IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: LUMBER LIQUIDATORS CHINESE-MANUFACTURED FLOORING PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	)	MDL No. 1:15-md-2627 (AJT/TRJ)

This Document Relates to ALL Cases

IN RE: LUMBER LIQUIDATORS CHINESE-MANUFACTURED FLOORING DURABILITY MARKETING AND SALES PRACTICE LITIGATION	)	MDL No. 1:16-md-2743 (AJT/TRJ)

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ORDER

Presently pending is Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service Awards to Class Representatives [Doc. 1644], as supplemented following the United States Court of Appeals for the Fourth Circuit's decision to vacate the Court's previous attorney's fee award. [Doc. 1843] (the "Motion" or "Mot.").[1] In their Motion, Class Counsel jointly request that the Court apply the lodestar method and award reasonable attorneys' fees in the amount of $10.08 million plus costs and expenses. Objectors Diana Cantu-Guerrero and Brice Johnston (together, the "Objectors") object to the award amount on the grounds that the $10.08 million fee request, which is equivalent to the amount previously awarded to Class Counsel in November 2018 under a percentage method, is excessive and, in any case, any award should not be based on

[1] All docket references refer to MDL No. 1:15-md-2627 unless indicated otherwise.

any value attributable to that portion of the Settlement providing to class members the option of selecting a voucher rather than a cash payment.

For the reasons stated below, the Court will award based on the lodestar method pursuant to 28 U.S.C. § 1712(b)(1) reasonable attorneys' fees in the amount of $10,080,000 plus costs and expenses in the amount of $797,397.45, the additional costs of notice and administration not to exceed $1,194,500, and twelve service awards of $5,000 to each named Plaintiff in both MDL matters.

I. BACKGROUND

A. Procedural History

These actions arise out of Defendant Lumber Liquidator, Inc.'s sale of laminate flooring products to more than 760,000 customers from 2009 to 2015. In March 2015, Plaintiffs, all of whom purchased the flooring products at issue, began filing lawsuits across the United States in both federal and state courts alleging that Defendant falsely stated that the flooring complied with the California Air Resource Board's ("CARB") maximum acceptable limits of formaldehyde emissions. [Doc. 1618] at 9-10.

In June 2015, the United States Judicial Panel on Multidistrict Litigation ("JPML") consolidated the pending federal cases and transferred each to this Court, where it has proceeded as Case No. 1:15-md-2627 (the "Formaldehyde Litigation" or "Formaldehyde MDL"). [Doc. 1]. After this Court granted in part and denied in part Defendant's motion to dismiss, the case proceeded to discovery, which involved the production of voluminous documentation and depositions of twenty-six fact and ten expert witnesses. *See* [Doc. 1618-3] at 4. The parties completed fact discovery in early 2016. *See* [Doc. 878]. In August 2016, Defendant moved for

summary judgment in the Formaldehyde Litigation. [Doc. 999]. The Court granted in part and denied in part that summary judgment motion. *See* [Docs. 1090, 1091].

In May 2015, purchasers of the same laminate flooring as in the Formaldehyde Litigation filed a proposed class action in the United States District Court for the Central District of California ("California District Court"), alleging that Defendant also falsely claimed that the flooring at issue in the Formaldehyde Litigation met various international and industry durability standards. [Doc. 1618] at 12-13. The California District Court ordered all plaintiffs who were not California residents to refile individual cases in their home federal districts. [Doc. 1618] at 13. In response, those plaintiffs filed individual actions in thirty-one federal districts throughout the United States. *Id*. In October 2016, the JPML consolidated those cases and transferred each to this Court, where it has proceeded as Case No. 1:16-md-2743 (the "Durability Litigation" or "Durability MDL"). Case No. 1:16-md-2743, [Doc. 3].

On October 23, 2017, after mediation and settlement discussions from 2015 through 2017, the parties in both MDLs agreed to key settlement terms, as memorialized in a Memorandum of Understanding. *See* [Doc. 1618] at 14-16. After additional negotiations to finalize the terms of settlement, the parties submitted the Settlement to this Court for preliminary approval on March 15, 2018. [Doc. 1339]. On June 15, 2018, the Court conditionally certified the two classes proposed in the Settlement, gave the Settlement preliminary approval, and approved the parties' plan to notify the class of the Settlement's terms. [Doc. 1524]. Overall, pursuant to the notice plan and the efforts by the Court-appointed Claims Administrator, approximately 73 percent of the class received notice through these efforts. [Doc. 1618] at 18-19.

On October 3, 2018, the Court held a hearing on whether to approve the Settlement. By Order dated October 9, 2018 [Doc. 1705], the Court overruled the pending objections and approved the Settlement.

B. Settlement

In exchange for a release of all claims by class members in both the Formaldehyde and Durability Litigations, Defendant, pursuant to the Settlement, created a non-reversionary fund consisting of $22 million in cash and in-store credit vouchers, with a defined value under the Settlement of $14 million, for a total settlement amount with a defined value of $36 million. [Doc. 1618-1] at 16. However, to reflect the comparative strength of certain class members' claims and to provide a realistic opportunity for those class members exposed to a higher level of formaldehyde emissions to replace their flooring, the Settlement categorized class members into two separate classes. The first (the "CARB1 Class") consists of customers who purchased a certain type of laminate flooring from Defendant between January 1, 2011 and May 31, 2015; the second (the "CARB2/Durability Class"), a much larger group, consists of customers who purchased the same type of flooring between January 1, 2009 and December 31, 2010. *See* [Doc. 1618-1] at 18-21.

As provided in the Settlement, the CARB1 Class, the class of purchasers who were allegedly exposed to lower formaldehyde emissions than members of the CARB2/Durability Class, could claim a *pro rata* cash share of a $1 million settlement fund, set aside from the $22 million cash fund. [Doc. 1618] at 17. Meanwhile, members of the CARB2/Durability Class could elect either a share of the $22 million cash fund or a voucher representing a share of the available $14 million valued in-store credit. *Id*. Voucher awards are based upon the class members' claim amount, which are redeemable for up to three years after the settlement date (or

longer, if required by state law) and are transferrable to a designated family member or charity elected by the eligible member. *Id*. Further, any cash payments are awarded *pro rata*. *Id.* Although the notice plan informed class members that they would likely receive between 20 and 56 percent of their purchase price if they chose the cash award and between 38 and 104 percent if they chose the vouchers, due to an actual participation rate over double that of the initial estimates,[2] Class Counsels' calculations indicate that those who elect the cash award will receive approximately 5.5 percent of their purchase price and those who elect to receive vouchers will receive a voucher with a face value of approximately $659 (or 59% of the average purchase price of the affected product). [Doc. 1688] at 2-3; *see also* [Doc. 1844] (Declaration of S. Toll) ¶¶ 14-15 More specifically, of the approximately 178,859 total class members who submitted an eligible claim, 35,341 CARB1 Class members are to receive cash; 123,904 CARB2/Durability Class members and CARB1 & CARB2 Class[3] members selected cash; and 20,154 CARB2/ Durability Class members selected vouchers. *Id.* (citing [Doc. 1688-2] at 1-2).

C. Attorney's Fees

The Settlement did not specify an amount of attorney's fees to be received by Class Counsel, but rather authorized Class Counsel to seek an award of attorneys' fees of up to 33.33% of "the Settlement fund," which has a defined value of $36 million, thereby authorizing attorney's fees of up to $11.88 million, as well as counsel's actual costs and expenses, administrative expenses, and twelve service awards of $5,000 each to be paid to the representative Plaintiffs in both matters. [Doc. 1618-1] at 33, 34.

[2] Of the 761,390 total class members across both MDLs, 178,859 (or 23.49%) filed eligible claims. [Doc. 1688-2] at 2. This was almost two-and-a-half times the expected 10% claim filing rate estimated in the Notice. *Id.*
[3] Approximately 2,231 class members were members of both the CARB1 and CARB2/Durability Classes. [Doc. 1688] at 2.

On August 18, 2018, Plaintiffs' counsel moved for an award of fees, costs, and expenses, requesting attorneys' fees in the amount of $11.16 million, reimbursement of reasonable costs and expenses totaling $797,397.45 from the common fund; and twelve service awards of $5,000 to each named Plaintiff or household in both matters, all of which was to be paid from the common fund. [Doc. 1644] at 1-2.

In determining attorneys' fees, the Court used the percentage method, with a lodestar cross-check; and by Order dated November 15, 2018, the Court awarded $10.08 million in attorneys' fees for both MDLs, [Doc. 1726] at 14-16, or 28 percent of the Settlement Fund's defined value, with a negative multiplier of Class Counsel's lodestar. Given the negative multiplier, the percentage awarded was significantly lower than what has been found reasonable in similar cases. *Id*. at 16. In support of that award, this Court explained that: (1) Class Counsel obtained "satisfactory results"[4] for class members in the face of both "significant questions remain[ing] in [the MDLs] that could have potentially foreclosed recovery" and Lumber Liquidators' financial distress; (2) Class Counsel "fashioned" the settlement "in a way to provide the most relief to those who are most likely to have been injured;" (3) there was a "low number of objections to the requested fee award;" (4) Class Counsel "consistently performed to a high standard;" (5) the litigation was complex and spanned years; and (6) Class Counsel avoided the potential risk of "partial or complete nonpayment" to the class members. *Id*. at 7-12. Its November 15, 2018 Order also overruled an objection that the vouchers are "coupons" for purposes of Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, 1711-1715, finding that the vouchers "are guaranteed, redeemable for three years, transferrable to family members, and carry an average value in the hundreds of dollars," and are "more akin to

[4] In reaching this conclusion, the Court considered that because of the effectiveness of the notice provided and the high response rate, the CARB2/Durability members will receive only 5.5% of their original purchase price.

gift cards," not "coupons," in that "they entitle the bearer to obtain [Lumber Liquidators'] inventory at the same exchange rate as customers who purchase [Lumber Liquidators'] flooring products with cash and do not require class members to make additional purchases with their own money in order to obtain the products eligible to be purchased with the vouchers." *Id*. at 9.

D. Appeal and Fourth Circuit Decision

On or before December 14, 2018, the Objectors separately filed an appeal with the Fourth Circuit. In their appeals, both Objectors contested the fairness and adequacy of the Settlement as well as the Court's using the percentage method to calculate its attorney's fee award without complying with the coupon provisions applicable to an award of attorney's fees under CAFA.

On appeal, the Fourth Circuit concluded that this Court did not abuse its discretion in approving the Settlement; however, it vacated the award of attorneys' fees after finding, as argued by the Objectors, that the vouchers, which claimants could opt for instead of a cash award, are "coupons" within the meaning of CAFA. *See Cantu-Guerrero v. Lumber Liquidators, Inc. (In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.)*, 952 F.3d 471, 476 (4th Cir. 2020). Accordingly, the Fourth Circuit remanded both MDLs to this Court with instructions to award attorneys' fees to class counsel consistent with CAFA's coupon settlement provisions. *Id*. at 492. In doing so, however, the Fourth Circuit did not opine on which "competing interpretation" of CAFA's "coupon" settlement provisions governing attorneys' fees should apply, leaving that issue, should it arise, to this Court. *Id*. at n. 14 (citing *In re HP Inkjet Printer Litig*., 716 F.3d 1173, 1187 (9th Cir. 2013) and *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 707 (7th Cir. 2015)).

The Fourth Circuit also made clear that the same award, after the proper treatment of the vouchers as "coupons" under CAFA, would *not* render the Settlement "infirm." As stated:

> The Objectors also argue that the settlement is both unfair and inadequate because Class Counsel secured much of the cash from the settlement for themselves. Although the proportion of the common fund cash awarded to Class Counsel in these proceedings gives us some pause, it alone does not mandate vacatur of the district court's decision to approve the settlement. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1051 (9th Cir. 2019) (explaining that attorney's fees award alone, which constituted 50% of settlement cash, did not require vacatur of settlement). In any event, our decision today vacates the Attorney's Fees Order, and that vacatur resolves the Objectors' current contention. *We observe, however, that if the district court were to award the same amount of attorney's fees after applying CAFA's "coupon" settlement provisions, that would not render the Settlement Approval Order infirm in light of our deferential standard for reviewing such decisions.*

952 F.3d at 486 (emphasis added).[5]

II. ANALYSIS

A. Current Posture

Plaintiffs, citing 28 U.S.C. § 1712,[6] contend that they are entitled to utilize the lodestar approach and that the lodestar approach justifies the attorneys' fee award of $10.08 million

[5] The Fourth Circuit also refused to vacate this Court's order approving the Settlement based on the possibility that class members may make a different election once a new attorney's fee award is issued on remand. *See* 952 F.3d at 492 ("Crucially, we are also satisfied that class members would not have made different decisions with respect to the settlement had they known that the attorney's fees award might be vacated and recalculated. Indeed, those class members who chose vouches would be unlikely to change their elections predicated on a potentially small increase in the individual cash award that could result from the recalculation of the attorney's fee award.").

[6] 28 U.S.C. § 1712 reads, in relevant part:

(a) **Contingent Fees in Coupon Settlements**.— If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) **Other Attorney's Fee Awards in Coupon Settlements**.—

(1) In general.— If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) Court approval.— Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an

initially awarded by this Court under the percentage method. In taking this approach, Plaintiffs propose that the Court comply with the "coupon provisions" of the CAFA by not basing its fee award on the face value of the coupons ($14,000,000.00) or the rate of redemption as of some designated period of time; but rather through the lodestar method based on its efforts in the action as a whole. In assessing an award of attorneys' fees, the Court is faced with two central issues: *First*, in this mixed settlement involving both a cash portion and a coupon portion, can Plaintiff receive attorneys' fees under the lodestar method? And *second*, if so, can the Court give any consideration to the fact or substance of the coupon portion of the Settlement without attributing a value (a face value or redemption value)?

B. Use of the Lodestar Approach in CAFA "Coupon" Settlements

Section 1712(b)(1) of Title 28 provides:

> If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

28 U.S.C. § 1712(b)(1). Section 1712(b)(1) clearly authorizes the lodestar method to determine attorneys' fees, so long as "a portion of the recovery of the coupons is not used to determine the attorney's fee." Notwithstanding this limitation, courts have concluded in settlements with a coupon component that class counsel may be compensated under the lodestar method. *See, e.g.*,

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injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) **Attorney's Fee Awards Calculated on a Mixed Basis in Coupon Settlements**.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

In re Southwest Airlines Voucher Litig., 799 F.3d at 707 (concluding based on the text and structure of 28 U.S.C. § 1712 "that § 1712 allows a district court discretion to use the lodestar method to calculate attorney fees even when those fees are intended to compensate class counsel for the coupon relief he or she obtained for the class."); *see also Linneman v. Vita-Mix Corp.*, 2020 U.S. App. LEXIS 25597, at *12 (6th Cir. Aug. 12, 2020); *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 974 (8th Cir. 2016); *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 65 (D. Mass. 2015). Joining these other courts, and while "bear[ing] in mind the potential for abuse posed by coupon settlements" and "critically [evaluating] the claims of success on behalf of a class receiving coupons," the Court will award attorney's fees under the lodestar approach and compensate Class Counsel with respect to their entire effort in these MDLs, without attributing any value (face value or redemption value) to the coupon portion of the Settlement. *Id*. at 710.

C. Application of the Lodestar Method

The Fourth Circuit has endorsed a three-step procedure in determining the proper award of attorneys' fees under the lodestar method:

> First, the court must "determine the lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Servs.*, LLC, 560 F.3d 235, 243 (4th Cir. 2009). To ascertain what is reasonable in terms of hours expended and the rate charged, the court is bound to apply the factors set forth in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). Next, the court must "subtract fees for hours spent on unsuccessful claims unrelated to successful ones." *Id*. Finally, the court should award "some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff." *Id*.

McAfee v. Boczar, 738 F.3d 81, 88 (4th Cir. 2013) (internal citations and footnote omitted).

The *Johnson* factors include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services

rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *See Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978). While these factors must guide the analysis, there is no strict formula that the Court is required to follow. *See Trimper v. City of Norfolk*, 846 F. Supp. 1295, 1303 (E.D. Va. 1994), *aff'd* 58 F.3d 68 (4th Cir. 1995); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 787 (E.D. Va. 2001) (recognizing that "arithmetic calculations aid the fee-setting process, but ultimately a trial court's judgment is centrally important and may trump the calculations").

1. Initial Lodestar Calculation

As to the rate charged for legal services, "the burden is on the fee applicant to produce satisfactory evidence—including attorney 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." *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). Determining whether an hourly rate is reasonable "is fact-intensive and is best guided by what attorneys earn from paying clients for similar services in similar circumstances." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994). To that end, the Court must consider "prevailing market rates in the relevant community," which is understood to be the community within the jurisdiction where the action is tried. *Id.*

"[C]ourts in the Eastern District of Virginia employ the *Vienna Metro* matrix." *Gomez v. Seoul Gool Dae Gee Inc.*, No. 1:19-cv-1121, 2020 WL 354313, at *2 (E.D. Va. Jan. 21, 2020) (collecting cases) (citing *Vienna Metro LLC v. Pulte Home Corp.*, 786 F. Supp. 2d 1090 (E.D. Va. 2011)). Under that matrix, the appropriate hourly rates in the Northern Virginia area based on years of experience are as follows: (1) 1-3 years of experience: $250-435; (2) 4-7 years of experience: $350-600; (3) 8-10 years of experience: $465-640; (4) 11-19 years of experience: $520-770; (5) 20+ years of experience: $505-820; (6) paralegal: $130-350. *See Taylor v. Republic Servs., Inc.*, No. 1:12-cv-523, 2014 WL 325169, at *5 (E.D. Va. Jan. 29, 2014). Moreover, courts in this district have observed that "[t]he matrix's hourly rate calculation accounts for [*Johnson*] 'factors (3) skill required, (5) customary fee, (9) the experience, reputation, and ability of the attorney, and (12) fee awards in similar cases by providing a stable and consistent rate' for northern Virginia attorneys, 'based on their skill in commercial litigation cases and years of experience.'" *Gomez*, 2020 WL 354313, at *2 (quoting *Entegee, Inc. v. Metters Indus.*, Inc., No. 1:17-cv-499, 2018 WL 3472819, at *3 (E.D. Va. July 19, 2018)).

Here, the Court finds that the billing estimates totaling just short of 24,000 hours submitted by Class Counsel are reasonable in light of the extensive litigation conducted in both matters and will initially accept those estimates as submitted in calculating the lodestar multiplier. Multiplying those estimates by the requested average billing rate of approximately $524 per hour results, which is in accordance with, and does not exceed the billing rates provided in, the *Vienna* matrix, reveals an aggregate lodestar of nearly $12.2 million, which exceeds the $10.08 million award requested, resulting in a negative multiplier. That negative multiplier (0.82x) is much smaller than multipliers which have been found reasonable in similar cases. *See, e.g.*, *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 766 (collecting cases) ("Courts have

generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee.").

In arguing that the $10.08 million award is too generous, Objector Cantu-Guerrero attacks the reasonableness of Plaintiff's requested lodestar on multiple grounds. The Court finds each of these arguments to be without merit.

First, Cantu-Guerrero argues that nearly $1 million of the lodestar is attributable to document review or "hot" document review, which should be discarded as vague. [Doc. 1859] at 6-7. In doing so, she argues that these tasks "do not provide much information concerning what the attorney actually did." *Id*. at 7 (citing *Mason Tenders Dist. Council of Greater New York v. F.M.C. Const., LLC*, 2013 WL 10937329, at *9 (S.D.N.Y. Nov. 22, 2013)). But Class Counsel's records appropriately indicate that these entries pertained to initial document review, which was capped at $350/hour regardless of seniority and occupied a significant amount of counsel's time, particularly during discrete time periods when Defendant made its document reviews. [Doc. 1844] at 3; *see also id*., Ex. 1 (Declaration of D. McNamara) ¶¶ 2-5 (indicating that class counsel in both MDLs reviewed more than 100,000 documents and 435,000 pages). Therefore, the Court finds that Cantu-Guerrero's request to strike $1 million from the lodestar is unwarranted.

Second, Cantu-Guerrero argues that certain discrete entries are vague and conclusory and therefore requests that the lodestar be reduced in the amount of $3,857,720.07.[7] In particular, she argues that these vague entries permeate Class Counsels' billing records and prevent a meaningful review of the hours expended by Class Counsel. While the fee application may contain some vague entries, the Court's review of the entire fee application, submitted to this Court in unredacted form under seal, gives it ample information to determine the reasonableness

[7] This proposed reduction includes the elimination of Cotchett Pitre's entire lodestar amount.

of Class Counsels' request. Additionally, where some vague entries are present, they are made clearer by an examination of entries preceding and following those entries or by the declarations provided by counsel in connection with its supplemental memoranda. *See United States ex rel. Abbott-Burdick v. Univ. Med. Assocs.*, 2002 U.S. Dist. LEXIS 26986, at *49-51 (D.S.C. May 23, 2002); *see also United States Football League v. National Football League*, 704 F. Supp. 474, 477 (S.D.N.Y.) (vague time entries made more specific by subsequent entries).

Here, after examining unredacted billing records in their totality, the Court finds that Class Counsels' entries are sufficient for it to determine the reasonableness of the time logged. The entries are not so vague as to prevent this Court from meaningfully understanding the work performed. Accordingly, the Court declines to reduce the fee award with respect to these allegedly vague entries.

Third, Cantu-Guerrero argues that the lodestar amount requires further reduction because the widespread use of block billing by Class Counsel. "Block billing occurs when an attorney records his or her time with several different tasks in a single time entry such that a court cannot decipher exactly how long was spent on each individual action." *Tinsley v. City of Charlotte*, 397 F. Supp. 3d 803, 808-809 (W.D.N.C. 2019). Finding this practice interferes with a court's ability to appropriately capture the reasonableness of the work performed, courts have found that when block billing is present, an appropriate remedy is to reduce the hours by a percentage within the district court's discretion. *See, e.g., Denton v. PennyMac Loan Servs., LLC*, 252 F. Supp. 3d 504, 525 (E.D. Va. May 15, 2017). That said, while the use of block billing to record time restricts a court's ability to determine the reasonableness of certain time entries, when all tasks within a single, block-billed time entry are compensable, the evils of block billing become less troublesome. *See Van Rossum v. Baltimore County*, 2017 U.S. Dist. LEXIS 157196, 2017

WL 4270435, *3 (D. Md. Sept. 26, 2017) ("Block billing would only be inappropriate if one or more tasks performed by an individual attorney was not recoverable such that the Court could not discern the actual time charged for recoverable tasks.")

Here, Cantu-Guerrero does not argue that any of the actions listed within the block billing entries are unreasonable. Rather, she takes issue with the practice of block billing generally. The Court has reviewed the billing records and did not find a task in the cited block billing entries that is an unreasonable task. Because all the tasks listed in the block billing entries appear reasonable, the Court finds that a reduction simply because Plaintiff utilized that form of record keeping is unwarranted. *See McIntyre v. Aetna Life Insurance Co.*, 586 F. Supp. 2d 638, 641 (W.D. Va. 2008) (distinguishing between block billing as a general matter and "setting aside block periods of time in a given day to perform various discrete tasks," which "simply reflects counsel's time management choice"). Thus, the Court will not reduce the hours expended simply because Plaintiff utilized block billing.

Fourth, Cantu-Guerrero demands that a total of approximately $220,000 be discarded from the lodestar because Class Counsel billed for "clerical" tasks, which are typically excluded. [Doc. 1859] at 8-9. To be sure, courts in this Circuit have held that clerical tasks should not be compensated for at all. *See Two Men & A Truck/Int'l, Inc. v. A. Mover Inc.*, 128 F. Supp. 3d 919, 929 (E.D. Va. 2015) (collecting cases). As such, tasks such as collating and filing documents with the court, issuing summonses, scanning and mailing documents, reviewing files for information, printing pleadings and preparing sets of orders, document organization, assembling binders, emailing documents or logistical telephone calls with the clerk's office or the judge's chambers are typically excluded from a lodestar. *Id*. However, having fully reviewed the unredacted time sheets presented by counsel—focusing, in particular, on the time

entries Objector Cantu-Guerrero has highlighted as clerical, *see* [Doc. 1859] at 9, n. 9—the Court finds that the cited tasks do not qualify as "clerical" and are therefore not to be excluded from Class Counsel's lodestar.

2. Unsuccessful Claims

After the lodestar figure, which is accorded a strong presumption of reasonableness, *City of Burlington v. Dague*, 505 U.S. 557 (1992), is calculated, the Court must determine whether the fee award should be reduced to reflect the time counsel spent on unsuccessful claims. *Robinson*, 560 F.3d at 244. In that regard, "[s]o long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994) (citation omitted). In other words, fees related to unsuccessful claims may be awarded where "the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories.'" *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir. 1996) (citation omitted). Indeed, when a case "present[s] only a single claim," or the claims for relief "involve a common core of facts" or are "based on related legal theories," it is "difficult to divide the hours expended on a claim-by-claim basis" because "[m]uch of counsel's time will be devoted generally to the litigation as a whole." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Those portions of Class Counsels' submissions which pertained to unsuccessful claims were not so unrelated to the successful claims in this action to justify a reduction in Class Counsels' lodestar. All of Plaintiffs' claims involved a single Defendant, pertained to the same operative facts, and advanced either one of two theories of liability: either that Defendant's flooring did not comply with CARB standards or that the flooring was not as durable as advertised. MDL No. 1:16-md-2743, [Doc. 41].

Resisting that conclusion, Cantu-Guerrero argues that Class Counsels' billing failed to distinguish between its representation of Lila Washington and that of her daughter, Laura Washington, whom the Court found lacked standing in the Formaldehyde MDL. *See* [Doc. 1090] at 22. Pointing to this issue, she requests that this Court eliminate from the lodestar work performed on behalf of Laura Washington. [1089] at 13. However, as stated above, the lack of success on this claim does not, by itself, merit a reduction of the lodestar. Indeed, Cantu-Guerrero has not explained how Laura Washington's claim was so unlike or unrelated to the remainder of the class's claims that this Court must excise any work performed on her behalf from the lodestar. *See United States ex rel. Cody*, 2017 U.S. Dist. LEXIS 221375, at *15-16 ("Where unsuccessful claims involve such a common core of facts or are based on related legal theories, the unsuccessful claims are 'inextricably intermingled' with the successful ones, and the court moves to the third step to assess the degree of success given the scope of the whole litigation.") (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789-90 (1989)). Therefore, the Court declines to reduce Class Counsels' lodestar on this basis.

3. Degree of Success Obtained

As repeatedly noted by the Fourth Circuit, "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Doe v. Chao*, 435 F.3d 492, 506 (4th Cir. 2006) (citations omitted). If a party has only achieved partial success, even when all claims raised were interrelated, non-frivolous, and raised in good faith, the product of calculating the reasonable number of hours expended on the litigation by the reasonable rate may result in an excessive award. *Hensley*, 461 U.S. at 436. However, it is inappropriate "to simply compare 'the total number of issues in the case with those actually prevailed upon.'" *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 676 (4th Cir. 2015) (quoting *Hensley*, 461

U.S. at 435 n.11). Instead, "[a] court may consider whether a fee award seems reasonable in light of the amount of damages awarded." *Id.* And in that respect, a "'reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.'" *Chao*, 435 F.3d at 505 (quoting *Hensley*, 461 U.S. at 440); *see also Tex. State Teachers Ass'n*, 489 U.S. at 789-90 ("[T]he district courts should exercise their equitable discretion . . . to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated *or by simply reducing the award to account for the limited success of the plaintiff*.") (emphasis added).

Here, the Court finds that given the degree of success obtained for the class, as reflected in the Settlement as a whole, which includes both cash and voucher relief, and when considered in light of the legal and practical realities that needed to be overcome, the lodestar award (reduced by a negative multiplier of 0.82x) is appropriate. As discussed in this Court's Order approving the Settlement, significant issues existed in both matters that could have potentially foreclosed all recovery for the classes, [Doc. 1705] at 9-10; and the Settlement was structured in light of these uncertainties to maximize the relief available to the classes. In that regard, the Settlement offered the class members a choice between two available remedies. While class members in the CARB2/Durability Class who chose a cash payout will receive a small fraction of their original purchase price, those most likely to have been injured the most have an option that will subsidize a significant portion of their replacement costs.[8] Finally, the Court has also considered, and cannot ignore, the restraining realities on any settlement or recovery due to Defendant's financial ability to pay, as reflected in the structure of the Settlement that has

[8] It should be noted in this regard that the level of payment to be received by those CARB2/Durability Class members who chose a cash payout reflects the success lead counsel achieved in constructing an effective notice program that reached a large percentage of prospective class members, ensuring that a broad segment of the population who purchased the flooring products at issue will obtain some relief.

allowed Defendant to use its product inventory to satisfy its voucher obligations. Under all the circumstances, the Court concludes that Class Counsel obtained satisfactory results for both classes and with the CARB2 Class, who was provided an opportunity to receive a voucher in lieu of cash. Indeed, this positive result was underscored by the Fourth Circuit's decision to affirm this Court's final Settlement Order notwithstanding its decision to vacate this Court's prior attorneys' fees order.[9]

4. *Johnson* Factors

Most of the *Johnson* factors have already been subsumed in the Court's lodestar analysis, and none of the factors warrant additional reductions or enhancements for the following reasons.

i. The time and labor expended

The Court has already considered the amount of time and labor Class Counsel has expended on this litigation above. Indeed, Class Counsel reviewed hundreds of thousands of documents, conducted nearly 40 depositions, and successfully opposed a motion to dismiss and summary judgment in the Formaldehyde litigation. Accordingly, no further adjustment is appropriate.

ii. The novelty and difficulty of the questions raised

Both MDLs encountered and were required to deal with novel issues of first impression, including, *inter alia*, the extraterritorial application of the CARB regulations, the feasibility of class-wide testing, as well as notice, reliance, and causation issues. In light of the difficulties posed by this multifaceted complex litigation, no further adjustment is appropriate.

[9] Cantu-Guerrero claims that, considering that Class Counsel only obtained approximately 1% of the potential $750 million in damages available in this action, a negative multiplier of 0.7x is more appropriate. [Doc. 1859] at 13-16. But the Court finds this argument unpersuasive. Cantu-Guerrero provides no factual support or explanation behind the $750 million damages figure, nor does she discount the damages figure by the reality of what could occur had this matter proceeded to trial.

iii. The skill required to properly perform the legal services rendered

The Court incorporated this factor into its lodestar analysis, and no further adjustment is appropriate.

iv. The attorney's opportunity costs in pressing the instant litigation

Class Counsel expended a large amount of time and out-of-pocket costs in the course of this litigation, thereby affecting their ability to devote their time and resources to other matters. Further underscoring the opportunity cost borne by counsel was the persistent risk of non-payment presented by Defendant's financial condition, particularly following a *60 Minutes* telecast of the Defendant's defective flooring. Accordingly, no further adjustment is appropriate.

v. The customary fee for like work

The Court has incorporated this factor into its analysis of the lodestar, which is based on fees that have been deemed reasonable in other cases. *See also, e.g.*, *Valador, Inc. v. HTC Corp.*, No. 1:16-cv-1162, 2018 WL 4940721, at *11 (E.D. Va. May 30, 2018), *report and recommendation adopted sub nom. Valador, Inc.*, No. 1:16-cv-1162, 2018 WL 4937057 (E.D. Va. Oct. 10, 2018) (finding rates of $485 or $500 per hour for partners and $325 per hour for associates to be reasonable); *Two Men and a Truck/Intern., Inc. v. A Mover, Inc.*, 128 F.Supp.3d 919, 927 (E.D. Va. 2015) (finding reasonable a rate of $600 per hour for a partner, $400 per hour for an associate, and $250 per hour for a paralegal). Accordingly, no further adjustment is appropriate.

vi. The attorney's expectations at the outset of the litigation

Class Counsel agreed to litigate this matter on a contingency fee basis. Thus, the attorney's expectations at these matter's outset was that any recovery would depend on the success of the claims raised. Cantu-Guerrero contends that one Class Counsel law firm (Hagens

Berman) agreed to limit its fees if appointed counsel and that this limitation should effectively be imputed to all counsel. [Doc. 1680] at 16-17. But no other firm agreed with Hagens Berman's limitation, and as discussed herein, counsel worked expeditiously and efficiently in this matter to achieve a desirable result for the class against the backdrop of Defendant's financial issues. Accordingly, no further adjustment is appropriate.

vii. The time limitations imposed by the client or circumstances

As Class Counsel correctly note, this litigation occurred against the backdrop of Defendant's declining share price and potential liquidity issues. In order to ensure some relief for the class, Class Counsel were incentivized to work (and did work) expeditiously to achieve a positive result for the class. Accordingly, no further adjustment is appropriate.

viii. The amount in controversy and the results obtained

As discussed above, the lodestar figure is consistent with the amount in controversy and the results obtained in this action. Accordingly, no further adjustment is appropriate.

ix. The experience, reputation and ability of the attorney

The Court incorporated this factor into its lodestar analysis, and no further adjustment is appropriate. In any event, as previously noted by this Court, the firms leading both MDLs have vast experience with class and complex litigation, particularly of the type at issue here.

x. The undesirability of the case within the legal community in which the suit arose

Given the resources, the out of pocket expenses and the effort required to successfully litigate as lead counsel and on a contingency basis the type of MDLs presented here, these types of cases are not for the faint of heart. Despite these risks, the lodestar carries a negative multiplier; and no further adjustment is appropriate.

xi. The nature and length of the professional relationship between attorney and client

Class Counsel have been working on behalf of the class since the outset of this matter in 2015 and as discussed above, have expended considerable time, effort, and expense in representing the class. As such, the nature and length of the professional relationship between Class Counsel and the class is significant, all the more so considering the contingency fee arrangement on which that professional relationship was based. Accordingly, no further adjustment is appropriate.

xii. Attorneys' fees awards in similar cases

The Court incorporated this factor into its lodestar analysis, and no further adjustment is appropriate.

xiii. Successful and unsuccessful claims and degree of success

As described above, Plaintiffs achieved their central goal in bringing this litigation to an end, namely by reaching a settlement that provides, against risks and uncertainties created by Defendant, some form of relief to a significant portion of the class. Accordingly, no further adjustment is appropriate.

D. Costs

Plaintiffs request reimbursement of costs and expenses totaling $797,397.45 from the common fund. [Doc. 1644] at 1. "[C]osts, if reasonable in nature and amount, may appropriately be reimbursed from the common fund." *In re Microstrategy*, 172 F. Supp. 2d at 791. The costs Plaintiffs seek include, *inter alia*, court reporter fees, expert fees, document-reproduction costs, legal research, travel, supplies, and small amounts of overtime for hourly staff. *See, e.g.*, [Doc. 1646-2] at 2. Further, Plaintiffs seek leave to pay the costs of notice and

administration, in an amount not to exceed $1,194,500.00, which is directly pertinent to the distribution of notice sent to the class in both MDL actions.

The Court has reviewed all of the declarations of Class Counsel in this regard and finds and concludes that all of the costs and expenses requested to be reimbursed are reasonable and are directly related to litigation of these matters. Thus, the Court awards costs in the amount of $797,397.45 to be paid from the common fund, along with leave to pay the costs of notice and administration not to exceed $1,194,500.00.

E. Service Awards

Finally, pursuant to the Settlement's terms, Plaintiffs seek twelve service awards of $5,000 each to each named Plaintiff in the matters. [Doc. 1620] at 26. The Court finds and concludes that such awards are reasonable and therefore awards them to be paid from the common fund.

F. Escrow Account Issues

On August 7, 2020, Objector Cantu-Guerrero filed a Motion to Enforce Settlement Agreement and Motion to Order Class Counsel to Return Class Funds Pursuant to 12(B) of the Settlement Agreement [Doc. 1887] (the "Motion to Enforce").[10] In her Motion to Enforce, Cantu-Guerrero contends, citing Paragraph 12(B) of the Settlement Agreement, that because the Fourth Circuit vacated this Court's November 15, 2018 Order awarding Class Counsel attorneys' fees and costs, all funds awarded to Class Counsel by that Order—$10.08 million in attorneys'

[10] On August 25, 2020, Objector Cantu-Guerrero filed an Amended Motion to Enforce Settlement [Doc. 1895], in which she reiterates her argument that the Settlement Agreement unambiguously requires Class Counsel to return all previously-award attorneys' fees withdrawn from the Escrow Account back into the Escrow Account. *Id.* at 2-3. She further moves this Court to compel Class Counsel to produce records of the interest earned in the Escrow Account since November 2018. *Id*. at 3-4. Finally, she argues that Class Counsel breached their fiduciary duty to the class, arguing that when Class Counsel failed to return the funds into escrow, they improperly retained property of the class, thereby violating a fiduciary duty. *Id*. at 4-7.

fees *plus* $797,397.45 in costs—should have been returned to escrow on or before June 23, 2020, *i.e.*, ten (10) days after any further appellate relief from the Fourth Circuit was possible. *Id.* Because those funds were not deposited back into escrow by that date, she now requests, regardless of any fee award entered by this Court, that this Court compel Class Counsel to do so *plus* any interest that would have accrued on the total amount in escrow had no distribution to Class Counsel been made. As this Court has now determined that Class Counsel are entitled to the full amount already distributed under the Settlement Agreement's quick-pay provision,[11] the issue is whether Class Counsel is obligated to deposit into the Escrow Account the amount of interest that would have accrued on those distributed funds from the time Class Counsel initially received those funds through the Effective Date, and at what interest rate.

Section 12(b) of the Settlement Agreement, in pertinent part, states:

> In the event that the Effective Date does not occur or the Settlement is terminated pursuant to its terms, or if, as the result of any appeal or further proceedings on remand, or successful collateral attack, the Fee, Cost, and Expense Order is reversed or modified pursuant to a final court order and attorneys' fees, costs, and expenses have been paid out of the Escrow Account to any extent, then Class Counsel shall be obligated and does hereby agree, within ten (10) business days after receiving notice of the foregoing from Defendants' Counsel or from a court of appropriate jurisdiction, to refund to the Escrow Account such attorneys' fees, costs, and expenses that have been paid, plus interest thereon at the same rate as would have been earned had those sums remained in the Escrow Account.

Settlement Agreement ¶ 12(B).[12]

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[11] The quick-pay provision permitted Class Counsel to receive the awarded attorneys' fees prior to the exhaustion of any appeals regarding the Settlement or attorneys' fees. Settlement Agreement ¶ 12(B). The Fourth Circuit upheld the Settlement Agreement's quick-pay provision despite a challenge from Cantu-Guerrero. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d at 487 ("Additionally, we observe that quick-pay provisions have generally been approved by other federal courts . . . We discern no reason to buck that trend in these proceedings.").

[12] In the Settlement Agreement, "Effective Date" is defined as "the first date by which all of the following events shall have occurred: (1) The Court has entered the Preliminary Approval Order[;] (2) The Court has entered the Final Approval Order and Judgment approving the Settlement Agreement in all respects, dismissing the

Although there is more than one reasonable reading of this paragraph, with different results regarding Class Counsels' obligations with respect to any previously-distributed award,[13] the Court resolves this ambiguity under Virginia law in favor of the class for whose benefit the Settlement Agreement was entered. *See* Settlement Agreement ¶ 22 ("All questions with respect to the construction of this Settlement Agreement . . . shall be governed by the laws of the Commonwealth of Virginia, without giving effect to its law of conflict of laws"). Accordingly, Class Counsel will be directed, as they have already agreed, to return to the Escrow Account the interest that would have accrued on the award amount previously distributed to Class Counsel under the Quick-Pay provision of the Settlement Agreement from the date of the disbursement(s) through the Effective Date, September 3, 2020, together with an accounting.[14]

Formaldehyde MDL and the Durability MDL, including all of the Complaints, with prejudice [;] and (3) The time for appeal from the Final Approval Order and Judgment shall have expired, or if any appeal of the Final Approval Order and Judgment as to the Settlement Agreement is taken, that appeal shall have been finally determined by the highest court, including any motions for reconsideration and/or petitions for writ of certiorari, and which Final Approval Order and Judgment is not subject to further adjudication or appeal;" "Fee, Cost, and Expense Order" is defined as "an order awarding any attorneys' fees, costs, and expenses" to Class Counsel; and "Escrow Account" refers to the "Settlement Fund Escrow Account" which is defined as "an escrow account established by Class Counsel and supervised by the Court to receive and maintain funds paid pursuant to this Settlement Agreement for the benefit of the Settlement Class." *See* Settlement Agreement ¶ 1. By Order dated September 3, 2020, this Court administratively closed both MDLs and found that, under the terms of the Settlement Agreement, the "Effective Date" had accrued as of September 3, 2020. *See* Formaldehyde MDL, [Doc. 1897]; Durability MDL, [Doc. 216].

[13] One reading favorable to Class Counsel is that its obligations to return to escrow "such attorneys' fees, costs, and expenses that have been paid, plus interest thereon" is triggered only if "as the result of any appeal *or further proceedings on remand*, . . ., the Fee, Cost, and Expense Order is reversed or modified *pursuant to a final court order*." Agreement ¶ 12(B) (emphasis added). While the Fourth Circuit vacated the award, it remanded the issue of attorney's fees for further proceedings; and there is yet to be entered a "final court order" with respect to Class Counsels' attorneys' fees. On the other hand, Class Counsel has ostensibly received notice from a court of appropriate jurisdiction (*i.e.*, the Fourth Circuit) that the fee award had been, in some sense, "reversed or modified" pursuant to a "final court order," *i.e.*, an order of the Fourth Circuit from which no further review could have been taken, thus triggering Class Counsel's obligations with respect to the escrow. Similarly, as of the date this obligation arguably accrued, the Effective Date had arguably not yet occurred and the Settlement had not been "terminated" pursuant to its own terms.

[14] For the reasons discussed above, the Court finds baseless Cantu-Guerrero's contention that Class Counsel has breached its fiduciary duty to the class and thereby has forfeited any fee otherwise payable. No party raised any aspect of the escrow issue until after the hearing on the Motion on July 29, 2020; and Cantu-Guerrero's breach of fiduciary duty claim first appeared in her Motion to Enforce, filed on August 7, 2020 [Docs. 1887, 1888] and repeated, in greater length, in her Amended Motion to Enforce Settlement, filed on August 25, 2020 [Docs. 1895,

III. CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Service Awards to Class Representatives [Doc. 1644] be, and the same hereby is, **GRANTED** to the extent that Plaintiffs are awarded reasonable attorneys' fees in the amount of $10.08 million;[15] and it is further

ORDERED that Plaintiffs are awarded reasonable costs and expenses totaling $797,397.45, as well as leave to pay the costs of notice and administration not to exceed $1,194,500; and it is further

ORDERED that twelve service awards of $5,000 each shall be paid to each named Plaintiff or household in the Formaldehyde MDL and the Durability MDL representative complaints; and it is further

ORDERED that Objector Diana Cantu-Guerrero's Motion to Enforce Settlement [Doc. 1887] and Amended Motion to Enforce Settlement [Doc. 1895] be, and the same hereby is, **GRANTED** in part and **DENIED** in part. The motions are granted to the extent that Class Counsel shall, within seven (7) days of the date of this Order, deposit into the Escrow Account the interest that would have accrued on the attorneys' fees, costs and expenses previously-withdrawn from the Escrow Account pursuant to Paragraph 12(B) of the Settlement Agreement

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1896]. As discussed above, Class Counsel's obligations under Paragraph 12(B) are less than clear; but whatever its reading, no payments to the class are yet due under the Settlement; Class Counsel has throughout affirmed its willingness to pay back into the Escrow Account whatever interest or deposits the Court concludes are required under the Settlement, *see* [Doc. 1885] (July 29, 2020 hearing transcript) at 35:17-36:1; and nothing about this issue has affected any class members.

[15] The Formaldehyde MDL Co-Lead Counsel shall have sole discretion to determine whether and how much of any of their fee award shall be shared with any non-co-lead firm in the Formaldehyde MDL that claims entitlement to a sum of fees.

from the date of disbursement(s) through the Effective Date, September 3, 2020, and shall file with the Court an appropriate accounting; and is otherwise denied.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 4, 2020