percentage of the total settlement is too high; (2) class members should be able to receive their settlement

payment other than as a deposit into their retirement account; and (3) the total settlement amount is too small, suggesting instead that individuals receive 50% more than allotted under the current amount. (Dkt. #470.)

## OPINION

### I. Final Approval of Class Action Settlement, Plan of Allocation, and Notices

The court may approve a proposed class action settlement only if it determines that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the court considers various factors, including "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996); *see also Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (listing "the probability of plaintiff prevailing on its various claims, the expected costs of future litigation, and hints of collusion" as factors for consideration). All of these factors, and others, support the settlement reached by the parties here.

From the outset of this case, the class faced numerous affirmative defenses and litigation risks, including statute of limitations, the class certification hurdle, and the varying merits of numerous legal claims. These challenges, in particular the statute of limitations defense, could have created a complete bar to recovery for all or a significant

portion of the class members. By the time of settlement, the court had limited the class's claims significantly by requiring in its summary judgment opinion that plaintiffs establish the breach of fiduciary duty at trial in order to overcome defendants' statute of limitations defense.

That this case settled on the eve of the liability phase of this trial also supports approval of the settlement. After four years of litigation, both sides, and to a lesser extent the court, had a solid understanding of the relative strengths and weaknesses of plaintiffs' claims and defenses to those claims. Class counsel represents that the accepted settlement amount represents a significant increase over past offers. (Declaration of Eli Gottesdiener ("Gottesdiener Decl.") (dkt. #473) ¶ 26.) This too weighs in favor of finding the settlement fair and reasonable.

Class counsel estimates the potential recovery under best-case litigation scenario to be $270 million, which means that the settlement amount of $82 million represents approximately one-third of the best-case scenario. (Deutsch Decl. (dkt. #474) ¶ 2; Gottesdiener Decl. (dkt. #473) ¶ 4.) As noted in the court's summary judgment decision, there was also a real risk of a zero recovery for some, if not all, of plaintiff classes. (7/3/14 Op. & Order (dkt. #415).)

In light of the significant challenges to the class's claims, the court finds that the settlement amount is fair and reasonable as compared to the "net expected gain." *In re Fort Wayne Telsat, Inc.*, 665 F.3d 816, 820 (7th Cir. 2011) ("The 'expected gain' is the gain if the judgment is favorable, discounted (that is, multiplied) by the probability of a favorable judgment."). Not surprisingly, a few class members -- as voiced by two of the

objectors -- prefer that the total settle amount, and in turn their respective portions, be larger, but the significant risks of plaintiffs' claims warrant settling the claims for the amount obtained. Indeed, plaintiffs' and defendants' counsel have done a remarkable job of arriving at a fair and reasonable settlement of highly contentious and uncertain claims.

Moreover, while plaintiffs successfully navigated motions to dismiss, opposition to class certification (including an interlocutory appeal), and extensive motions for summary judgment, the parties still faced separate trials on liability and damages and a near certain appeal to the Seventh Circuit by the losing side (if not both sides), likely stretching this action out for at least another year or more beyond the four plus years it has already been pending. The age of a number of the class members, the length and expense of future litigation, coupled with the amount of time already invested in this action, all similarly weigh in favor of finding this settlement fair and reasonable.

The court further finds that the lone objection from class members strongly supports a finding that the settlement is fair and reasonable. Of the 5,800 class members, the court only received three objections, while class counsel plausibly represents that he has heard from approximately 210 class members since the settlement was announced, and that the reaction has been positive. (Gottesdiener Decl. (dkt. #474) ¶¶ 7-8.) Ultimately, one objection remains, which speaks volumes as to the fairness of the proposed settlement in the class members' eyes.

As already described above, the plan allocates the net settlement proceeds on an individualized basis by taking into consideration each class member's claimed damages, making adjustments based on the probability of success of each claim in light of the risks

specific to each class member. In light of the fact that this lawsuit covers approximately seven different causes of action spanning a twenty-five year period of administration of the plan at issue, the court finds class counsel's approach, as supported by plaintiffs' expert, fair and reasonable. *See In re PainWebber Ltd. V. Partnerships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) ("[W]hen real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weight the distribution of the settlement in favor of plaintiffs show claims comprise the set that was more likely to succeed." (internal citations and quotations omitted)).[1]

The court also previously determined, and now confirms, that the mailed and published notices constitute the best notice practicable under the circumstances, as well as provide adequate notice to class members. These notices were reasonably calculated to apprise class members of the pendency of this lawsuit, the nature of the claims, class definitions, and the proposed settlement, as well as inform members of their opportunity to object to the plan of allocation, class counsel's petition for fees and expenses and named plaintiffs' incentive awards. *See generally* 2 MCLAUGHLIN ON CLASS ACTIONS § 6:17 (10th ed. 2013) ("The settlement notice does not need to describe every facet of the settlement, or describe in exhaustive detail those features it does describe. It must contain enough information about the settlement and its implications for participants to

[1] One of the objectors suggested that the settlement be allocated simply based on years of service. This method, however, would fail to account for several key factors, including the legal claims at stake, the disproportionate impact of the statute of limitations defense on various class members' claims and the benefits accrued, among other factors.

enable class members to make an informed decision about whether to be heard concerning the settlement or, if allowed, to opt-out.") (citing cases).

Finally, the court further finds that the form and manner of the notice provided by defendant pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, (dkt. #463), fully complied with CAFA, and that defendants have fully satisfied their obligations under CAFA.

**II. Incentive Fees for Named Plaintiffs**

The court also finds reasonable plaintiffs' motion for payment of incentive awards of $5,000 each to the named plaintiffs, Phyllis A. Johnson, Madge E. English, Claudia M. Greco, Joyce E. Emerson, Sue L. Hansen, Donna L. Smith, Linda L. Muller, Michele L. McCabe, Krysal J. Wages, Ann Marie Stephens, Jill E. Anthony, and Tammy J. Wetley, most of whom were also appointed class representatives.

Incentive awards for class representatives are fairly common. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722-23 (7th Cir. 2001) (describing purpose of incentive awards as "induc[ing] individuals to become named representatives"). In deciding whether an incentive award is appropriate and what the amount should be, the Seventh Circuit advised that courts may consider "the actions the plaintiff has taken to protect the interest of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Here, each of the named plaintiffs was deposed, required to respond to discovery requests, produce documents and respond to interrogatories. Class counsel further represents that the named plaintiffs were consulted throughout the years the action was pending, communicated with co-workers and former co-workers, generally stayed abreast of the litigation, and approved the settlement. Moreover, two of the named plaintiffs are current employees, who risked retaliation from Meriter. Accordingly, the court finds a sufficient basis for approving incentive awards.

As for the appropriate amount, district courts in this circuit have awarded incentive fee awards ranging from $5,000 to $25,000. *See Cook*, 142 F.3d at 1016 (affirming incentive award of $25,000 where class representative spent hundreds of hours with attorney, providing them with an abundance of information, and reasonably feared workplace retaliation); *Redman v. RadioShack Corp.*, No. 11 C 6741, 2014 WL 497438, at *12 (N.D. Ill. Feb. 7, 2014) (awarding $5,000 to each class representative); *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013) (approving $15,000 award for two class representatives because of active participation in litigation); *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (awarding $25,000 each to two class representatives based on extensive involvement over seven years of litigation); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002) (approving $5,000 awards where plaintiffs were "required to respond to discovery requests, produce documents, meet with counsel in preparation for their depositions and undergo depositions").

While incentive awards in the higher end of the range described below appears unwarranted in light of the named plaintiffs' involvement, the court finds that an award of $5,000 each is certainly fair and reasonable.

**III. Attorneys' Fee Award and Costs**

Plaintiffs are seeking an award of attorney's fees of $23,780,000, an amount equal to 29% of the total settlement amount. "When attorney's fees are deducted from class damages, the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohn & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001)).[2] While preferable to do this at the outset of litigation, *see Synthoid*, 264 F.3d at 719, the court was not consulted at that point. In making this determination at the end of the lawsuit, the court still considers the same factors: "actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions," in addition to "the amount of work involved, the risks of nonpayment, and the quality of representation." *Williams*, 658 F.3d at 635-36 (quoting *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005)) (citing *Synthroid*, 264 F.3d at 721).

[2] Recently, the Seventh Circuit clarified -- or arguably simply reiterated -- that a district court may also opt to review a request for attorneys' fees from a common settlement fund using the lodestar method. *Am. Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[I]n our circuit, it is legally correct for a district court to choose either. Doing so is obviously not an abuse of discretion."); *see also Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) (approving both methods based on the circumstances).

As a starting point, the court looks to awards approved by other courts in similar large ERISA class actions settlements or other large class action settlements. Most helpful, in *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011), a similar ERISA class action, the Seventh Circuit affirmed the district court's award of attorney's fees representing 24% on a $180 million settlement, finding it within the market rate range for ERISA class actions. Broadening the inquiry to other large class action settlements (outside of the ERISA context), the Seventh Circuit has also approved fee awards in the mid to high 20% range. *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, (7th Cir. 2013) (affirming award of 27.5% on $200 million settlement of securities class action); *Sutton v. Bernard*, 504 F.3d 688 (7th Cir. 2007) (affirming award of 28% of $18 million settlement of securities class action).

The court also looked to other ERISA cases in which class counsel has been involved. These cases similarly reflect a range of 25% to 30% of the common fund settlement. *See In re Colgate-Palmolive Co. ERISA Litig.*, No. 07-cv-9515, 2015 WL 3292415, at *2 (S.D.N.Y. July 8, 2014) (awarding 25% of $45.9 million settlement fund); *Downes v. Wis. Energy Corp. Retirement Account Plan*, No. 09-C-0637, 2012 WL 1410023, at *4 (E.D. Wis. Apr. 20, 2012) (awarding 30% of $45 million settlement fund); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 466 (E.D. Pa. 2008) (awarding 30% of $14 million settlement fund).

As further support of the 29% fee request, class counsel submitted declarations from attorneys specializing in similar ERISA litigation. (Declaration of Douglas Sprong ("Sprong Decl.") (dkt. #476); Declaration of Susan Martin ("Martin Decl.") (dkt.

#477).) Perhaps not surprisingly, the practitioners averred that if presented with this case at its onset, each would have insisted on a contingency fee rate of at least 30% to 33 1/3%. (Sprong Decl. (dkt. #476) ¶ 6; Martin Decl. (dkt. #7).)[3] Finally, each named plaintiff agreed to a contingency fee arrangement of 33 1/3%, *and* but one objection remains as to fees even among the approximately 5,800 class members. (Gottesdiener Decl. (dkt. #473) ¶ 31; *id.*, Ex. 3 (dkt. #473-3).)

After considering all of these factors, the court determines that a fee award in the range of 25% to 30% reflects the market for large-scale, sophisticated ERISA class actions. The court next considers whether specific aspects of this case would either warrant a departure from this range, or if not, the appropriate award within this range. *First*, class counsel faced a fairly significant risk of nonpayment given the statute of limitations defense -- especially, in light of the fact that this case covers a twenty-five year period -- and the novel character of some of plaintiffs' legal claims. This risk of nonpayment weighs in favor of awarding fees within the 25 to 30% range.

*Second*, the court notes the quality of representation, particularly class counsel's extensive experience in litigating complex ERISA class actions. (Pls.' Br. (dkt. #472) 35.) Although after the fact, the result reached here supports this finding. The $82 million settlement represents a significant victory for the class on the eve of trial in the face of a difficult hurdle in defendants' statute of limitations defense. *See Redman v. RadioShack*

[3] Mary Ellen Signorille, a senior staff attorney with AARP Foundation Litigation, also submitted a declaration in support of class counsel's fee petition, in which she averred that in valuing the case at its onset under a lodestar-time-multiplier method, a highly qualified practitioner would have sought a multiplier of at least 2. (Declaration of Mary Ellen Signorille (dkt. #478) ¶ 17.)

*Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) ("We have emphasized that in determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation.").

*Third* and finally, the court also considers the amount of work involved. Class counsel submitted detailed time records, which reflect 37,000 hours of work over the past four and a half years and represent a lodestar value of more than $12 million using counsel's actual billing rates. (Gottesdiener Decl. (dkt. #473) ¶¶ 15-16; *id.*, Exs. 4-5 (dkt. ##473-4, 473-5.) The court would be remiss not to note that some of these hours were of class counsel's own making, particularly with respect to unnecessary scorched earth discovery practices and overblown, hyperbolic briefs. Moreover, given that counsel generally works on a contingency basis, the hourly rates are of more limited value, but certainly not unreasonable on their face. Nevertheless, these observations neither change the overall expertise that class counsel brought to the table, nor the quality of counsel's overall representation.[4] The amount requested reflects approximately twice the lodestar value (or as previously described as a multiplier of 2), which is well within the bounds of reason. *See, e.g.*, *Williams v. Rohm & Haas Pension Plan*, No. 04-0078-SEB, 2010 WL 4723725 (S.D. Ind. Nov. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011) (awarded fees of $43.5 million, representing 5.85 multiplier).

[4] At the same time, the court is hopeful that class counsel will not misinterpret the sizable fee award (or even the successfully negotiated settlement award) as positive reinforcement for tactics the court has previously criticized and has now seen enough of to conclude (as other have in the past) are counterproductive to both their clients and the interests of justice.

After considering these various factors, the court finds that an award within the 25% to 30% range is appropriate. The court further finds that in light of the risk of nonpayment, the significant amount of time and resources necessarily committed by class counsel over the four and a half years, and the quality of representation, an award in the middle of that range of 27.5% or $22.55 million is fair and reasonable.

Class counsel also seeks reimbursement of costs advanced by class counsel in the total amount of $1,774,629.36, and provides documentation in support of that request. (Gottesdiener Decl. (dkt #473) ¶ 20; *id.*, Ex. 7 (dkt. #473-3).) The court finds the expenses adequately documented, reasonably incurred in connection with the prosecution of this action, and reasonable for a case of this complexity, scope and duration.

Accordingly, the court will enter a judgment consistent with this opinion.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for final approval of settlement agreement, plan of allocation and attorneys' fees, reimbursement of expenses and named plaintiffs' incentive awards (dkt. #471) is GRANTED;

2) The court APPROVES the settlement pursuant to Fed. R. Civ. P. 23(e);

3) The court AWARDS to class counsel attorney's fees to be paid out of the total settlement amount in the amount of $22,550,000.00, and costs in the amount of $1,774,629.36;

4) The court further AWARDS incentive fees of $5,000, also to be paid out of the total settlement amount to named plaintiffs Phyllis A. Johnson, Madge E. English, Claudia M. Greco, Joyce E. Emerson, Sue L. Hansen, Donna L. Smith, Linda L. Muller, Michele L. McCabe, Krysal J. Wages, Ann Marie Stephens, Jill E. Anthony, and Tammy J. Wetley;

5) The court DIRECTS distribution of the net settlement proceeds consistent with the approved plan of allocation;

6) The court DISMISSES the claims of named plaintiffs and class members against defendants with prejudice and without further costs. Without affecting the finality of this final order and judgment, the court retains jurisdiction under the Employee Retirement Income Services Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, to implement, interpret, and/or enforce this final order and judgment, the preliminary approval order and the settlement agreement, the terms of which are incorporated in this order; and

7) The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 5th day of January, 2015.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge