

The Honorable BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GENE ACHZIGER, individually and as the
representative of all persons similarly situated,

Plaintiff,

vs.

IDS PROPERTY CASUALTY INSURANCE
COMPANY,

Defendant.

NO. 3:14-CV-05445 BHS

MOTION FOR AWARD OF
ATTORNEY’S FEES/COSTS &
CLASS REPRESENTATIVE
INCENTIVE AWARD

Hearing Date: June 22, 2020

I. MOTION/RELIEF REQUESTED

Plaintiff GENE ACHZIGER submits the following unopposed motion for an award of attorney’s fees and costs, and an incentive award to Mr. Achziger as the Class Representative consistent with the Stipulation of Settlement which was preliminarily approved by the Court on January 14, 2020.

While the approval of the motion will not be considered until the Final Approval hearing date, Plaintiff and his counsel believe that best practice is that the instant motion be of record prior to the May 12, 2020 deadline for objections to the proposed settlement. The relief requested in this motion is consistent with the Stipulation of Settlement agreed to by the parties and Defendant does not oppose Plaintiff’s request: it would award \$1,303,150.00 to Class Counsel for attorney’s fees, award \$50,065.46 to Class Counsel

1 in reimbursement of out-of-pocket expenses, and award an incentive fee to Plaintiff
2 Gene Achziger of \$10,000.00. To date no objections have been received.¹

3 **II. PROCEDURAL AND FACTUAL BASIS FOR MOTION**

4 This matter was originally filed in State Superior Court on April 4, 2014 and was
5 removed by IDS Property Casualty Insurance Company (“IDS”) on June 3, 2014 under
6 CAFA. (Dkt#1). The parties conducted extensive discovery in preparation of Plaintiff’s
7 class certification motion. A Motion for Class Certification and supporting factual
8 showing was filed on March 18, 2015 (Dkt#26 & #27; Dkt# 63, #82). IDS then deposed
9 Plaintiff’s witnesses, and in turn Plaintiff deposed the witnesses put forward by IDS in
10 opposition to Class Certification. Both sides filed multiple motions to exclude witnesses.
11 Plaintiff’s Reply (Dkt#64) and extensive Reply exhibits (Dkt#62), along with oppositions
12 to the motions to exclude/strike Plaintiff’s experts were filed on October 23, 2015.
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14 On January 27, 2016 this Court denied the parties’ respective motions to
15 exclude/strike and requested further briefing on Typicality. (Dkt#83). On March 23,
16 2016 this Court conducted a hearing limited to the typicality issue, and then on April 1,
17 2016 denied Class Certification. (Dkt#91).

18 The parties prepared the case for an individual trial, and Plaintiff moved for
19 partial summary judgement that Diminished Value (“DV”) was a covered loss under his
20 UMPD coverage. On October 14, 2016 the Court granted partial summary judgment,
21 finding coverage. (Dkt#109).
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24 _____
25 ¹ Consistent with the templates created by the Federal Judicial Center, the notice mailed to all Class
26 members discloses the fee and cost request that would be made, as well as the request for a \$10,000
27 incentive payment. As of the most recent (May 1, 2020) report from the notice administrator, 1,479 claims
have been received, with one opt-out, and no objections.

1 The parties then prepared for trial on Plaintiff's individual claims. Prior to trial,
2 the parties begin negotiations toward a resolution of Plaintiff's individual claims while
3 allowing an appeal of the class certification decision. After several rounds of
4 negotiations, IDS moved to enforce what it contended was the parties' agreement via
5 summary judgement. (Dkt#117). Plaintiff opposed the motion, contending that no
6 enforceable settlement was reached. (Dkt#121-122). On November 9, 2017 the Court
7 granted summary judgment to IDS. (Dkt#129). On December 11, 2017 "having
8 previously denied Plaintiff's Motion for Class Certification (Dkt#91)" on the unresolved
9 claims, the Court entered an order of dismissal with prejudice on all claims. (Dkt#131).
10 After preparation of the record and full briefing, on May 9, 2019, the Ninth Circuit
11 reversed the Court's order denying Class Certification. *Achziger v. IDS Prop. Cas. Ins.*
12 *Co.*, No 17-35996, 772 Fed. App'x 416 (9th Cir. 2019). The 9th Circuit then denied *en*
13 *banc* review.
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16 Upon remand, the parties eventually engaged in extensive settlement negotiations
17 with the assistance of mediator Louis D. Petersen, including a full day mediation on July
18 17, 2019. These negotiations only concluded with a deal being reached on December 21,
19 2019. *See* (Dkt#153). The parties' written settlement agreement was signed on January
20 9, 2020.
21

22 The party's discussions followed the settlement structure used first used in
23 *Moeller v. Farmers*, and the amounts of any fee (and incentive award) that would not be
24 contested were not discussed other than through, and at the direction of, the mediator
25 Louis D. Peterson, and were not finalized until all other material terms were addressed.
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1 *Id.* Through the mediator, the parties eventually agreed that a fee of the “benchmark”
2 25% fee, and an incentive payment of up to \$10,000, would not be opposed by IDS.

3 On January 14, 2020, this Court granted preliminary approval. The claims
4 deadline is August 6, 2020, with the deadline to opt-out or submit objections to the
5 settlement being May 12, 2020.

6 The Stipulation of Settlement preliminarily approved by the Court provides in
7 part at paragraph 59 as follows:

8 59. Attorneys' fees and costs have been fully negotiated by Class Counsel
9 and Defendant, and were negotiated and discussed only through the
10 Mediator Lou Peterson. Class Counsel will submit their fee and cost
11 request, and any request for an incentive payment for the Plaintiff for his
12 service as Class Representative, to the Court, and Defendant agrees not to
13 oppose a fee request that does not exceed 25% of the amount referred to in
Paragraph 48 above (i.e. of the “Updated Settlement Fund”), or a Class
Representative fee for Plaintiff Gene Achziger of \$10,000.00., or a cost
request of up to \$50,065.46.

14 (Dkt#149, Exh 1). The proposed incentive award to Mr. Achziger, \$10,000.00, is
15 further set forth at paragraph 49 of the Stipulation of Settlement.

16 The relief requested in this motion follows the terms of the parties’
17 stipulation. Notice of the attorney’s fee/cost request, and the requested incentive
18 award is detailed in Section 11 of the Court-approved Notice disseminated to the
19 Class Members, with a copy of the Notice being on the website constructed by the
20 Claims Administrator at <https://www.achzigerclasssettlement.com/documents>.

22 III. ARGUMENT

23 A. *Attorney’s Fee Requests & the “Common Fund Doctrine.”*

24 Under *Alyeska Pipeline Service Co. v. Wilderness Soc’y*, 421 U.S. 240, 273
25 (1975), the common fund exception to the American Rule permits class counsel and
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1 representatives to be compensated for their efforts that create a common fund for the
2 benefit a class of litigants. *See also Manual for Complex Litigation, Fourth*, §14.11 at
3 185 (“*Manual*”). The “common fund” exception “rests on the perception that persons
4 who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched
5 at the successful litigant’s expense.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
6 (1980). Since the decisions in *Trustees v. Greenough*, 105 U.S. 527, 537 (1881), and
7 *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 124 (1885), the courts have
8 recognized consistently that a litigant or a lawyer whose efforts create a common fund for
9 the benefit of persons other than himself or his/her client is entitled to a reasonable
10 attorneys’ fee, plus expenses from the fund as a whole. *Boeing*, 444 U.S. at 478; *Mills v.*
11 *Electric Auto-lite Co.*, 396 U.S. 375, 395 (1970).

12
13 “Absent extraordinary circumstances, the unrepresented claimants should pay for
14 the attorneys’ services in proportion to their benefit from them – that is, the
15 unrepresented claimants should pay a percentage of the reasonable value of the attorneys’
16 services to the class equal to their percentage of the class’ recovery.” *Lindy Bros*
17 *Builders, Inc., v. American Radiator & Standard Sanitary Corp.* 487 F. 2d 161, 169 (3d
18 Cir. 1973). The equitable powers of the courts over the fund created by the litigation
19 allows a court to prevent inequity by assessing attorney’s fees against the entire fund,
20 thus spreading fees proportionately among those benefited by the suit. *Boeing*, 444 U.S.
21 at 478; *Mills*, 396 U.S. at 394.

22 23 24 ***B. Washington & Ninth Circuit Case Law***

25 Because Washington law governed Plaintiffs’ substantive claims in this matter, it
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1 also governs the award of fees. *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470,
 2 1478 (9th Cir. 1995) (“Existing Ninth Circuit precedent has applied state law in
 3 determining not only the right to fees, but also in the method of calculating the fees” and
 4 citing to similar rulings in other circuits, holding that “calculation of the amount of the
 5 fee is bound up in the substantive state right.”). Under Washington law, the percentage-
 6 of-recovery approach, not the lodestar method, is used in calculating fees in common
 7 fund cases. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993) (holding
 8 that in a common fund case, "the size of the recovery constitutes a suitable measure of the
 9 attorney's performance"). Because the claims at issue arise under Washington Law,
 10 Plaintiff's request focuses on the “percentage of the fund” approach.²

11
 12 *Bowles* states that "in common fund cases, the 'benchmark' award is 25 percent of
 13 the recovery obtained," with 20-30% as the usual range. *Bowles*, 121 Wn.2d at 72-73.
 14 Ninth Circuit cases echo this approach. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
 15 1047-48, 1051, n.6 (9th Cir. 2002) (holding that under *Mangold*, Court would apply
 16 *Bowles*, noting that 20-30% range was typical, approving 28% fee in “megafund” case).³

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 20 ² In this matter, as detailed in Dkt#153, Plaintiff's counsel's lodestar through March 2020 is calculated at
 21 \$797,814.00 (which is time billed for attorneys only). Under Ninth Circuit law, where (unlike here) Federal
 22 claims are at issue, the district court has discretion to choose either the percentage-of-the-fund or the
 23 lodestar method. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 129596 (9th Cir. 1994)
 24 ("WPPSS").

25 ³ The *Vizcaino* Court further held that a common fund percentage fee that was 3.65 times lodestar further
 26 supported the fee, noting that while a cross-check *was not necessary*:

27 in the case of an early settlement, the lodestar calculation may convince a court that a lower
 percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher
 percentage when litigation has been protracted. Thus, while the primary basis of the fee award
 remains the percentage method, the lodestar may provide a useful perspective on the
 reasonableness of a given percentage award.

Vizcaino, 290 F.3d at 1051. Given that this was the antithesis of an “early settlement”, the requested fee is
 entirely reasonable under a cross-check.

1 Here, the size of the common fund, \$5,212,600.00, is the measure of Class
2 Counsel’s success and performance. Notably, the fee agreed to by IDS – based upon
3 negotiations involving a well-respected and experienced mediator – is the benchmark
4 25% of the fund fee.

5 As noted commentators observe:

6 [o]ne of the primary advantages of the POR method is that it is thought to
7 equate the interests of class counsel with those of the class members and
8 encourage class counsel to prosecute the case in an efficient manner.

9 Heubert B. Newberg & Alba Conte, *4 Newberg on Class Actions* §14:06, at 566-67 (4th
10 Ed. 2002). The Settlement clearly evidences the efficient manner in which Class Counsel
11 brought an end to this litigation, and it addresses equally both the Class’ interest in
12 receiving an immediate cash payment and Class Counsel’s interest in receiving a fee for
13 their efforts in creating a common fund. Class Counsels’ request of \$1,303,150.00 for
14 fees (25% of the common fund) and \$50,065.46 in costs is reasonable, without
15 considering the costs of notice and Claims administration which was paid by Defendant
16 on top of the settlement fund.

17
18 As stated above, the Washington Supreme Court, in *Bowles*, recognized 25% as a
19 “benchmark” for the common fund as a reasonable fee. *Bowles*, 847 P.2d. at 451. Ninth
20 Circuit authority such as the Court in *WPPSS* recognizes ranges between 20% and 40%.
21 *See e.g. In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1297. Other
22 examples of the range of fee awards include *In re Pacific Enterprises Sec. Lit.*, 47 F.3d
23 373, 379 (9th Cir. 1995) (affirming an award equal to 33% of the common fund); *In re*
24 *Activision Sec. Lit.*, 723 F.Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8%);
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1 *Dennings v. Clearwire Corp*, No. C10-1859JLR, 2013 U.S. Dist. LEXIS 64021 (W.D.
2 Wash. 5/3/13) (granting request for 35.78% fee).

3 ***C. The Requested Fee of 25% Is Reasonable***

4 The decision of what percentage to award in attorneys' fees in common fund
5 cases is committed to the sound discretion of the trial court. In exercising this discretion,
6 courts have recognized several factors that may assist in determining whether the fee
7 requested is reasonable. Analysis of these factors, considering the Washington Supreme
8 Court's holding in *Bowles*, provides further support that an award of \$1,303,150.00
9 (25% of the fund) is reasonable given the excellent result in this case for the Class. The
10 factors to consider include: (i) the size of the fund and the number of persons who
11 received monetary benefits; (ii) the skill and efficiency of the attorneys involved; (iii) the
12 complexity and duration of the litigation; (iv) the risks of the non-recovery and non-
13 payment; and (v) the presence or absence of substantial objections. *See Manual*, §
14 14:121 at 192.

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17 ***1) The Size of the Settlement Created and the Number of Persons Benefited***

18 The common fund created by the Settlement results in a meaningful cash award to
19 each of the Class Members who submit a valid Claim Form. The settlement fund of
20 \$5,212,600.00 is substantial, and will provide substantial payments to Class members,
21 with the payout being higher under the settlement formula for those with more severely
22 damaged vehicles. This sum is made available via a simple claims process.

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24 While the payouts to Class Members who elect to participate will be significant,
25 the amounts would still clearly be insufficient to provide the proper financial incentive
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1 for any individual class member to achieve justice in the absence of this class settlement.

2 Both the size of the class and the large amount of the common fund support Class

3 Counsel's application for fees and costs.

4 **2) *The Skill and Efficiency of the Attorneys Involved***

5 Counsel who worked on this case are experienced in class action litigation
6 generally and have decades of experience in the prosecution of consumer claims against
7 insurers and other large corporations as well. Class Counsel have litigated this case over
8 a span of now seven-years' time. The case was complex, involving substantial expert
9 issues and a successful appeal. The docket stretches to 151 items, without considering
10 the proceedings on Appeal. Counsel attempted at all times to proceed in an efficient
11 manner against skilled adversaries who obviously invested substantial resources in
12 attacking Plaintiff's common expert proof and disputing each and every issue both in this
13 Court and before the 9th Circuit.⁴

14 **3) *The Complexity of the Litigation***

15 Class Counsel submit that their overall approach and strategy for handling this
16 case played a key role in producing the settlement obtained on behalf of the Class. At
17 each stage Class Counsel gathering the evidence and arguments necessary to bring this
18 matter before this Court, and expending a considerable sum (in excess of \$50,000.00) in
19 out of pocket costs, nearly all on discovery and experts. Rather than accepting IDS' offer
20 to resolve the individual claim (or resolve only the UMPD claims) they persisted on a
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25 ⁴ As an example, IDS's expert witnesses on damages Dr. Salve was paid over \$174,000 for his work. See
26 Dkt#66 at 2. Given that Dr. Salve was only one of six "expert" witnesses put forward by IDS, the
27 expenditures by IDS were doubtlessly substantial.

1 successful appeal. Upon remand, in arm's length settlement discussions with a skilled
2 mediator, Class Counsel were able to draw not only upon their hard work in this case, but
3 also upon their experience in other diminished value litigation against other insurance
4 carriers. Thus, this factor strongly supports the requested award of fees and costs.

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6 **4) *The Risk of Non-Payment***

7 Class Counsel can personally attest that the risk of non-payment in class action
8 litigation is substantial. This case has been on-going for over six years, and Class
9 Counsel knows all too well the risk of non-payment, including numerous diminished
10 value cases (cases that were cited to this Court by IDS in opposition to Class
11 Certification) against insurance carriers pre-*Moeller III*, that for various reasons were
12 either dismissed or not certified such that Class Counsel received no payment for their
13 services *and no recovery for their extensive hard costs*.

14
15 Despite this, Class Counsel undertook the responsibility for an expert and
16 discovery-heavy class action involving an out-of-state corporate defendant financially
17 capable of fully litigating this matter through trial and appeal. Class Counsel were
18 likewise prepared to invest their time and financial resources to litigate this matter
19 through trial and subsequent appeals although the end result was far from certain.

20
21 As the Ninth Circuit has observed, “[c]ontingent fees that may far exceed the
22 market value of these services, if rendered on a non-contingent basis are acceptable in the
23 legal profession as a legitimate way of assuring competent representation for plaintiffs
24 who could not afford to pay on an hourly basis, regardless whether they win or lose.” *In*
25 *re Washington Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d at 1299. Here a 25%

1 benchmark fee includes no such premium, let alone “far exceeding” a typical fee.

2 **5) *The Presence or Absence of Substantial Objections***

3 Through the Individual Notice, Class Members have been specifically advised
4 that Class Counsel intended to request an award of fees of up to 25% of the common
5 fund, together with costs, and as of the date of this filing there have been no objections
6 and only one exclusion. Plaintiff’s Counsel will update this factor if needed.⁵

7 **D. *Incurred costs should be awarded***

8 The hard costs have totaled \$50,065.46. These include expert witness and on-line
9 research costs, travel, preparation of the appellate record, and the original filing and
10 service of process fees. This figure was also disclosed in the notice, agreed to by IDS,
11 and no objection has been received.

12 **E. *An Incentive Award to the Class Representative is Proper***

13 The Stipulation of Settlement provides that Defendants will pay the class
14 representative Mr. Achizger \$10,000.00 and the notice informed Class Members of this
15 request. Class Counsel respectfully request that the Court approve this modest incentive
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20 ⁵ Plaintiff’s counsel finally note that the fee being requested (25% of the fund) in this matter is actually a
21 lower percentage than that involved in prior materially similar matters – including multiple matters which
22 did not involve as here as substantial of proceedings. These prior awards include: *Meyer v. American*
23 *Family Mutual Insurance Company*, U.S. District Court, Western District of Washington, No. 3:14-cv-
24 05305 RBL (June 3, 2016) (30% fee); *Merrill v. PEMCO*, Pierce County Superior Court Cause No. 13-2-
25 13764-5 (Sep 23, 2015) (30% fee); and *Moeller v. Farmers Ins. Co. of Wa.*, Pierce County Superior Court
26 Cause No. 99-2-07850-6 (Dec 12, 2013) (30% fee); *Snyder v. Farmers Ins. Co. of Wa.*, Pierce County
27 Superior Court Cause No. 13-2-15638-1 (Dec 3, 2016) (30% fee); *Atkins v. National General*, Pierce
County Superior Court Cause No. 16-2-04728-4 (Mar 24, 2017)(26.5% fee); *Dawsey v. Travelers Ind. Co.*,
No. 15-cv-05188-RBL (W.D. Wa. Oct 13, 2017) (26.25% fee); *Zarelli v. Encompass Ins. Co.*, Pierce
County Superior Court Cause No., 15-2-10639-8 (Mar 10, 2017) (26.25% fee); *Lewis v. Hartford Cas. Ins.*
Co., No. 15-cv-05275-RBL (W.D. Wa. Feb 10, 2017) (26.25% fee); *Johnson v. USAA*, Pierce County
Superior Court Cause No. 14-2-10507-5 (Oct 10, 2016) (27.5% fee); *Mansker v. Farmers Ins. Co. of Wa.*,
Pierce County Superior Court Cause No. 11-2-06668-7 (Nov 14, 2014) (28% fee).

1 payment for the class representative.

2 The granting of an incentive award to a class representative lies within the Court's
3 sound discretion. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 463 (9th
4 Cir. 2000). The size of an incentive award depends on several factors, including the
5 amount of risks to the class representative, both financial and otherwise, in becoming and
6 continuing as a litigant; the time and effort expended by the representative in assisting in
7 the prosecution of the litigation or in bringing to bear added value; and any other burden
8 sustained by the representative in lending himself to prosecute an ultimate recovery of
9 those claims. *See, e.g., Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 199 (S.D.N.Y. 1997);
10 *In re Catfish Antitrust Litig.*, 939 F. Supp. 493 (N.D. Miss. 1996); *Spicer v. Chicago Bd.*
11 *Options Exch. Inc.*, 844 F. Supp. 1226, 1266 (N.D. Ill. 1993). The requested incentive
12 award is well within the range of reasonableness.
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15 IV. CONCLUSION

16 For the foregoing reasons, Class Counsel, on behalf of the Plaintiffs and Class
17 Members, respectfully request the Court to

- 18 a) AWARD an award of attorneys' fees and costs in the amount of
19 \$1,303,150 (25% of the fund);
20 b) AWARD costs of \$50,065.46; and
21 c) AWARD GENE ACHZIGER an incentive payment in the
22 amount of \$10,000.00.

23 RESPECTFULLY SUBMITTED this 7th day of May, 2020.

24 Law Offices of STEPHEN M. HANSEN, PS

25 

26 STEPHEN M. HANSEN, WSBA # 15642

Of Counsel for Class

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