

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

3 Jeff Pokorny, Larry Blenn, and Kenneth
4 Busiere, on behalf of themselves and those
5 similarly situated,

5 Plaintiffs,

6 v.

7 Quixtar, Inc.,

8 Defendant.

) CASE NO. C 07-0201 SC

) ~~PROPOSED~~ ORDER GRANTING
) MOTION FOR ATTORNEYS'
) FEES, EXPENSES, AND
) INCENTIVE COMPENSATION

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10 Plaintiffs in this class action have moved for an award of attorneys’ fees, expenses,
11 and incentive compensation to the three named class representatives. DE 225. From a class
12 of over 2.9 million persons, the only objections to the motion were filed by Maria Wong and
13 Maria Juarez, DE 235, Mike and Evie Bitondo, DE 241-1, Ex. F, and Virgil and Darlene
14 Hill, DE 241-1, Ex. F. The Court held a hearing on the motion on November 16, 2012
15 (none of the objectors appeared), took the matter under submission, and later deferred ruling
16 until a “plan for equitable distribution of the settlement proceeds has been adduced and
17 finalized.” DE 246. Such a plan has been adduced and finalized and the Court now
18 overrules all objections and GRANTS the motion.

19 I. ATTORNEYS’ FEES

20 In a class action, an attorneys’ fee award to class counsel must be “fair, reasonable,
21 and adequate.” *Staton v. Boeing Co.*, 327 F.3d 938, 963–64 (9th Cir. 2003). Courts usually
22 base the fee award on a percentage of the fund recovered for the class but then cross-check
23 the reasonableness of the percentage to be awarded by reviewing the lodestar multiplier.
24 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit uses a
25 25% baseline in common fund class actions, and “in most common fund cases, the award
26 exceeds that benchmark,” with a 30% award the norm “absent extraordinary circumstances
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1 that suggest reasons to lower or increase the percentage.” *In re Omnivision Techs. Inc.*, 559 F.
2 Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) (quotation omitted).

3 After considering the evidence and all of the pertinent factors set forth in *Staton*,
4 *Vizcaino*, and subsequent cases, the Court finds Class Counsel’s \$15 million fee request to be
5 fair, adequate, and reasonable under both the percentage method and the lodestar cross-check.
6 The requested \$15 million award is 27.3% of the \$55 million common fund, if the non-cash
7 component of the fund is valued at retail. Even if the product component of the fund is
8 discounted by 20% off Quixtar’s retail prices, in light of Plaintiffs’ allegations of overcharges,
9 *see In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me.
10 2003) (valuing products at 20% below retail), the requested fee would be 29.5% of the fund.
11 These amounts are reasonable even without consideration of the value of injunctive relief.

12 The court may properly consider the value of injunctive relief obtained as a result of
13 settlement in determining the appropriate fee. *See Staton*, 327 F.3d at 968 (injunctive relief
14 may be a “relevant circumstance” in determining what percentage of the common fund class
15 counsel should receive as attorneys’ fees). Here, the settlement contains substantial injunctive
16 relief. *See* DE 224-1, Goddard Decl. ¶ 9 (injunctive relief in settlement is “even more valuable
17 than the substantial economic relief.”) It is undisputed that the injunctive relief has substantial
18 value. Accordingly, the injunctive relief elements of the settlement constitute further support
19 for the reasonableness of the fee award.

20 The reasonableness of this fee is confirmed by the lodestar cross-check, which results
21 in a multiplier of less than 2.20, DE 243-1 ¶ 7, well within the range of reasonableness. *See*
22 *Vizcaino*, 290 F.3d at 1052-54 (approving 28% fee that resulted in a 3.65 multiplier); *Milliron*
23 *v. T-Mobile USA*, 423 F. App’x 131, 135 (3d Cir. 2011) (“we have approved a multiplier of
24 2.99 in a relatively simple case”); *In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, No.
25 C-08-4966 SC, 2012 WL 1414092, at *5 (N.D. Cal. April 23, 2012 (awarding counsel “more
26 than 2.88 times its lodestar amount”); *Been v. O.K. Industries, Inc.*, No. CIV-02-285-RAW,
27 2011 WL 4478766, at *11 (E.D. Okla. 2011) (citing a study “reporting average multiplier of

1 3.89 in survey of 1,120 class action cases” and finding that a multiplier of 2.43% would be
2 “per se reasonable”).

3 Accordingly, Class Counsel’s request for a \$15 million fee award is GRANTED, with a
4 reduction of \$16,000 in accordance with the Court’s prior order, DE 275 at 2.

5 **II. EXPENSES**

6 Class Counsel is entitled to recover its “out-of-pocket expenses that would normally be
7 charged to a fee paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Class
8 Counsel has submitted adequate support for \$666,525 in expenses they incurred over the past
9 seven years for which reimbursement is sought. No party has objected to reimbursement of
10 any of these expenses, and the motion for reimbursement is GRANTED.

11 **III. INCENTIVE COMPENSATION**

12 “Incentive awards are fairly typical in class action cases ... and are intended to
13 compensate class representatives for work done on behalf of the class, to make up for financial
14 or reputational risk undertaken in bringing the action, and, sometimes, to recognize their
15 willingness to act as a private attorney general.” *Rodriguez v. West Publ’g Co.*, 563 F.3d 948,
16 958-59 (9th Cir. 2009) (internal citation omitted). *See Van Vranken v. Atl. Richfield Co.*, 901
17 F. Supp. 294, 299-300 (N.D. Cal. 1995) (\$50,000 award to named plaintiff). It is undisputed
18 that each of the three class representatives spent over two hundred hours of time assisting
19 counsel, reviewing documents, meeting witnesses, attending hearings and mediation sessions,
20 and doing additional work over the seven year course of this litigation. In view of the
21 evidence submitted and the pertinent law, the request for awards of \$20,000 to each class
22 representative is GRANTED.

23 **IV. CONCLUSION**

24 In view of the foregoing, the Escrow Agent is AUTHORIZED and DIRECTED to pay
25 the following amounts from the Cash Fund:

- 26 • \$15,000,000 for attorneys’ fees, minus \$16,000 reduction per prior order, for a total
27 attorneys’ fee of \$14,984,000 to Class Counsel

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- \$666,525 in expenses to Class Counsel
- \$20,000 to plaintiff Jeff Pokorny
- \$20,000 to plaintiff Larry Blenn, and
- \$20,000 to plaintiff Kenneth Busiere.

These amounts should be paid to a bank account designated by Boies Schiller & Flexner LLP (“BSF”). BSF shall be responsible for the distribution of all funds to the appropriate parties.

DONE AND ORDERED this 18 day of July, 2013.



UNITED STATES SENIOR DISTRICT JUDGE