

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 IN RE EASYSAVER REWARDS
12 LITIGATION

Case No. 09-cv-02094-BAS-WVG

13 **ORDER GRANTING PLAINTIFFS'**
14 **UNOPPOSED MOTION FOR**
15 **SUPPLEMENTAL ATTORNEY'S**
16 **FEES (ECF No. 373)**

17
18 Presently before the Court is Plaintiffs' Motion for Supplemental Attorney's Fees.
19 (ECF No. 373.) Plaintiffs seek an additional award of \$215,370.75 in fees in this consumer
20 class action that reached a settlement. (*Id.*) The Motion is unopposed. The Court finds
21 this request suitable for determination on the papers submitted and without oral argument.
22 *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following reasons, the Court
23 **GRANTS** Plaintiffs' Motion for Supplemental Attorney's Fees.

24 **I. BACKGROUND**

25 The Court chronicled this action's lengthy history in its previous fee orders.
26 (ECF Nos. 352, 367, 372.) Relevant here, this case is a consumer class action where the
27 Court approved a settlement with two components. First, the settlement provided for class
28 members to receive credits with a total face value of \$25.5 million. Second, the settlement

1 established a \$12.5 million common fund for paying refunds to class members, attorney’s
2 fees, litigation costs, incentive awards, and settlement administration expenses. Any funds
3 left over will be distributed to several *cy pres* beneficiaries.

4 In 2013, the Court approved Plaintiffs’ counsel’s request for \$8.7 million in
5 attorney’s fees. After subtracting this award and the other items from the common fund,
6 about \$3 million remained for distribution to the *cy pres* beneficiaries. Brian Perryman
7 objected. He argued the *cy pres* award was improper and the attorney’s fee award did not
8 comply with the Class Action Fairness Act’s requirements for coupon settlements. The
9 Court rejected Objector’s challenges, and he appealed. The Ninth Circuit vacated the
10 settlement approval and remanded for further proceedings in light of its then-recent
11 decision in *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th Cir. 2015),
12 which addresses what qualifies as a “coupon” under CAFA.

13 After another final approval determination, as well as a second trip to the Ninth
14 Circuit and back, Plaintiffs filed a new motion for attorney’s fees. (ECF No. 338.) They
15 asked for the same amount of attorney’s fees as before—\$8.7 million. The Court ultimately
16 bifurcated the fee award. (ECF No. 352.) Specifically, the Court permitted Plaintiffs to
17 resubmit a request for attorney’s fees that was based on only the non-coupon portion of the
18 settlement—i.e., the \$12.5 million cash fund—and then later seek an additional fee award
19 based on the value of the coupons redeemed by the class members—if any.

20 Around this time, bankruptcy-related events unfolded that further muddled this case.
21 Eventually, the Court addressed a renewed fee motion from Plaintiffs based “solely on the
22 cash fund” component of the settlement. (ECF No. 356.) Plaintiffs sought a reduced fee
23 award of \$5.7 million based on the lodestar method.

24 By this time, in light of the bankruptcy developments, the Court valued the cash fund
25 at \$10.5 million—instead of \$12.5 million. (ECF No. 367.) The Court determined that
26 awarding Plaintiffs’ counsel \$5.7 million for recovering \$10.5 million would be
27 unreasonable. After applying the lodestar method, the Court found it appropriate to adjust
28 the \$5.7 million lodestar with a 0.6 multiplier. That adjustment reduced the \$5.7 million

1 lodestar to \$3.42 million, which is approximately 32.5% of the then-estimated \$10.5
2 million recovery for the class. However, the Court further noted that if “Plaintiffs are
3 ultimately successful in obtaining more benefits for the class than the anticipated \$10.5
4 million cash fund, they may return to the Court to file a request for a supplemental award
5 of fees.” (*Id.*)

6 Plaintiffs now do so, reporting that their counsel ultimately secured an additional
7 monetary benefit for the Class through the bankruptcy proceeding. Having reviewed the
8 accompanying declarations, the Court adopts Plaintiffs’ summary of the more recent
9 events:

10 Pursuant to the Bankruptcy Court’s modification of the automatic stay, the
11 undersigned counsel was tasked with pursuing payment from Provide
12 Commerce Inc.’s insurance carriers. Like all matters in this case, this was a
13 Sisyphean effort. In pursuing payment from the insurance carriers, it was
14 discovered that the amount of the contributions from each of Provide
15 Commerce’s multiple carriers and respective underwriters was in dispute. As
16 a result, the insurance carrier contributions for the cash settlement
conservatively estimated by the Court at \$10.5 million [were] in dispute and
made distribution impossible.

17 As such, Plaintiffs’ counsel had to obtain contribution from each of Provide
18 Commerce, Inc.’s insurance carriers. This process involved ascertaining the
19 multiple insurance policies at issue, determining counsel for each of these
20 carriers, [and] making demands on [the] FTD Committee Liquidation Trust
21 and Debtor Trust . . . that these carriers tender their disputed contributions.
22 After extensive research and demands, counsel for the FTD Committee
23 Liquidation Trust and Debtor Trust’s counsel at Kelley, Drye & Warren LLP
24 and their subsequently retained coverage counsel at Reed Smith LLP agreed
25 to work with Class Counsel to obtain Provide Commerce’s contribution from
the carriers. This coordinated effort involved multiple demands, negotiations,
and eventually a mediation with the carriers, underwriters, and their respective
counsel to get the carriers to contribute to the cash fund.

26 This effort beginning in May of 2020 eventually resulted in a mediation to
27 resolve the insurance dispute, which was memorialized in a Confidential
28 Settlement Agreement and Release between the FTD Committee Liquidation
Trust and Debtor Trust, multiple underwriters and carriers, and Class

1 Plaintiffs to ensure funding of the class settlement with all of the requisite
2 policies in accordance with the 2012 Settlement Agreement. As a result . . .
3 the cash fund received **\$11,161,811.00**, resulting in an additional **\$661,811.00**
4 to the cash fund than anticipated by the Court’s conservative estimate. This
5 also resulted in the drafting and filing of a Stipulation with the Bankruptcy
6 Court allowing for a general unsecured claim for Class Plaintiffs in the amount
7 of \$2,500,000.00, hoped to be realized in the future.

8 (Mot. 3–4 (emphasis added); *see also* Steckler Decl., ECF No. 373-2; Anderson Decl., ECF
9 No. 373-5.) In short, because Plaintiffs’ counsel achieved greater success in the bankruptcy
10 matter than anticipated in the Court’s prior fee order, they now seek to recoup additional
11 attorney’s fees.

12 **II. ANALYSIS**

13 The Court already determined that the lodestar method is the correct approach for
14 fee requests based on the settlement’s common fund. (ECF No. 367.) This method “begins
15 with the multiplication of the number of hours reasonably expended by a reasonable hourly
16 rate.” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc).
17 The Court then may apply a risk multiplier to the lodestar and adjust the figure upward or
18 downward. *Stetson v. Grissom*, 821 F.3d 1157, 1166–67 (9th Cir. 2016).

19 For their supplemental fee request, Plaintiffs submit a proposed lodestar that
20 includes 184.12 hours of time. (Steckler Decl. ¶ 4; Anderson Decl. ¶ 2.) This time was
21 spent “ascertaining, researching, pursuing, and securing the insurance policies and carrier
22 contributions for the cash funding of the settlement” through the bankruptcy proceeding,
23 written demands, mediation, and settlement, which resulted in a payment to the class that
24 is \$661,811 larger than expected. (*See* Steckler Decl. ¶ 4; *see also* Anderson Decl. ¶¶ 2–
25 3.) The Court finds these hours are the amount “reasonably expended on the litigation” in
26 addition to those hours addressed in the Court’s prior fee order. *See Moreno v. City of*
27 *Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The Court also finds Plaintiffs’
28 counsel’s proposed rates are appropriate. They are materially the same as the rates the
Court approved in the prior order from 2020. (*See* ECF No. 367.) The Court thus adopts
Plaintiffs’ proposed lodestar of \$143,580.50.

1 The Court turns to considering whether this figure should be enhanced with a risk
2 multiplier or otherwise adjusted under the *Kerr* factors. In a common fund case, the court
3 “must apply a risk multiplier to the lodestar ‘when (1) attorneys take a case with the
4 expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does
5 not reflect that risk, and (3) there is evidence the case was risky.’” *Stanger v. China Elec.*
6 *Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016); *see also Fischel v. Equitable Life Assur.*
7 *Soc’y of U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002). Risk enhancements in common fund
8 cases stem from “the equitable notion that those who benefit from the creation of the fund
9 should share the wealth with the lawyers whose skill and effort helped create it.” *In re*
10 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

11 The court also “has discretion to adjust the lodestar upward or downward using a
12 multiplier that reflects ‘a host of “reasonableness” factors.’” *Stetson*, 821 F.3d at 1166
13 (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

14 These factors are:

15 (1) the time and labor required, (2) the novelty and difficulty of the questions
16 involved, (3) the skill requisite to perform the legal service properly, (4) the
17 preclusion of other employment by the attorney due to acceptance of the case,
18 (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time
19 limitations imposed by the client or the circumstances, (8) the amount
20 involved and the results obtained, (9) the experience, reputation, and ability
21 of the attorneys, (10) the “undesirability” of the case, (11) the nature and
22 length of the professional relationship with the client, and (12) awards in
23 similar cases.

24 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *abrogated on other*
25 *grounds by City of Burlington v. Dague*, 505 U.S. 557 (1992). “Foremost among these
26 considerations, however, is the benefit obtained for the class.” *Bluetooth*, 654 F.3d at 942.

27 Plaintiffs’ counsel request “a modest 1.5 multiplier of their lodestar for the additional
28 money received to the cash fund.” (Mot. 7.) They argue the bankruptcy developments
threw a wrench into an already complicated case. (*Id.* 6.) It was not clear whether the
bankrupt Defendant’s insurance policies would cover the settlement or be available in light

1 of the bankruptcy. (*Id.*) Nor was it clear whether the insurers would agree to fund the
2 settlement considering the appellate and bankruptcy developments. (*Id.*) Hence, Plaintiffs’
3 counsel “accepted this legal Rubik’s cube with an expectation that they would receive a
4 risk enhancement if they obtained a favorable result for the class as indicated by the Court’s
5 Order.” (*Id.*)


6 The Court finds a multiplier is appropriate here. Plaintiffs’ counsel exceeded the
7 Court’s expectations and recovered \$661,811 more than expected from the bankrupt
8 Defendant’s insurers. This additional benefit to the Class is the foremost consideration.
9 *See Bluetooth*, 654 F.3d at 942. Further, Plaintiffs’ counsel’s additional work involved
10 enforcing an almost decade-old settlement agreement against a bankrupt Defendant that
11 was purchased by a third party. This work required more skill and involved more difficult
12 issues than typical class action settlement proceedings. Hence, having considered the *Kerr*
13 factors and the risk involved, the Court finds it appropriate to apply the requested multiplier
14 to Plaintiffs’ counsel’s lodestar.

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court **GRANTS** Plaintiffs’ Motion for Supplemental
17 Attorney’s Fees. (ECF No. 373.) The Court awards Plaintiffs’ counsel an additional
18 \$215,370.75 in attorney’s fees from the settlement’s common fund in light of their
19 successful efforts to secure \$661,811 more for the Class than the Court’s prior order
20 anticipated.

21 **IT IS SO ORDERED.**

22
23 **DATED: November 8, 2021**


Hon. Cynthia Bashant
United States District Judge