IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SARA E. EPPARD, *et al.*,

Plaintiffs,

vs. **Civil Action 2:09-CV-234**
Judge Smith
Magistrate Judge King

VIAQUEST, INC., *et al.*,

Defendants.

OPINION AND ORDER

With the agreement of the parties, this matter is before the undersigned on the issue of the amount of attorney's fees to be paid to class counsel. *Plaintiffs' Motion for Attorneys' Fees and Costs*, Doc. No. 62 ("*Plaintiff's Motion*"); *Defendants' Brief on the Issue of Plaintiffs' Attorneys' Fees*, Doc. No. 61 ("*Defendants' Brief*").

I. BACKGROUND

Plaintiffs brought this action on behalf of themselves and a class of employees and beneficiaries of the ViaQuest, Inc. Employee Benefits Plan alleging that defendants violated ERISA, 29 U.S.C. §1001, *et seq.*, by, *inter alia,* failing to pay valid medical claims. The parties thereafter agreed to terms of settlement and sought the Court's approval of that agreement. *Joint Motion to Approve Settlement Agreement*, Doc. No. 51 ["*Joint Motion to Approve*"].

The Court preliminarily approved the parties' stipulated settlement, certified a settlement class, directed that notice be given to the class and scheduled a fairness hearing. *Order of Preliminary Approval of Settlement, Certification of Settlement Class and Appointment of Class Counsel*, Doc. No. 52 ["*Order of Preliminary*

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Approval"]. On August 30, 2010, the undersigned conducted a fairness hearing; no objections to the proposed settlement were raised and no members of the class appeared at the hearing. *See Order*, Doc. No. 54; *Report and Recommendation*, Doc. No. 57. Thereafter, the Court approved the parties' proposed final order and judgment approving settlement. *Order*, Doc. No. 58; *Report and Recommendation*, Doc. No. 57.

Pursuant to the parties' settlement agreement, payment of the class members' outstanding medical claims will be satisfied as of November 1, 2010, and any unpaid claims will be personally guaranteed by Richard D. Johnson, president of defendant companies. *Settlement Agreement and Release and Waiver of All Claims*, Doc. No. 52-1, ¶¶ 1-6 ("*Settlement Agreement*"). Defendants also agreed, *inter alia*, to pay class counsel's reasonable attorney's fees in an amount to be determined by the undersigned. *Id.* at ¶ 14. The parties agreed to conduct no discovery, nor would they present any evidence, other than the itemization of plaintiffs' counsel's fees. *Id.* Their time records reflect a total amount of $74,566.50 in attorneys' fees, including ten hours preparing *Plaintiffs' Motion* and twenty hours for anticipated future time to meet obligations to the class. *Plaintiffs' Motion*, p. 11; *Declaration of Danny L. Caudill in Support of Plaintiff's* [sic] *Motion for Fees and Costs*, attached thereto ("*Caudill Declaration*"), and *Exhibit 1*, attached to *Caudill Declaration*.

After the parties had filed memoranda supporting their respective positions on the issue of fees, the undersigned heard oral argument on October 21, 2010. *Order*, Doc. No. 60; *Minute Entry*, Doc. No. 64. This matter is now ripe for resolution.

II. DISCUSSION

A. Applicable Method of Calculating Fees

As noted *supra*, the parties have agreed that defendants shall pay

to class counsel "reasonable" attorney's fees in an amount to be determined by the undersigned. However, the parties dispute the method of calculating these fees and what amount is "reasonable." Plaintiffs contend that a percentage method, which awards a percentage of a "common fund," is the preferred method of calculating fees. Plaintiffs specifically argue that the "common fund" in this case totals $1.1 million, which represents the total amount of money that accrued to the benefit of class members. In advancing this argument, class counsel acknowledges that there is no separate sum of money, *i.e.*, no separate fund, that has been specifically set aside for class members. Instead, plaintiffs referred to a figure appearing in defendants' motion for summary judgment, Doc. No. 28, in which defendants estimated the total amount of unpaid class claims as of August 31, 2009 to be $1.1 million. *Plaintiffs' Motion*, p. 6 n.2. Plaintiffs further argue that twenty percent (20%) of the recovered funds is an appropriate percentage to award because (1) it is within the percentage range typically awarded, and (2) it is reasonable after considering, *inter alia*, the class benefits secured, the complexity of the case and class counsel's litigation skill. Under plaintiffs' method of calculation, class counsel would be entitled to fees in the amount of $220,000.00, which is equal to twenty percent (20%) of the estimated $1.1 million of unpaid class claims. *Id.* at 6.

Defendants, while not disputing class counsel's hourly rate, argue that a fee in the range of $40,000.00 to $50,000.00 is reasonable. *Defendants' Brief.* In advancing this argument, defendants contend that a lodestar method of calculating fees, *i.e.*, where the number of hours expended is multiplied by a reasonable hourly rate, is the preferred method in a case such as this.

Defendants specifically contend that a fee enhancement,[1] reserved only for rare and exceptional cases, is unreasonable here.

Defendants' arguments are well-taken. First, review of other cases in this circuit show that settlements of class actions that involve a common fund typically include a defined sum of money, agreed upon by the parties and identified in the settlement agreement. *See Rawlings v. Prudential-Bache Prop., Inc.*, 9 F.3d 513, 515 (6th Cir. 1993) (identifying an agreed-upon common fund of $3.9 million); *In re Cardinal Health, Inc. Sec. Litigation*, 550 F. Supp.2d 751, 752 (S.D. Ohio 2008) (noting that class action settled for the specific sum of $600 million); *In re Broadwing, Inc.*, 252 F.R.D. 369, 373, 379 (S.D. Ohio 2006) (noting that the settlement includes an $11 million cash fund).

In the case *sub judice*, however, there was no defined sum of money set aside for the benefit of class members in a separate fund, *i.e.*, no common fund was established pursuant to the parties' agreement. As discussed *supra*, the plain language of the *Settlement Agreement* does not reflect the parties' agreement for a $1.1 million payment into a separate fund. *Id.* at ¶¶ 1-6. Instead, the *Settlement Agreement* simply provided that defendants would pay class members' previously unpaid claims, whatever that amount might ultimately prove to be. *Id.* Indeed, during oral argument class counsel conceded that there was no separate account with a sum certain set aside for the benefit of class members, although class counsel argued that that fact is immaterial. Moreover, the $1.1 million figure adopted by plaintiffs was based on an interim number mentioned in passing, without evidentiary support, in defendants' motion for summary judgment. *Defendants' Motion for Summary Judgment*, Doc. No. 28, at 7. However,

[1]This issue is addressed *infra*.

counsel offers no persuasive explanation or authority that a figure chosen arbitrarily from defendants' motion is a sufficient basis upon which to calculate a reasonable attorney's fee. Under these circumstances, the Court concludes that a randomly selected figure referenced, without evidentiary support or documentation, in a motion filed more than a year before the *Settlement Agreement* was approved does not convert a general agreement to pay medical claims in an unspecified amount into a "common fund" of $1.1 million. Accordingly, the Court is persuaded that the lodestar method of calculation is preferable to plaintiffs' proposed calculation of fees based on a percentage of an arbitrarily selected amount.

Second, even if this were a common fund case, this Court nevertheless has the discretion to award fees based on the lodestar calculation method. *See, e.g.*, *Schwartz v. Gregori*, 160 F.3d 1116, 1120 (6th Cir. 1998) (stating that, under Section 1132(g) of Title 29,[2] a district court has "broad discretion" when awarding attorney's fees in ERISA cases); *Rawlings*, 9 F.3d at 516-17. In *Rawlings*, for instance, the United States Court of Appeals for the Sixth Circuit approved the district court's award of attorney's fees based on a lodestar analysis even though that case indisputably involved a common fund. *Id.* In doing so, the Sixth Circuit expressly noted that the district court "recognized that it had a choice between the two methods [lodestar analysis and the percentage of fund method]." *Id.* at 517. *See also Plummer v. Hartford Life Ins. Co.*, No. C-3-06-094, 2007 U.S. Dist. LEXIS 18189, at *8 (S.D. Ohio Mar. 15, 2007) ("Federal courts generally follow the 'lodestar' approach when assessing the reasonableness of the amount of attorney's fees requested in ERISA

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[2]"In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

cases.") (citations omitted). Accordingly, even in the context of a common fund case, applying a lodestar method to calculate fees falls within a district court's discretion.

Indeed, the United States Supreme Court has recognized several benefits to applying a lodestar method. *See Perdue v. Kenny*, __ U.S. ___, 130 S.Ct. 1662, 1672 (2010). For example, using "prevailing market rates in the relevant community[,]" the lodestar method awards an amount that the prevailing attorney would likely have earned from a client paying an hourly attorney rate in a comparable case. *Id.* (citations and internal quotation marks omitted). In addition, the lodestar approach is "readily administratable." *Id.* (citations and internal quotation marks omitted). Finally, this method provides an "objective" calculation, which "produces reasonably predictable results." *Id.* (citations and internal quotation marks omitted). Indeed, the lodestar approach has "achieved dominance in the federal courts" and has "become the guiding light of our fee-shifting jurisprudence." *Id.* (quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (1984)) (internal quotation marks omitted). Accordingly, the Court concludes that the lodestar analysis is the proper method of determining a reasonable attorney's fee in this case.

B. Application

In making its determination, the Court's "'primary concern in an attorney fee case is that the fee awarded be reasonable,' that is, one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (quoting *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999)).

1. Reasonable hourly rate

"The starting point for determining the amount of a reasonable

attorney fee is the 'lodestar' amount, which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 551-52 (6th Cir. 2008). In making this determination, the Court "should initially assess the '*prevailing market rate in the relevant community*.'" *Adcock-Ladd*, 227 F.3d at 350 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (emphasis in original)). The prevailing market rate is that rate which "lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record[.]" *Id.* (citing *Hudson v. Reno*, 130 F.3d 1193, 1208 (6th Cir. 1997)).

As an initial matter, the Court notes that defendants do not object to class counsel's hourly rates. Specifically, during oral argument, defense counsel represented that he does not dispute counsel's rates. The Court further observes that class counsel's declaration and time records do not identify a single hourly rate for the hours billed. *See Caudill Declaration* and *Exhibit 1*, attached thereto. Instead, the records list multiple rates for a number of individuals. *Exhibit 1*. During oral argument, class counsel admitted that the total amounts billed reflect a "blended" hourly rate, which apparently includes the hourly rates of those several individuals. *See also Exhibit 1*.

Class counsel's time records establish a total of 311.20 hours expended during the course of this litigation and a total fee of $67,216.50, *Exhibit 1*, which reflects a blended hourly rate of approximately $216.00.[3] A survey of other awards of attorney's fees in

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[3]Class counsel seeks an additional 30 hours (10 hours spent on the motion for fees and 20 hours for anticipated future hours), which would bring the total number of hours to 341.20. *See Plaintiffs' Motion*, p. 11. These 30 hours would bring the total amount sought to $74,566.50. *Id.* Counsel,

ERISA cases in this district would suggest that this hourly rate, while somewhat lower than some hourly rates, is not inconsistent with previously approved hourly rates. *See*, *e.g.*, *Bowers v. Hartford Life and Accident Ins. Co.*, Case No. 2:09-cv-290, *Opinion and Order*, Doc. No. 39 (S.D. Ohio October 19, 2010) (finding that an hourly rate of $350 was reasonable); *Weidauer v. Broadspire Servs.*, No. C-3-07-097, 2009 U.S. Dist. LEXIS 4167, at *26 (S.D. Ohio Jan. 21, 2009) (approving an hourly rate of $300.00); *Kauffman v. Sedalia Med. Ctr., Inc., Profit Sharing Plan and Trust*, No. 2:04-CV-543, 2007 U.S. Dist. LEXIS 9572, at *11 (S.D. Ohio Feb. 9, 2007) (approving rates of one attorney at $210.00 to $235.00 per hour and another attorney at $300.00 to $325.00 per hour); *Plummer*, 2007 U.S. Dist. LEXIS 18189, at *8 (finding that an hourly rate of $175.00 and $200.00 for two different attorneys and an hourly rate of $85.00 for paralegal time was reasonable).[4] Accordingly, the Court concludes that an hourly rate of $216.00 is reasonable.

2. Hours expended

As noted *supra*, class counsel seeks to recover payment for a total of 341.20 hours, which includes 10 hours expended in connection with the issue of attorney's fees and 20 hours anticipated future time to meet the "continuing obligations" to the class members.

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however, does not identify which individual worked on *Plaintiffs' Motion* or who will meet future "continuing obligations to the class[,]" *i.e.*, there is no hourly rate identified to be applied to these 30 hours. *Id.* The Court notes that dividing the total amount identified by counsel, $74,566.50, by the total number of additional hours, 341.20, results in an hourly rate of approximately $219.00, which is approximately the same as the $216.00 blended rate identified above.

[4]The Court notes that plaintiffs have submitted the *Affidavit of John S. Marshall*, ¶¶ 10, 14, attached as *Exhibit I* to *Plaintiff's Motion*. However, because the parties previously agreed that they would conduct no discovery and submit no evidence on the issue of fees, other than an itemization of fees sought*, Settlement Agreement* ¶ 14, the Court will not consider this affidavit.

Defendants do not object to the 10 hours spent on the issue of attorney's fees. However, defendants do object to the total number of hours submitted by class counsel, arguing that a total of hours reflecting a fee in the range of $40,000 to $50,000 (rather than nearly $70,000) is reasonable. Specifically, defendants contend that the Court should subtract the following hours: (1) hours spent from approximately September 24, 2009 to the present because the parties had reached an agreement in principle at that time (approximately $25,000); (2) hours in connection with entries where portions of the description have been redacted (approximately $4200.00); (3) hours spent preparing a motion for preliminary injunction and temporary restraining order that was never filed (approximately $3000.00); and (4) hours spent preparing discovery papers that were not pursued (approximately $750.00). *Defendants' Brief*, pp. 3-5. Defendants also complain that many entries appear to be duplicative, *i.e.*, several individuals worked on the same matter, and that the description of many entries are vague. *Id.* at 6. During oral argument, defense counsel further objected to the proposed 20 hours in connection with anticipated future time. Specifically, defense counsel argued that 20 hours is out of proportion to the rest of the itemized hours, which establish that class counsel expended a total of approximately 9 hours in all of 2010 on this litigation.

In addressing defendants' first objection, the Court disagrees that class counsel is not entitled to legal fees for time spent on this litigation since September 24, 2009. The Court agrees with class counsel's position that this matter was not fully resolved in September 2009. These unresolved matters, including preparation of the parties' agreement and notice to the class members, reasonably required class counsel's time and attention. Therefore, class counsel

is entitled to payment for hours incurred after September 24, 2009.

Second, the Court also rejects defendants' argument that entries with redactions should be subtracted from class counsel's recovery. In reviewing the time records and the representations of class counsel during oral argument, the Court notes that these redactions simply removed names of certain individuals. These redactions do not prevent the Court from determining whether the activity was reasonable or necessary. Accordingly, the Court concludes that class counsel is entitled to compensation for the work reflected in the entries containing redactions.

Third, the Court is also not persuaded that it should subtract the hours expended on motions that were not filed and discovery that was not pursued. In determining whether the number of hours expended were reasonable,

> [t]he question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Wooldridge v. Marlene Industries Corp., 898 F.2d 1169, 1177 (6th Cir. 1990). In reviewing the records, the Court cannot say that a reasonable attorney would not have viewed these motions and discovery as reasonable and necessary at the time that they were prepared. Accordingly, class counsel is entitled to compensation for this work.

Third, after reviewing the time records, the Court does not believe that any of the entries reflect work that is improperly billed as "duplicative,"[5] "vague" or "ministerial." Accordingly, the Court will not subtract any time for any of these reasons.

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[5]Indeed, the Court observes that it is not unusual for more than one attorney to work on the same motion or brief.

However, the Court agrees with defendants that 20 hours for anticipated future time is excessive when viewed in light of the number of hours (approximately 9 hours) expended in all of 2010. *See Exhibit 1*. Therefore, the Court will reduce the number of anticipated future time from 20 hours to 10 hours. *Id*.

Accordingly, the Court concludes that class counsel is entitled to payment of fees for 331.20 hours. When this total number of hours is multiplied by an hourly rate of $216.00, the Court concludes that a lodestar award of attorney's fees in the amount of $71,539.20 is reasonable.

3. Fee enhancement

Class counsel argues, however, that this Court should award an amount in excess of the lodestar figure for the following reasons:[6] (1) class counsel secured valuable benefits for the class; (2) an enhancement of the lodestar would further the policy of encouraging attorneys to take on such cases; (3) services were rendered on a contingency basis; (4) a multiplier of 2.95 falls within the multipliers applied in cases within this circuit; (5) complex legal claims and theories were involved; and (6) class counsel demonstrated invaluable skill throughout the litigation. *Plaintiffs' Motion*, pp. 11-15. Defendants disagree, contending that a fee enhancement should not be permitted in this case.

Defendants' argument is well-taken. There exists a "strong presumption that the lodestar figure is reasonable" and therefore fee enhancements are awarded only in "rare" and "exceptional"

[6]Although class counsel offers these reasons in support of its argument that the Court should apply a calculation of attorney's fees that utilizes a percentage of a common fund, an argument that this Court rejected *supra*, the Court also interprets these arguments to support a request for an enhancement of the lodestar award.

circumstances. *See*, *e.g.*, *Perdue*, 130 S.Ct. at 1673 (internal citations and quotation marks omitted). A court "may" find an enhancement appropriate when the following factors are present: (1) "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value"; (2) the requesting attorney provided "an extraordinary outlay of expenses and the litigation is exceptionally protracted"; and (3) "an attorney's performance involves exceptional delay in the payment of fees." *Id.* at 1674-75. An attorney seeking a fee enhancement must provide "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel[.]'" *Id.* at 1674 (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

Here, the Court is not persuaded that this case presents such "rare" and "exceptional" circumstances as to warrant an enhancement. First, class counsel has failed to convince this Court that the lodestar calculation fails to adequately measure class counsel's true market value. As discussed *supra*, the lodestar amount in this case falls within the range of other lodestar awards in this district. Second, class counsel's billing record establishes that there was no "extraordinary outlay of expenses." *Id.* Indeed, the billing record reflects that costs in this case totaled only $896.36. *Exhibit 1*. Similarly, this litigation was not "exceptionally protracted." Finally, because this case was filed less than two years ago, it cannot be said that there has been an "exceptional delay in the payment of fees" to class counsel. *Perdue*, 130 S.Ct. at 1675. Accordingly, the Court concludes that the lodestar award in this case is reasonable and serves its intended purpose, *i.e.*, "one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Adcock-Ladd*, 227 F.3d at 349.

C. Costs

Class counsel seek reimbursement of costs in the amount of $896.36. *Exhibit 1*. It does not appear that defendants oppose this request. After review of these costs, *Exhibit 1*, the Court concludes that the requested costs are reasonable and should be reimbursed.

WHEREUPON, the Court concludes that class counsel is entitled to an award of $72,435.56, which includes an award of attorney's fees in the amount of $71,539.20 and payment of costs in the amount of $896.36.

November 2, 2010

s/Norah McCann King
Norah McCann King
United States Magistrate Judge