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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 BEVERLY KANAWI, et al.,

No. C 06-05566 CRB

12 Plaintiffs,

**ORDER AWARDING ATTORNEYS'
FEES AND COSTS**

13 v.

14 BECHTEL CORP., et al.,

15 Defendants.
16 _____/

17 Plaintiffs brought this ERISA class action against Bechtel Corp. and Fremont
18 Investment Advisors, asserting various claims in connection with the administration of a
19 defined 401(k) contribution plan. The parties settled the dispute. The settlement provides an
20 \$18.5 million monetary fund for class members and potentially significant non-monetary
21 relief. The Court has given final approval of the settlement. Dkt. 827.

22 Before the Court is Plaintiffs' Motion for Attorneys' Fees and Costs. Dkt. 805.
23 Plaintiffs seek an award of \$6.1 million in attorneys' fees, \$1,571,102.56 in litigation costs,
24 and a \$25,000 incentive award for each named Plaintiff.¹

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28 ¹ Class Counsel's requested fee award of \$6.1 million amounts to roughly one-third of the \$18.5 gross settlement fund. Adding the projected non-monetary relief to the gross settlement fund, Class Counsel characterizes its \$6.1 million fee award request to be less than 14% of the lowest estimated value and less than 5% of the highest estimated value of the settlement.

1 The Court finds that 30% of the net settlement fund (not to exceed \$4,859,872.33) is
2 an appropriate fee award in this case.² In addition, Class Counsel shall be awarded costs in
3 the amount of \$1,571,102.56. Each named Plaintiff shall be awarded a \$7,500 incentive
4 award.

5 **I. ATTORNEYS' FEES**

6 Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class
7 action, the court may award reasonable attorney's fees and nontaxable costs that are
8 authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "Attorneys' fees
9 provisions included in proposed class action agreements are, like every other aspect of such
10 agreements, subject to the determination whether the settlement is 'fundamentally fair,
11 adequate and reasonable.'" Staton v. Boeing Co., 327 F.3d 938, 964 (9th Cir. 2003) (internal
12 citation omitted).

13 In "common fund cases," such as the present action, a court has discretion to award
14 attorneys' fees as either a percentage of such common fund or by using the lodestar method.
15 Id. at 967-968. In the Ninth Circuit, the "benchmark" for attorneys' fees in common fund
16 class actions is 25% of the common fund. Id. at 968. "Selection of the benchmark or any
17 other rate must be supported by findings that take into account all of the circumstances of the
18 case." Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048 (9th Cir. 2002).

19 The Ninth Circuit has looked to the following factors when determining what a proper
20 percentage is for an award of attorneys' fees: (1) the results achieved; (2) the risks of
21 litigation; (3) whether there are benefits to the class beyond the immediate generation of a
22 cash fund; (4) whether the percentage rate is above or below the market rate; (5) the
23 contingent nature of the representation and the opportunity cost of bringing the suit; (6)
24 reactions from the class; and (7) a lodestar cross-check. Id. at 1048-52.

25 Applying these factors, the Court finds that an upward adjustment of the benchmark to
26 30% is warranted in this case.

27 ² The net settlement fund is the gross settlement fund of \$18.5 million less costs
28 (\$1,571,102.56), class representative compensation (\$15,000), and total administrative expenses
(currently estimated at \$714,323).

1 **A. Results Achieved**

2 Class Counsel obtained quality results. In November 2008, this Court entered its
3 Order on summary judgment, granting judgment in favor of Defendants as to all claims save
4 for one alleged prohibited transaction claim covering a four-month period. Class Counsel
5 negotiated the settlement after it lost summary judgment, and they still obtained a meaningful
6 recovery. This factor favors an upward adjustment to the benchmark.

7 **B. Litigation Risk**

8 Class Counsel assumed a good deal of risk in bringing this suit against highly
9 sophisticated parties. Uncertainty loomed throughout the litigation. This factors favors an
10 increase in the benchmark rate.

11 **C. Non-monetary Relief**

12 Class Counsel has secured non-monetary relief with the potential of bringing a large
13 benefit to the class. According Plaintiffs' economist, the non-monetary relief will provide the
14 class, in present value terms, roughly \$46 million over five years and \$126 million over
15 fifteen years. This factor strongly favors an increase in the benchmark rate.

16 **D. Percentage Rate Relative to Market Rate**

17 A 25% fee award is below the market rate for similar cases. The retainer agreements
18 between Class Counsel and the named Plaintiffs provided that Class Counsel would receive
19 roughly one-third of any recovery. However, as noted by the Ninth Circuit, retainer
20 agreements alone, though somewhat probative of a reasonable rate, are not particularly
21 helpful because retainer agreements do not involve, and are not binding, on the class. *Id.* at
22 1049. This factor favors an increase in the benchmark rate.

23 **E. Contingent Nature of Representation and Opportunity Cost**

24 Class Counsel brought this claim on a purely contingent basis, agreeing to advance all
25 necessary expenses, knowing that they would receive a fee only if there was a recovery. It is
26 an established practice to reward attorneys who assume representation on a contingent basis
27 with an enhanced fee to compensate them for the risk that they might be paid nothing at all.
28 See In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir.

1 1994). Such a practice encourages the legal profession to assume such a risk and promotes
2 competent representation for plaintiffs who could not otherwise hire an attorney. Id.
3 Moreover, Class Counsel had to turn down opportunities to work on other cases to devote the
4 appropriate amount of time, resources, and energy necessary to handle this relatively
5 complex case. This factor supports an increase in the benchmark rate.

6 **F. Class Reaction**

7 The fact that only five members out of a class of more than 40,000 objected to the
8 proposed fee award of roughly one-third of the gross settlement fund further supports an
9 increase in the benchmark. Presumably, even fewer class members would object to a fee
10 award of 30% of the net settlement fund. This factor supports an increase in the benchmark
11 rate.

12 **G. Lodestar Cross-Check**

13 A lodestar cross-check also supports the reasonableness of increasing the benchmark
14 rate. Class Counsel expended over 21,000 attorney hours while litigating this claim. Further,
15 Class Counsel's reasonably blended attorneys' rate is \$514.60 per hour. With these numbers,
16 the lodestar would amount to roughly \$10.8 million, well above the requested attorneys' fee
17 of \$6.1 million and the awarded amount of 30% of the net settlement fund.

18 * * *

19 On balance, the Court finds that the aforementioned factors support a fee award of
20 30% of the net settlement fund.

21 **II. LITIGATION EXPENSES**

22 Class Counsel seeks reimbursement of \$1,571,102.56 in litigation expenses they
23 incurred while prosecuting this case. The Court finds that such expenses were reasonable
24 and that the reimbursement of such expenses is appropriate.

25 **III. INCENTIVE AWARD**

26 Class Counsel has asked this Court to reward each named Plaintiff an incentive award
27 of \$25,000. While some incentive award for the named plaintiffs is merited, \$25,000 is too
28 high. Given the infrequency with which plaintiffs in similar cases are held liable for paying

1 attorneys' fees and costs of defendants, the suggestion that the named Plaintiffs "risked a
2 judgment against them for Defendants' costs to obtain this historic recovery" is unpersuasive.
3 See Munoz v. UPS Ground Freight, Inc., No. C 07-00970 MHP, 2009 WL 1626376, at *6
4 (N.D. Cal. Jun. 9, 2009) (noting the small risk assumed by plaintiffs in bringing class suits).
5 Each named Plaintiff shall receive an incentive award of \$7500.

6 **IV. CONCLUSION**

7 Class Counsel shall be awarded attorneys' fees equal to 30% of the net settlement
8 fund (not to exceed \$4,859,872.33). The percentage rate shall be applied after litigation
9 expenses, all incurred and reasonably projected administrative costs, and the named
10 Plaintiffs' incentive awards have been subtracted from the \$18.5 million fund. Class Counsel
11 shall be awarded costs in the amount of \$1,571,102.56. Named Plaintiffs shall each be
12 awarded \$7500.

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14 **IT IS SO ORDERED.**

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17 Dated: March 1, 2011



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE