

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WILLIAM NASH, Individually and on)
Behalf of All Other Persons Similarly)
Situating,)
Plaintiff,)

CIVIL ACTION NO.: CA-09-079

v.)

CVS CAREMARK CORPORATION)
and HOLIDAY CVS, L.L.C.,)
Defendants.)

JEANETTE BELANGER, Individually)
and on Behalf of All Other Persons)
Similarly Situated,)
Plaintiff,)

v.)

CVS CAREMARK CORPORATION)
and BETHEL CVS, INC.,)
Defendants.)

FRANK MEADOWS on behalf of)
himself and all other similarly situated)
employees,)
Plaintiff,)

v.)

CVS CAREMARK CORPORATION,)
Defendant.)

RICHARD McFARLAND, Individually
and on Behalf of All Other Persons
Similarly Situated,

Plaintiff,

v.

CVS CAREMARK CORPORATION,

Defendant.

SANDRA JOHNSON, Individually and
on Behalf of All Other Persons
Similarly Situated,

Plaintiff,

v.

CVS CAREMARK CORPORATION,

Defendant.

KRISTY HENDERSON, individually
and on behalf of persons similarly
situated,

Plaintiff,

v.

HOLIDAY CVS, L.L.C, a Florida
limited liability company, CVS
CAREMARK, CORPORATION,
a Delaware corporation, d/b/a
CVS/PHARMACY, CVS
PHARMACY, INC., a Rhode Island
corporation, d/b/a CVS/PHARMACY,
and XYZ ENTITIES 1-1000, fictitious
names of unknown liable entities,

Defendants.

REINALDO CRUZ, BENJAMIN)
TETTEYFIO, ANTHONY)
MANNARINO, CHRISTOPHER)
TURKO, DONNA PETERS, DENISE)
RAMSEY, RAFIK MISSAK, and JEFF)
ANDERSEN, Individually and on)
Behalf of all Others Similarly Situated,)

Plaintiffs,)

v.)

HOOK-SUPERX, L.L.C., CVS)
CAREMARK CORPORATION; CVS)
PHARMACY, INC.; CVS ALBANY,)
L.L.C.; NEW JERSEY CVS)
PHARMACY, L.L.C.; and)
MASSACHUSETTS CVS)
PHARMACY,)
L.L.C.,)

Defendants.)

ELIZABETH DUCASSE, Individually)
and on Behalf of All Other Persons)
Similarly Situated,)

Plaintiff,)

v.)

CVS CAREMARK CORPORATION)
and CVS ALBANY, L.L.C.,)

Defendants.)

SHAWN GRIFFITH, Individually and)
on Behalf of All Other Persons)
Similarly Situated,)

Plaintiff,)

v.)
)
CVS CAREMARK CORPORATION,)
and MASSACHUSETTS CVS)
PHARMACY, L.L.C.)
Defendants.)

GARY S. OLSEN, Individually and on)
Behalf of All Other Persons Similarly)
Situated, as Class/Collective)
Representative,)
Plaintiff,)

v.)
CVS CAREMARK CORPORATION,)
Defendant.)

OLSEN COUNSEL¹ APPLICATION FOR AWARD OF AND ALLOCATION OF ATTORNEYS' FEES AND LAWSUIT COSTS

Pursuant to the Court’s December 9, 2011 order granting preliminary approval of the Class and Collective Action Settlement, *Olsen* Counsel now file this Application for both an Award and an Allocation of Attorneys’ Fees and Lawsuit Costs based on the percentage of the fund (“POF”) method. *Olsen* Counsel petitions for a total legal fee for all Plaintiffs’ Counsel of

¹ *Olsen* Counsel consist of the following attorneys: Mark S. Mandell, Mandell, Schwartz & Boisclair, Ltd., 1 Park Row, Providence, Rhode Island, 02903; Kathleen C. Chavez, Chavez Law Firm, P.C., 3 North Second Street, Suite 300, Saint Charles, Illinois 60174; Peter L. Currie, The Law Firm of Peter L. Currie, P.C., 22 West Washington, Suite 1500, Chicago, IL 60602; and Robert Foote, Matt Herman, Michael Wong, Alexander Caron and Sean Hendricks, Foote, Meyers, Mielke & Flowers, LLC, 3 North Second Street, Suite 300, Saint Charles, IL 60174.

twenty-five percent (25%) of the \$34 million dollar settlement fund (\$8,500,000). In support therefor, *Olsen* Counsel states as follows:

Background

1. The Class and Collective Action Settlement (“Settlement”), which has been preliminarily approved by this Honorable Court, applies to over 12,000 settlement class members (consisting of certain current and former CVS Assistant Store Managers). The Settlement fairly, adequately and reasonably resolves their pending federal and state wage and hour claims against Defendant CVS. Those claims against CVS were that it did not pay Plaintiffs proper overtime wages for weeks in which they worked more than forty (40) hours because they were misclassified by Defendant CVS as “exempt” from federal and state overtime pay requirements. Among other material terms the Settlement provides for establishment of a settlement fund into which Defendant CVS will pay up to \$34 million dollars.

2. The Settlement and resulting settlement fund is the result of litigation efforts by numerous Plaintiffs’ counsel that were organized into four separate litigation groups. These four (4) groups proceeded simultaneously against CVS in four separate federal cases. *William Nash v. CVS Caremark Corp., et al.*, 09-cv-0079-S-LDA (“*Nash*”); *Shawn Griffith v. CVS Caremark Corp., et al.*, Civil Action No. 4:10-cv-10106-FDS (“*Griffith*”); *Gary Olsen v. CVS Caremark Corp.*, Civil Action No. 10-cv-03784 (“*Olsen*”); and *Cruz, et al. v. Hook SuperX L.L.C., et al.*, No. 09-CIV-7717-PAC (“*Cruz*”); Each of the *four litigation groups* have a representative designated as Lead Settlement Counsel for Plaintiffs and the Class, as follows:

Lead Settlement Counsel for Plaintiffs & the Class:

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Outten & Golden LLP
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Saint Charles, IL 60174
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Klafter Olsen & Lesser, LLP corresponds to the *Nash* case and litigation group (“*Nash* Counsel”). Shavitz Law Group, P.A. corresponds to the *Griffith* case and litigation group (“*Griffith*” Counsel). Outten & Golden LLP corresponds to the *Cruz* case (“*Cruz* Counsel”). Chavez Law Firm, PC corresponds to the *Olsen* case and litigation group (“*Olsen* Counsel”). Each litigation group substantially contributed to the Settlement and to the establishment of the \$34 million dollar settlement fund.

3. It has been well established that an attorney who recovers a common fund for the benefit of others is entitled to “a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). Judge Selya, writing for The U.S. Court of Appeals for the First Circuit, *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295 (1st Cir. 1995), acknowledged that “use of the POF method in common fund cases is the prevailing praxis,” and further acknowledged certain “distinct advantages” of calculating attorneys’ fees by POF method, including that, “(t)he POF approach “(i)s often less burdensome to administer than the lodestar method. *See Swedish Hospital Corporation v. Shalala*, 1 F.3d 1261, 1269 (D.C.C. 1993)(finding POF approach “less

demanding of scarce judicial resources”). Rather than forcing the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended, the POF method **permits the judge to focus on “a showing that the fund conferring a benefit on the class resulted from” the lawyers' efforts.** *In re Thirteen Appeals*, 56 F.3d at 307.

4. Consistent with this precedent, Paragraph 7(a) of the Settlement Agreement provides, in pertinent part, that:

(a) Within thirty (30) days preceding the date of the Final Approval Hearing or the date set by the Court, Settlement Class Counsel shall make, and CVS agrees not to oppose, an application for Attorneys' Fees and Lawsuit Costs that *does not exceed thirty-three and one-third percent (33-1/3%) of the Thirty-four million dollars.*

5. While ¶7(a) of the Settlement obliges Defendant CVS not to oppose an application by Settlement Class Counsel for Attorneys' Fees and Lawsuit costs that does not exceed thirty-three and one-third percent (33-1/3%) of the Thirty-four million dollars, Settlement Class Counsel is not obliged to petition the Court for the upper limit/maximum (33-1/3%) set forth in the agreement.

6. Class litigation and settlement processes are uncertain. It is definitely prudent that Settlement Class Counsel negotiate a comfortable upper limit (ceiling), relative to its application for an award of Attorneys' Fees and Lawsuit Costs, in their settlement agreement. Upper limits afford flexibility and insure against unforeseen or extraordinary circumstances. However, the ceiling contained in a settlement agreement should not be determinative of the POF actually applied for by settlement class counsel. Settlement Class Counsel, even if a defendant agrees to a high POF ceiling, still must limit its application to a POF which is fair and reasonable, based on the totality

of the very specific factual and procedural considerations relevant to the case, and consistent with case law in the applicable federal circuit.

7. In this case, *Olsen* Counsel agrees with the utilization of the POF method. However, *Olsen* Counsel simply cannot agree to join in an application for thirty three and one-third percent (33-1/3%) of the \$34 million dollar settlement fund. Given the particular facts of these claims, the nature of the legal arguments and the procedural history of this case, *Olsen* Counsel does not believe that there is a reasonable basis for an upward departure from the 1st Circuit's "benchmark" POF of twenty-five percent (25%), especially where the requested POF would greatly diminish the amount of the settlement fund available for allocation and distribution to the settlement collective and class. In the instant case *Olsen* Counsel believes that, as fiduciaries of the Settlement Class, it should request that this Court limit any award of Attorneys' fees and Lawsuit Costs to the 1st Circuit Benchmark of twenty-five percent (25%). *Olsen* Counsel is respectfully requesting that this Court award total Attorneys' Fees and Lawsuit Costs in the amount of eight million five hundred dollars (\$8,500,000.00), which amount represents twenty five percent (25%) of the \$34 million dollar settlement fund, leaving the differential eight and one third percent (8-1/3%) in the common fund for distribution and allocation to the class.

Legal Standard

8. A district court in the 1st Circuit has "extremely broad" latitude to determine an appropriate fee award under the POF method. *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F.Supp.2d 249 (D.N.H. 2007)(citing *Thirteen Appeals*, 56 F.3d at 309).² *Olsen* Counsel

² Compare the lack of discretion vested with district courts in the Second and Third Circuits, which are required to examine a fixed laundry list of factors. *Thirteen Appeals*, 56 F.3d at 307-309 *Cf. In re Rite Aid Corporation Securities Litigation*, 396 F.3d 294, 301 (3rd Cir. 2005); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2nd Cir.2000).

acknowledges that broad discretion and appreciates the challenge this Court faces in ultimately making its determination in light of the differing perspectives among Settlement Class Counsel.

9. When utilizing the POF method, courts in the 1st Circuit generally award attorneys' fees in the range of twenty to thirty percent (20–30%), with twenty-five percent (25%) as “the benchmark.” See *Latorraca v. Centennial Technologies Inc.*, 2011 WL 5882193 (D.Mass. 2011)(citing *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 187 (D.Mass. 1998))(citing *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); see also *New Eng. Carpenters Health Benefits Fund v. 1st Databank, Inc.*, No. 05–CV–11148–PBS, 2009 WL 2408560, at *1–2, 2009 U.S. Dist. LEXIS 68419, at *9 (D.Mass. 2009)(20%); *In re Am. Dental Partners, Inc. Sec. Litig.*, No. 08–CV–10119–RGS, 2010 WL 1427404, at *1, 2010 U.S. Dist. LEXIS 35074, at *2 (D.Mass. 2010)(22.5%); *In re Fleet/Norstar Sec. Litig.*, 935 F.Supp. 99, 110 (D.R.I. 1996)(20%); *In re Puerto Rican Cabotage Antitrust Litig.*, No. 08–MD–1960(DRD), 2011 WL 4537726, at *9–10, 2011 U.S. Dist. LEXIS 113980, at *48 (D.P.R. 2011)(23%); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees & Expenses in Class Action Settlements: 1993–2008*, J. of Empirical Legal Stud. 248 (2010)(Table 4)(finding that the median and mean attorneys' fees awarded in the First Circuit are 20%).

10. *Olsen* Counsel respectfully suggest that a POF of twenty five (25%) is sufficient to adequately compensate Settlement Class Counsel, and importantly, would result in preserving an additional eight and one third percent (8-1/3%) of the settlement fund for allocation and distribution to the settlement class members. There is nothing extraordinary about this litigation, in general, or the Settlement, that would justify an upward departure from the 1st Circuit's twenty-five percent (25%) benchmark. Also, there is definitely nothing about the procedural posture, litigation history, complexity of claims in dispute or challenges imbued in the

underlying facts that would warrant this Court awarding a POF that is greater than even the upper end of the well-recognized POF range in the 1st Circuit (twenty percent (20%) to thirty percent (30%)).

11. This application is not intended to demean or disparage the quality of legal representation provided by Settlement Class Counsel, and their associated attorneys, in each of the pending lawsuits. *Olsen* Counsel acknowledges that the Settlement is largely being accomplished, at the pre-merits discovery phase, because of the outstanding and vigorous collective efforts of all involved counsel.

12. After Defendant CVS agreed to send the FLSA notice advising putative collective members of the pendency of, and their rights to participate in, the four federal cases, it faced a full-on affront in four separate federal venues. Each case was in a nearly identical litigation posture (initial stages of aggressive and extensive merits discovery), which presented a unique challenge in itself. If Defendant CVS did not collectively resolve the litigation, it faced the immediate and daunting prospect of conducting (within a matter of months) simultaneous discovery in all four federal venues, including the possibility of taking/defending in excess of one hundred (100+) depositions and complying with four separate sets of detailed and extensive written discovery. Each of the four cases would require Defendant CVS to expend significant time and resources. Furthermore, each case involved relatively straightforward FLSA and state wage and hour claims and the common underlying facts, relative to misclassification, made it highly likely that Defendant CVS would face trial on the merits in all four venues.

13. Defendant CVS desired complete closure and conditioned settlement on the participation of the *Nash*, *Griffith*, *Cruz* and *Olsen* cases. Each of the four federal cases: (a) have multiple plaintiffs' attorneys' involved in the litigation; (b) were conditionally certified and in the pre-

merits discovery phase at the time of the settlement; (c) involved pre-certification/pre-merits motion practice, as well as formal and informal discovery; (d) involved work in connection with the original notices and opt-in process; and (e) participated in the mediation and agreed to consolidation and settlement before this Court. Settlement Class Counsel, and the four federal litigation groups, are all entitled to attorneys' fees and lawsuit costs. Consistent with the long-standing principles justifying a common fund award, each of the four groups should share equally in the POF ultimately awarded by this Court.

Fee Allocation

14. Allocation "by agreement" of the total Attorneys' Fees and Lawsuit Costs, among Settlement Class Counsel and its associated counsel, is highly improbable. Therefore, *Olsen* Counsel requests that this Court enter an order allocating and dividing equally the total Attorneys' Fees and Lawsuit Costs awarded.

15. *Olsen* Counsel requests that this Court allocate the total award of Attorneys' Fees and Lawsuit costs, equally, in four quarters, among the four core litigation groups:

Nash Counsel~ 25%

Griffith Counsel~ 25%

Cruz Counsel~ 25%

Olsen Counsel~ 25%

16. The POF method is premised on the foundation concept that an attorney who recovers a common fund, for the benefit of others, is entitled to "a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980).

17. All four core litigation groups were influential and necessary in both benefiting the fund and effectuating the Settlement.

18. Each of the four federal cases, located in different venues, were in substantially the same procedural posture at the time of settlement: collective actions were certified and notice sent, the opt-in process was ongoing and merits discovery was commencing. None of the four litigation groups performed substantially more productive compensable time. None more meaningfully advanced the litigation efforts.

19. CVS would not agree to *any* settlement without all four litigation groups participating in the settlement.

20. Each litigation group was also instrumental in working up their individual case and eventually obtaining a just settlement for their clients. This process for *Olsen* counsel included, but was not limited to:

- a. Pre-filing fact investigation and legal research;
- b. Preparing and filing a complaint;
- c. Preparing and filing a Joint Jurisdictional and Status Report;
- d. Engaging in Rule 26(f) conference;
- e. Negotiating, preparing and filing a joint scheduling order;
- f. Negotiating with Defense Counsel the terms of an agreed certification and notice to the collective in the *Olsen* matter, which included coordination and cooperation with the other pending federal cases;
- g. Working with two of the other co-lead counsel and opposing counsel to send out a joint notice to the collective;
- h. Participating in many court hearings in the Northern District of Illinois;

- i. Responding to hundreds of calls from opt-in Plaintiffs;
- j. Interviewing hundreds of opt-ins for specific facts and experiences;
- k. Collecting documents from the hundreds of opt-in Plaintiffs;
- l. Explaining the case to hundreds of op-in Plaintiffs;
- m. Performing damage calculations for each individual opt-in;
- n. Filing consent forms to join Plaintiffs, including researching underlying state law claims and applicable statutes in states *Olsen* counsel had opt-in Plaintiffs;
- o. Participating in and preparing for out-of-state mediation with Defendant;
- p. Coming to a formal agreement, with all the other parties, to settle the case for 34 million dollars;
- q. Equally participating in the negotiation, drafting and revising of all settlement related documents;
- r. Transferring the *Olsen* case to Rhode Island; and
- s. Continuing to currently manage the opt-ins, including taking phone calls and calling opt-ins to make sure they receive notice and work out issues with claim forms.

21. *Olsen* counsel, as well as the other three litigation groups, have certainly “earned their keep” throughout the course of this litigation. *In re Thirteen Appeals*, 56 F.3d at 310.

22. Further, *Olsen* counsel was responsible for 25% of the joint litigation costs associated with the case, in addition to all *Olsen* case specific costs.

23. *Olsen* Counsel requests allocation of a quarter (25%) of the total attorneys’ fees and lawsuit costs awarded. If this Court utilizes the twenty-five percent (25%) POF Benchmark, and awards total attorneys’ fees and lawsuit costs in the amount of eight million five hundred thousand dollars (\$8,500,000.00), then *Olsen* Counsel requests the amount of two million one hundred and

twenty-five thousand dollars (\$2, 125,000.00). If, after considering the arguments made by all Counsel, this Court determines that a different POF should be utilized, *Olsen* Counsel nevertheless requests twenty-five percent (25%) of the ultimate amount awarded in this matter as Attorneys' Fees and Lawsuit Costs.

Respectfully Submitted,

/s/ Mark S. Mandell

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WILLIAM NASH, Individually and)	
on)	
Behalf of All Other Persons Similarly)	
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CVS CAREMARK CORPORATION)	
and HOLIDAY CVS, L.L.C.,)	
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Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I electronically filed the *Olsen Counsel Application for Award of and Allocation of Attorneys' Fees and Lawsuit Costs* using the Court's CM/ECF filing system, allowing such document to be available for viewing and downloading to all attorneys of record in the *Nash v. CVS Caremark Corporation* case.

/s/ Mark S. Mandell

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Dated: 3/7/12