

STATE OF MAINE
CUMBERLAND, ss
LOCATION: Portland

BUSINESS AND CONSUMER COURT
CIVIL ACTION
Docket No. BCD-RE-17-01

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CASCADE CORPORATION, for itself and all others similarly situated,)	FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES TO SETTLEMENT CLASS COUNSEL
)	
Plaintiff,)	
)	
v.)	
)	
SPRINT COMMUNICATIONS COMPANY L.P.,)	
)	
Defendant.)	
)	

Under Maine Rules of Civil Procedures 23 and Rule 54(b)(3), Plaintiff in this class action has moved for an award of attorneys' fees and expenses to Settlement Class Counsel. The Court makes the following findings of fact and conclusions of law in granting the motion:

Findings of Fact

1. This class-action settlement resolves a property-rights dispute that arises out of the installation of fiber-optic cable on railroad rights of way by Sprint Communications Company L.P. ("the Settling Defendants"). The claims resolved by the Settlement affect parcels of land in Maine covering 31.63 miles of rights of way throughout the state.

2. On February 28, 2017, the Court entered an order preliminarily approving the Settlement, certifying the Settlement class, and approving the form and manner of notice. On March 31, 2017, the claims administrator mailed notices to 651 current and prior property owners along railroad rights of way in Maine containing telecommunications facilities installed by the Settling Defendant, and opened a Settlement call center and website. The notice, which was posted on the website, advised in pertinent part:

The Court will decide how much Class Counsel and any other lawyers will be paid. Class Counsel will ask the Court for attorneys' fees, costs and expenses of \$103,000 The Defendant will separately pay these fees and expenses and the payment will not reduce the benefits available for the Class.

Notice ¶ 24. The Notice further advised that the Court would hold a Fairness Hearing on July 21, 2017, at which time the Court would “consider how much to pay Class Counsel.” *Id.* ¶ 27. On July 21, 2017, the Court held the final Fairness Hearing.

3. The Settlement Agreement provides in pertinent part: “Settlement Class Counsel may seek from the Court a cash award of fees and expenses from the Settling Defendant, in an amount not to exceed the Maximum Attorneys’ Fee Award, to which the Settling Defendants will not object.” Settlement Agreement § II.E.1. The Settlement Agreement defines the Maximum Attorneys’ Fee Award as \$103,000. Settlement Agreement Definitions. The Settlement Agreement further provides that “the Settling Defendants shall deposit any attorneys’ fee award approved by the Court, which shall not exceed the Maximum Attorneys’ Fee Award, into the interest-bearing escrow account established with U.S. Bank in New York, New York, no later than ten (10) days after the date on which the Order and Judgment becomes Final.” Settlement Agreement § II.E.2.

4. The escrow account established with U.S. Bank is a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B. The escrow account is maintained by U.S. Bank in New York, New York, with the Garretson Firm Resolution Group, Inc. (“GFRG”) serving as the Fund Administrator. These arrangements are consistent with the terms of an Escrow Agreement entered into as of August 26, 2011 between certain Settlement Class Counsel, U.S. Bank, and GFRG.

5. Settlement Class Counsel estimate that approximately \$230,000 in cash benefits are available for class members to claim. Administrative costs—to be paid separately by the

Settling Defendants—in creating and updating a sophisticated database to notify class members, implement the Settlement, and process claims, are estimated at an additional \$29,000. The agreed-to attorneys’ fees and non-taxable costs of \$103,000—which will not reduce benefits payable to class members—bring the total gross value of the Settlement to roughly \$362,469.

Conclusions of Law

6. Rule 54(b)(3) requires a claim for fees to be made by application and specifies the time for filing such application. Me. R. Civ. P. 54(b)(3).

7. Maine law allows recovery of attorneys’ fees when authorized by agreement of the parties. *Balkan v. Johnston*, 561 A.2d 177, 178 (Me. 1989); *Poussard v. Commercial Credit Plan, Inc. of Lewiston*, 479 A.2d 881, 883 (Me. 1984). Contractual authorization is present here under the Settlement Agreement, and the requested fee award is reasonable under Maine law following the lodestar method for awarding attorneys’ fees in class actions.

8. In determining whether a fee award is reasonable, courts in Maine perform a type of lodestar analysis, considering a range of factors derived from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *Poussard*, 479 A.2d at 884. A central consideration is the lodestar calculation of “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also Sullivan v. City of Augusta*, 625 F.Supp.2d 28, 36 (D. Me. 2009) (“The court should begin with the lodestar analysis, multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure. . . .). Other considerations include the amount involved and the results obtained; the time, labor and skill required; the difficulty of the legal issues; and awards in similar cases. *Poussard*, 479 A.2d at 884; *Sullivan*, 625 F.Supp.2d at 36 (“[T]he . . . court . . . has the authority to adjust the lodestar itself upward or downwards based on

several different factors, including the results obtained, and the time and labor required for the efficacious handling of the matter.”).

9. The overlapping nature of discovery, motions practice, research, litigation, and settlement efforts across the country for more than a decade, prevent segregating Settlement Class Counsel’s fees and expenses into a “Maine-only” category or similar categories for other states. *See* Declaration of Settlement Class Counsel Dan Millea ¶ 16; Declaration of Settlement Class Counsel Irwin Levin ¶ 22. Nonetheless, it is apparent that the Maine fee-and-expense request is amply supported by a lodestar analysis based on the time and expense incurred, and fees available, in resolution of all the state-by-state settlements of the fiber-optic-cable right-of-way litigation.

10. The total attorneys’ fees and expenses incurred by Settlement Class Counsel in the decade-plus of right-of-way litigation culminating in this Settlement, excluding local counsel fees and expenses, were just over \$60,000,000 as of March 31, 2011; that number has since increased as Settlement Class Counsel have performed substantial work in seeking approval of the settlements in courts around the country, and it will continue to do so until the settlements are fully administered. *See* Millea Decl. ¶ 17; Levin Decl. ¶ 23. Collectively, the Settling Defendants in the right-of-way litigation have agreed to pay a total of \$41,500,000 in attorneys’ fees and expenses in settlement of the forty-six state actions (and the District of Columbia) nationwide. Millea Decl. ¶ 17; Levin Decl. ¶ 23. Therefore, the incurred fees and expenses are subject to a *negative* multiplier — roughly .70 — on a nationwide basis and with a pro-rata Maine allocation.

11. A cross check based on the percentage-of-the fund approach also supports the fee-and-expense request. Under the percentage-of-the-fund method, it is appropriate to base the

percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the Settling Defendants' separate payment of attorneys' fees and expenses, and the expenses of administration. *See Boeing v. Gemert*, 444 U.S. 472, 479 (1980) ("Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.") (citation omitted).

12. Here, Settlement Class Counsel estimate that, based on the miles of rights of way covered by the Settlement, if each class member were to claim the available cash benefits, approximately \$230,469 would be paid to qualifying class members. When estimated administrative costs of \$29,000—to be borne by the Settling Defendants—and the agreed-to attorneys' fees and expenses of \$103,000—also to be paid separately by the Settling Defendants—are factored in, the gross value of the Settlement is approximately \$362,469. The \$103,000 fee-and-expense award therefore represents 28.4 percent of the fund as a whole.

13. Fee-and-expense award percentages in 44 other state settlements that have received final approval range from 18 to 30 percent. At 28.4 percent of the common fund, the fee and expense request is reasonable. *See McCormick v. Festiva Dev. Grp., LLC*, No. 2:09-CV-00365-GZS, 2011 WL 2457883, at *1 (D. Me. June 20, 2011) (approving fee of \$166,666, equal to one-third of class-action settlement fund); *Bennett v. Roark Capital Grp., Inc.*, Civil Action No. 2:09-cv-00421-GZS, 2011 WL 1703447, at *2 (D. Me. May 4, 2011) ("[G]iving due weight to all of the relevant factors, the Court believes that Class Counsel in this matter are entitled to the customary one third fee to cover their fees and costs"); *Mazola v. May Dept. Stores Co.*, No. 97CV10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("[I]n this circuit,

percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions.”).

14. Additionally, there were no objections to the fee-and-expense award. This is a factor for the Court’s consideration. *See Greenspun v. Bogan*, 492 F.2d 375, 380 (1st Cir. 1974); *In re Compact Disc*, 216 F.R.D. at 211; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (noting that objections to attorneys’ fees “do not have a direct effect on the fairness of the settlement itself” and addressing them separately (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 71 (D. Mass. 1997))). The Court-approved notice stated that, at the conclusion of the fairness hearing, counsel would seek a fee-and-expense award up to \$103,000. The notice also informed class members of their ability to object to the fee-and-expense request. No class member objected to it. The absence of objection by class members to Settlement Class Counsel’s fee-and-expense request further supports finding it reasonable.

WHEREFORE it is **ORDERED** that the motion for an award of attorneys’ fees and expenses to Settlement Class Counsel is **GRANTED**.

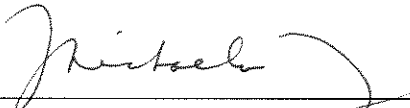
It is further **ORDERED** that the Court approves a fee-and-expense award of \$103,000 to Settlement Class Counsel,

It is further **ORDERED** that the Settling Defendants shall deposit the fee-and-expense award approved by the Court into the interest-bearing escrow account—established as a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B and as a trust under state law—with U.S. Bank in New York, New York, no later than ten (10) days after the date on which the Order and Judgment becomes Final, that any alleged or actual civil liability against the Settling Defendants for attorneys’ fees arising out of the tort claims resolved by the Maine Class Settlement Agreement approved by this Court is satisfied and extinguished through

the Settling Defendants' payment of the fee-and-expense award, and that any interest earned on the escrow account shall be recognized as gross income of the Qualified Settlement Fund; and

It is further **ORDERED** that appointment of GFRG as the Fund Administrator for the escrow account is hereby confirmed and that the escrow account shall be governed by the Escrow Agreement entered into as of August 26, 2011 between Settlement Class Counsel, U.S. Bank, and GFRG.

Date: July 21, 2017



Honorable Michaela Murphy
Justice, Superior Court

Entered on the Docket: 7/21/17
Copies sent via Mail Electronically