IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID MATSON, BARBARA MATSON, YOLANDA GARRET, INDIVIDUALLY AND ON BEHLF OF ALL OTHERS SIMILARLY SITUATED;	§	5-19-CV-00717-RBF
Plaintiffs,	§	
vs.	§	
NIBCO INC.,	§	
Defendant.	§	

ORDER APPROVING CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS

Before the Court are the Motion for Approval of Class Counsel's Attorneys' Fees and Costs filed by Plaintiffs David Matson, Barbara Matson, and Yolanda Garret, individually and on behalf of all others similarly situated, Dkt. No. 78; and Class Member Jose Garcia's Objection to Plaintiffs' Attorney Fee Request, Dkt. No. 125. The parties consented to U.S. Magistrate Judge jurisdiction, and the case was accordingly reassigned. *See* 28 U.S.C. § 636(c). For the reasons discussed below, Plaintiffs' Motion, Dkt. No. 78, is **GRANTED** and Garcia's objections, Dkt. No. 125, are **OVERRULED**.

Factual and Procedural Background

A detailed factual and procedural background of this case is set forth in the Court's contemporaneously entered Final Settlement Approval Order. Accordingly, those matters are not reiterated here. For present purposes, it is sufficient to note that Plaintiffs filed this action on behalf of themselves and others similarly situated, alleging that Defendant NIBCO manufactured or distributed defective cross-linked polyethylene tubing ("PEX tubing") that caused or will

cause them and the class members to suffer water damage to their residences. On December 22, 2020—a year and a half after Plaintiffs instituted this action, and after engaging in extensive arms-length negotiations with Defendants both informally and formally at mediation—Plaintiffs advised the Court that they successfully resolved their claims with NIBCO. *See* Dkt. No. 50. That settlement creates a common fund for all class members in the amount of $7.65 million. On February 23, 2021, the Court provisionally certified a settlement class and preliminarily approved the terms of the settlement. *See* Dkt. No. 68. The Court held a final approval hearing on September 9, 2021, at which counsel for the parties and objector Garcia were present. After considering the arguments lodged by the parties and Garcia in their briefing and at the September 9 hearing, the Court certified the previously provisionally certified settlement class and finally approved the Settlement Agreement. *See* Final Settlement Approval Order.

Class Counsel now requests that the Court approve an award in the amount of $2,330,000 in attorneys' fees and costs to be paid by NIBCO separate and apart from the settlement fund and to be shared amongst the five firms appointed as co-class counsel. *See* Dkt. No. 78. Garcia—the only class member who has objected to the settlement—also objects to the fee request, contending that Class Counsel hasn't provided sufficient proof to demonstrate the reasonableness of their fees. *See* Dkt. No. 125.

Analysis

Class Counsel's fees request is granted. The fee request, which represents approximately 30% of the total value of the Settlement fund, is in-line with other class actions and application of a lodestar cross-check followed by the use of a slight—but appropriate—multiplier further demonstrates the reasonableness of the request.

Federal Rule of Civil Procedure 23(h) authorizes a district court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the requested fees are both authorized by Texas law[1] and the parties' agreement. Federal law governs the procedure for awarding fees. In this diversity case, the determination of the fee award is governed by state law. *See Schilling v. Belcher*, 582 F.2d 995, 1003 (5th Cir. 1978).[2] In Texas, there are two methods for calculating fees in the class-action context: the percentage method, when the value of the settlement is subject to reasonably clear estimation, and the lodestar method. *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996). Recognizing that both methods have their strengths and weaknesses, the Texas Supreme Court has left the determination of the appropriate method to the sound discretion of the trial court. *See id.* Under the circumstances of this case, the Court finds that the percentage method, tested by applying a lodestar cross-check, is the best method to apply in arriving at a reasonable attorneys' fees award. *See id.*[3]

[1] *See Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 63 (Tex. 2008) (authorizing attorneys' fees for breach of express warranty claims).

[2] *See also* 5 Newberg on Class Actions § 15:2 (5th ed. 2021); 2 McLaughlin on Class Actions § 6:24 (17th ed. 2020).

[3] *See also Greer v. Mockingbird Station Partners, L.*P., No. CIV.A. 302CV2342K, 2004 WL 2544967, at *2 (N.D. Tex. Nov. 9, 2004) (applying same method in class action brought under the Texas Commission on Human Rights Act); *Stassi v. Boone*, No. GN200180, 2003 WL 21436995, at *18 (Tex. Dist. Jun. 6, 2003) (same while observing that "[t]he percentage method appears to have become the preferred method in many courts: It rewards efficiency and results, rather than rewarding inefficiency and beleaguering the court system with paper.").

A. Application of the Percentage Method Supports the Fee Request.

As an initial matter, the Court must determine the value of the benefit received by the Class Members. Once the Court calculates this value, it can then determine whether the fees requested fall within the range of other fees awarded in class action settlements.

The Settlement here creates a $7.65 million fund. The Settlement also provides for additional benefits, such as the use of preferred plumbing providers who—through Class Counsel's efforts—have agreed to provide replumbing services at an approximate 15% discount from the standard rates those providers would otherwise charge homeowners. Other benefits, such as financing for out-of-pocket expenses associated with the re-plumb, are also provided. Accordingly, the true value of the settlement fund is potentially as much as $8,124,750 (assuming a 15% premium on the maximum $7,650,000 fund). Here, Class Counsel's fee request of $2,330,000, which represents approximately 30% of the common fund, falls within the same range of fees typically awarded in both Texas state and federal cases.[4]

B. A Lodestar Cross-Check Supports the Fee Request.

The requested fees are also reasonable in light of a lodestar cross-check. The record reflects that Class Counsel have spent 2,905 hours on this Class Action at rates ranging from $195 to $800 per hour, which yields a lodestar of $1,477,965. *See* Suppl Linkin Decl. (Dkt. No. 130-1). In addition, Class Counsel has incurred $59,322.27 in travel, mediation, expert, and

[4] *See, e.g.*, *Gooch v. Life Invs. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012) ("'The majority of common fund fee awards fall between 20% and 30% of the fund.'") (quoting *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999)); Manual for Complex Litigation, Fourth, § 14.121 ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund."); *Rodriguez v. Stage 3 Separation, LLC*, No. 5:14-CV-00603-RP, 2015 WL 12866212, at *5 (W.D. Tex. Dec. 23, 2015) ("A review of Fifth Circuit precedent suggests a benchmark fee of 30%."); *Stassi*, 2003 WL 21436995, at *18 (Tex. Dist. Jun. 6, 2003) (explaining that "[o]ften, either 25% or 30% is considered the benchmark" by both Texas state and federal courts).

filing expenses. *See id.* Accordingly, Class Counsel's attorneys' fees request amounts to an approximate 1.5 multiplier of the lodestar, which under the circumstances of this case is appropriate.

To start, the range of multiplier requested is within the range routinely approved by both Texas and federal courts when using the lodestar approach in class actions.[5] Moreover, consideration of the relevant *Arthur Andersen* factors,[6] which are "virtually identical" to the *Johnson v. Georgia Highway Express* factors[7] as analyzed in detail in Class Counsel's briefing and adopted in full herein, supports this modest upward adjustment. *See* Dkt. No. 78 at 5-14. The Court need not reiterate this analysis in detail here, but it bears mention that Class Counsel's

[5] *See, e.g., In re Cendant Corp*., 243 F.3d 724, 742 (3d Cir. 2001) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (quoting 3 Herbert Newberg & Alba Conte, Newberg on Class Actions, § 14.03 at 14-5 (3d ed. 1992); *Di Giacomo v. Plains All Am. Pipeline*, No. H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19, 2001) (noting "courts typically apply multipliers ranging from one to four" and approving 30% percentage fee as confirmed by lodestar crosscheck that resulted in a 5.3 multiplier); *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012) (recognizing that Texas law governing class actions permits a multiplier "in the range of 25% to 400% of the lodestar figure") (citing Tex. R. Civ. P. 42(i)(1)).

[6] In diversity actions governed by Texas law, federal courts analyze the factors set forth in *Arthur Andersen* to determine whether an adjustment to the lodestar is warranted. *See Plains Cotton Coop. Ass'n v. Gray*, No. 16-10806, 2016 WL 7093943, at *4 n. 4 (5th Cir. Dec. 5, 2016). These factors include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *See Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812, 818 (Tex. 1997) (citing Tex. Disciplinary R. Prof. Conduct 1.04).

[7] *Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau,* 258 F.3d 345, 354 n. 9 (5th Cir. 2001) (noting that the *Arthur Andersen* factors are "virtually identical to those examined by federal courts in awarding attorneys' fees"); *Plains Cotton,* 2016 WL 7093943, at *4 n. 4 (recognizing that because the analysis under *Arthur Andersen* and *Johnson* is "so similar," the district court's consideration of the *Johnson* factors wasn't material).

diligent efforts and skill culminated in a favorable result for the Class Members, particularly in light of the novelty and difficulty of the issues involved, uncertainty of recovery, and contingent nature of the engagement.[8] For all these reasons, this multiplier is warranted here.

C. Garcia's Objections Are Overruled.

Garcia doesn't dispute Class Counsel's qualifications, diligence, or any of the other representations made by Class Counsel in their motion. Garcia claims instead that the lack of billing data provided by Class Counsel dooms the fee application. But neither Texas nor federal law requires Class Counsel to submit detailed billing records for purposes of a lodestar cross-check, as Garcia claims. Imposing such a requirement would largely negate the purpose of applying the percentage method here; it would burden Class Counsel with performing unnecessary redactions and further saddle the Court with the task of parsing detailed time records. Accordingly, to assist the Court in performing the lodestar cross-check, the Court requested at the September 9 hearing—and Class Counsel in response provided—a *summary* of the hours, work, and hourly rates for the lawyers who will benefit from the fees awarded.[9] The Court therefore finds that the supplemental information provided by Class Counsel, *see* Dkt. No. 130-1, is sufficiently detailed for the Court to assess (or, perhaps more accurately stated, cross-check) the reasonableness of the fees requested here.

There is also no merit to Garcia's argument that fees shouldn't be approved here because Class Counsel fails to explain "how attorney's fees are to be divided among the Matson Plaintiffs' Settlement Counsel." Dkt. No. 125 at 5. Garcia cites no case—nor is the Court aware

[8] *See, e.g.*, *Sanders v. Barnhart*, No. 04–10600, 2005 WL 2285403, at *2 (5th Cir. Sept. 19, 2005) (per curiam) ("[I]t is not necessary for a district court to examine each of the factors independently if it is apparent that the court has arrived at a just compensation based upon appropriate standards.").

[9] Other Courts in this Circuit have adopted this approach. *See, e.g.*, *Di Giacomo*, 2001 WL 34633373, at *7.

of any authority—requiring that co-counsel necessarily must notify a court regarding how they intend to split between and among themselves any fees awarded. Here, the Court appointed five firms as co-Class Counsel. The Court sees no reason why Class Counsel can't divvy the fee award as they see fit.

Conclusion

For the reasons discussed below, Plaintiffs' Motion for Approval of Class Counsel's Attorneys' Fees and Costs, Dkt. No. 78, is **GRANTED** and Garcia's objections, Dkt. No. 125, are **OVERRULED**. NIBCO shall tender Class Counsel the $2,330,000 in fees and costs in the manner contemplated by the parties' Settlement Agreement.

IT IS SO ORDERED.

SIGNED this 20th day of October, 2021.

RICHARD B. FARRER
UNITED STATES MAGISTRATE JUDGE