UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHI TROY, *et al.*,

Plaintiffs,

v.

AEGIS SENIOR COMMUNITIES LLC,

Defendant.

Case No. 16-cv-03991-JSW

**ORDER GRANTING IN PART MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

Re: Dkt. No. 213

Now before the Court for consideration is the Motion for Attorneys' Fees, Costs, and Service Awards filed by Plaintiffs June Newirth, by and through her successor-in-interest Kathi Troy; Elizabeth Barber, Andrew Bardin, and Thomas Bardin as successors-in-interest to the Estate of Margaret Pierce; and Carol M. Morrison by Stacy A. Van Vleck as Attorney-in-Fact (collectively "Plaintiffs" ) in connection with their motion for final approval of a class action settlement.

The Court has considered Plaintiffs' motion, the lack of objections or opposition thereto, the declarations and exhibits submitted in support of the motion, including the supplemental materials filed in response to the Court's written questions and Ms. Van Vleck's supplemental declaration, the record in this case, and the parties' argument at the final approval hearing held on August 20, 2021. For the reasons that follow, the Court GRANTS, IN PART, Plaintiffs' motion.

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## ANALYSIS

### A. The Court Grants the Motion for Fees.

#### 1. Applicable Legal Standards on Fee Award.

As part of the Settlement Stipulation[1], the parties agreed that Plaintiffs could seek a fee award that would not exceed $6,350,000. The Court has an "independent obligation" to ensure Plaintiffs' fee request is reasonable. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 941 (9th Cir. 2011). "The reasonableness of any fee award must be considered against the backdrop of the American Rule, which provides that courts generally are without discretion to award attorneys' fees to a prevailing plaintiff unless (1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) the successful litigants have created a common fund for recovery or extended a substantial benefit to a class." *Id.* (internal quotations and citations omitted).

Plaintiffs' claims are based on state law, and the Court applies state law with respect to the fee request. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("*Vizcaino II*"). Under California law, "[t]he primary method for establishing the amount of reasonable attorney fees is the lodestar method." *In re Vitamin Cases,* 110 Cal. App. 4th 1041, 1052 (2003) (internal quotation marks and citations omitted). However, Plaintiffs asserted California state law claims that provide for mandatory fees. *See* Cal. Civ. Code § 1780(e); Cal. Wel. & Inst. Code § 15657.5. California's Unfair Competition Law will also support fee recovery under the "private attorney general" theory if the lawsuit enforces an important right affecting the public interest. *See* Cal. Code Civ. Proc. § 1021.5; *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 489 (2016). Further, under California law, the court may award reasonable attorneys' fees and costs when a litigant proceeding in a representative capacity has achieved a "substantial benefit" for a class of persons. *Serrano III v. Priest*, 20 Cal. 3d 25, 38 (1977) ("*Serrano III*").

In the Washington Action, the Washington state law claims also include mandatory fee shifting provisions. *See* RCW § 19.86.090; RCW § 74.34.200(3). Washington courts consider the

[1] The terms and definitions in the Settlement Stipulation are incorporated by reference into this Order.

value of "future benefits" in determining the overall recovery obtained. *See, e.g., Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001). Washington courts also look to federal law for guidance on attorneys' fee awards. *Vizcaino II*, 290 F.3d at 1047.

There are two methods of calculating attorneys' fees in civil class actions: (1) the lodestar/multiplier method, and (2) the percentage of recovery method. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001), *disapproved of on other grounds by Hernandez v. Restoration Hardware*, 4 Cal. 5th 260 (2018). Under Washington law, the percentage-of-recovery approach is generally used in calculating fees in common fund cases. *Vizcaino II*, 290 F.3d at 1047; *Bowles*, 121 Wash. 2d at 72. California law also allows courts to use the percentage of recovery approach with a lodestar cross-check. *Laffitte*, 1 Cal. 5th at 503. Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the lodestar method or the percentage of recovery. *Vizcaino II*, 290 F.3d at 1047; *accord In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010)

The Ninth Circuit has approved the use of a lodestar method where the underlying claims provide for fee-shifting and the relief obtained includes an injunction. *See In re Bluetooth Headset,* 654 F.3d at 941; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Under the "percentage-of-recovery" method, "courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)).

**2. The Lodestar Method.**

Under the lodestar method, the Court calculates "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also In re Bluetooth Headset*, 654 F.3d at 941 ("The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.").

Class Counsel attest that, in total, they have expended 17,191.4 hours for an unadjusted

lodestar of $10,817,440.50. The Court has reviewed the Declarations of Kathryn Stebner, Chris Healey, Guy Wallace, Michael Thamer, Robert Arns, Megan Yarnall, David Marks, Dan Drachler, Leah Snyder, and Kirsten Fish describing the work performed by Class Counsel on this case, and the additional argument at the hearing addressing how counsel worked to avoid duplication of efforts. The total hours claimed by Class Counsel are approved based on evidence presented of the work performed, including detailed summaries, and the results achieved. The Court is also satisfied that Class Counsel have exercised appropriate and significant billing judgment by not requesting fees for unproductive or duplicative work. Accordingly, the Court finds the number of hours that Class Counsel devoted to this case is reasonable.

The second step in the lodestar analysis is to determine the reasonable market value of the attorneys' services at an hourly rate. The Court has examined whether Class Counsel's hourly rates are reasonable within the "relevant community," *i.e.*, the Northern District of California. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Plaintiffs bear the burden to "produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.*, at 980. In support of their motion, Settlement Class Counsel submitted a declaration from Richard M. Pearl, who opined on the reasonableness of the rates charged by counsel. (Declaration of Richard M. Pearl, ¶¶ 10-13.) Mr. Pearl relies on rates that have been approved in other cases and refers to the rates charged by other firms within the Northern District that are similar to the rates charged by Settlement Class Counsel. Class Counsel also attested that the rates requested here are also similar or equal to Class Counsel's rates in class actions against operators of assisted living and skilled nursing facilities. Accordingly, the Court finds the hourly rates requested by Class Counsel to be reasonable and in line with the market rates charged by skilled counsel in the Northern District in similar complex civil litigation. The Court notes that these actions were filed between three and five years ago. For that reason, the Court also concludes that an award based on Class Counsels' 2021 rates is appropriate. *See, e.g., Gates v. Deukmejian*, 987 F.2d 1392, 1406 (9th Cir. 1992) ("We long have recognized that district courts have the discretion to compensate prevailing parties

for any delay in the receipt of fees by awarding fees at current rather than historic rates in order to adjust for inflation and loss of the use funds.").

A court may adjust the lodestar "upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment[.]" *Id.* (quoting *Hanlon*, 150 F.3d at 1029). Class Counsel bore the substantial risk of an uncertain outcome in agreeing to prosecute this class action case purely on a contingency fee basis. Class Counsel attested their hourly rates do not include consideration of risk and that they gave up other work or were unable to take on other work as a result of pursuing this case. Notwithstanding the foregoing, Class Counsel have managed to achieve a good result and a substantial benefit for the members of the settlement class of current and former residents at Defendant's assisted living facilities in California and Washington. In addition to significant cash payments, the case settlement produced substantial non-monetary relief by way of the Stipulated Injunction. Further, a fee award may be increased or additional funds may be set aside for future services. *See Hanlon*, 150 F.3d at 1029-30. Class Counsel have estimated that additional fees and costs of approximately $75,000 to $100,000 for future work related to monitoring compliance with the three-year Injunction. This further supports the reasonableness of the requested fees.

In this case, Class Counsels' lodestar fee exceeds the amount of fees they are seeking. As set forth in their response to the Court's supplemental questions, if the Court applied their historical rates, the award would reflect a negative multiplier of 0.63. If the Court applies 2021 rates, the award reflects a negative multiplier of 0.59.

The Court concludes that under the lodestar method, Class Counsel's request for fees is reasonable.

**3. The Percentage-Of-Recovery Method.**

Under the percentage of recovery approach, the Court considers total value of the benefits conferred on the class. *See, e.g., Vizcaino,* 290 F.3d at 1047-49; *Serrano III*, 20 Cal. 3d at 34. Viewed from a "percentage of fund" perspective, the fee request here of $6,350,000 represents

39% of the Settlement Fund of $16,250,000. Although that exceeds the 25% benchmark, it does fall within the percentage range approved in comparable consumer class actions. *See, e.g., Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003) (approving award of 33%); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir., 1995) (approving award amounting to 33% of $12 million settlement); *Cicero v. DirectTV, Inc.*, 2010 WL 2991486, at *6-7 (C.D. Cal. July 27, 2010) (citing cases and noting that "case law surveys suggest that 50% is the upper limit, with 30-50% commonly awarded in cases in which the common fund is relatively small"). The Court has also considered the value of the injunctive relief obtained by Plaintiffs. *See Serrano III*, 20 Cal.3d at 34. As this Court held in approving a class settlement in an analogous setting, "[t]he parties also negotiated substantial injunctive relief, and when the Court considers the value of that injunction, it reduces the overall percentage of fees that counsel will receive." *See Walsh v. Kindred Healthcare*, No. 11-cv-50-JSW, 2013 WL 6623224, at *3 (N.D. Cal. Dec. 16, 2013).

In addition to the $16.25 million Settlement Fund, the Court concludes the Settlement Stipulation provides important non-monetary relief, as set forth in the Stipulated Injunction issued this date. Specifically, the Stipulated Injunction requires Defendant to provide staffing levels sufficient to provide current residents with the care services set forth in their service plans at its California and Washington assisted living facilities, which addresses the crux of Plaintiffs' case. Plaintiffs' damages expert, Dr. Patrick Kennedy, calculated the residents' economic harm that would have been incurred but-for the injunctive relief. Dr. Kennedy's valuation methodology has been approved in analogous settlements by this Court and others, including *Walsh v. Kindred Healthcare*, 2013 WL 6623190, at*4 (N.D. Cal. Dec. 16, 2013). Accounting for various real-world factors such as average length of resident stay, Dr. Kennedy conservatively quantified the avoided economic harm (which is the equivalent of the benefit received) during the three-year period of the Injunction to be $48,979,593 (*i.e.*, $23,045,600 for resident Class Members in Defendant's California facilities, and $25,933,992 for resident Class Members in Defendant's Washington facilities). The estimated per-Settlement Class Member benefits are $4,236 and $6,624 in California and Washington respectively, in addition to the $16.25 million Settlement Fund. The value of the injunction is a relevant special circumstance and "future benefit" that

justifies an increase from the 25% benchmark. *See, e.g., Vizcaino II*, 290 F.3d at 1047-49 (noting "nonmonetary benefits conferred by the litigation are a relevant circumstance" to consider when evaluating the total benefit of the litigation).

Accordingly, the Court finds that the percentage-of-recovery analysis demonstrates the propriety of Plaintiffs' requested fee. The Court GRANTS Plaintiffs' motion for attorneys' fees in the amount of $6,350,000.

**B. The Court Grants the Request for Costs.[2]**

Under the Settlement Stipulation, Plaintiffs are entitled to seek reimbursement of their reasonable out-of-pocket expenses not to exceed $1,300,000. *See also* Fed. R. Civ. P. 23(h); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs in class action settlement). Plaintiffs seek the reimbursement of litigation expenses and costs in the amount of $1,174,531.06, which includes court fees, costs for service, copying, postage, legal research, and travel. The Court concludes the request is reasonable and is adequately documented in Class Counsels' declarations. *See, e.g., In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995).

The Court GRANTS Plaintiffs' Motion for reimbursement of reasonable litigation expenses and costs in the amount of $1,174,531.06.

**C. The Court Grants, in Part, the Requested Service Awards.**

Each of the named Plaintiffs also move for services awards in the amount of $15,000, totaling $75,000. "Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). The decision to approve such an award is a matter within the Court's discretion. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). An incentive award is designed to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*,

[2] The parties also agreed that the costs incurred by the Settlement Administrator, not to exceed $105,000, would be paid from the Settlement Fund. The Court approves those costs as well.

563 F.3d at 958-59. "[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. ... [C]oncerns over potential conflicts may be especially pressing where, ... the proposed service fees greatly exceed the payments to absent class members." *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (internal citation and quotation marks omitted).

Although courts have approved service awards that are similar in size to or greater than that requested by the named Plaintiffs, their request is greater than the average award. *See, e.g., Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 267 (N.D. Cal. 2015) (noting an award of $20,000 was "nearly four times the amount that is deemed presumptively reasonable in this District"). The Named Plaintiffs lent their names to this case and the California plaintiffs have been involved for five years. As detailed in their respective declarations, during the time they have been involved they each devoted approximately ten to thirty hours or more to this case to help secure the Settlement Fund to the class members and Injunction. They met in person with Class Counsel on numerous occasions and communicated extensively via telephone with Class Counsel throughout the pendency of this lawsuit. They gave significant assistance in providing facts towards the drafting of the complaints and written discovery responses.

Named Plaintiffs Kathi Troy and Stacy Van Vleck prepared and sat for their depositions, and Ms. Van Vleck assisted in preparing her sisters for their depositions. (*See* Dkt. No. 222-2, Supplemental Van Vleck Declaration, ¶ 2.) Ms. Van Vleck also attests that an individual who served her and her sisters with papers relating to the litigation caused some distress because it appeared that he was surveilling her sister's home. (*Id.* ¶ 3.) The Named Plaintiffs all reviewed documents related to their decision to place family members at Defendant's facilities and took on the weighty responsibility of representing the Class. Plaintiffs also attest their participation was draining because they were forced to relive and discuss the circumstances at Defendants' facilities. The Court acknowledges and recognizes the sacrifices and contributions the named Plaintiffs have made that produced the substantial benefits now offered to the Settlement Class. However, taking into consideration the amount of time expended and the fact that Plaintiffs have not demonstrated any particular stigma associated with acting as Class Representatives, and having compared the

size of their request to the size of the average award due to Class Members, the Court concludes a reduction in their request is appropriate.

Accordingly, the Court GRANTS, IN PART, Plaintiffs' motion for service awards, and it shall award service awards in the amount of $10,000 to Kathi Troy, $10,000 to Elizabeth Barber, $10,000 to Andrew Bardin, $10,000 to Thomas Bardin, and $10,000 to Stacy Van Vleck, totaling $50,000.

**IT IS SO ORDERED**.

Dated: August 23, 2021

JEFFREY S. WHITE
United States District Judge