UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT CASON-MERENDA and JEFFREY A. SUHRE on behalf of themselves and others similarly situated, Plaintiffs, v. VHS OF MICHIGAN, INC., d/b/a DETROIT MEDICAL CENTER et al Defendant.	Case No. 2:06-cv-15601-GER-DAS Hon. Gerald E. Rosen

ORDER GRANTING PLAINTIFFS' COUNSEL'S APPLICATION FOR AWARD OF ATTORNEY'S FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND PAYMENT OF INCENTIVE AWARDS

Having received and reviewed *Plaintiffs' Counsel's Application for Award of Attorney's Fees, Reimbursement of Litigation Expenses, and Payment of Incentive Awards*, all exhibits and declarations attached thereto, and the Reply in support thereof, and having held a January 27, 2016 hearing on Plaintiffs' Application, and noting the lack of any opposition to this Application, this Court makes the following findings and rulings.

Plaintiffs' Counsel have applied for an award of fees in an amount equal to 33% of the sum collected from the last settling defendant, VHS of Michigan, d.b.a. Detroit Medical Center ("DMC"). This would amount to an award of $14 million

from the $42 million recovered from DMC. When added to the fee award previously granted by this Court, and when compared to the total recovery for the Class of over $90 million, the total fees sought amount to less than 29% of the common fund created by this litigation. In addition, Plaintiffs' Counsel ask for (1) reimbursement of $1,816,086.26 in litigation expenses incurred in excess of the amount previously awarded by this Court as reimbursements and set-asides, (2) a set-aside of $100,870 to pay for the cost of claims administration, (3) an award of $15,000 to each of the Named Plaintiffs for their continuing work in pursing this litigation, and (4) an award of $1,000 to each of four nurses who agreed to provide testimony at trial.

While the Sixth Circuit permits courts in this District to award attorney's fees either as a percentage of the common fund or by using a lodestar/multiplier approach, the recent trend has been towards application of the percentage of the fund method. *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516-517 (6th Cir. 1993). This Court finds that under the circumstances of this case, an award determined as a percentage of the common fund is appropriate, but that the fee award requested is "reasonable under the circumstances," *id*. at 516, whichever method is applied.

In the Sixth Circuit courts look to a six-factor test, commonly referred to as the "*Bowling* Factors" (following *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th

Cir. 1996)), to determine an appropriate fee award from a common fund. These factors are: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved in both sides.

The Court finds that these *Bowling* Factors, individually and jointly, support the award sought.

(1) The settlements have conferred significant and valuable benefits to members of the Class and the Settlement Classes. A cash recovery to date of over $90 million, including $42 million from DMC alone, is certainly a significant and valuable benefit.

(2) Plaintiffs' Counsel has provided evidence that they have devoted more than 78,000 hours to this litigation, for a total lodestar based on their standard billing rates of over $32 million (this calculation blends rates from 2013 and current rates, and therefore understates the lodestar at current rates). This means that Plaintiffs' Counsel, far from being awarded a multiplier on their lodestar, as is commonplace to reward them for the risk of contingent fee litigation, *Rawlings*, 9 F.3d at 517, are being awarded less than 80% of their total lodestar.

(3) Plaintiffs' Counsel, with one limited exception that has been disclosed to the Court throughout, have pursued this case on a contingent fee basis, advancing millions of dollars in costs and expending tens of thousands of hours of work with no guarantee of recovery. Plaintiffs' Counsel's first efforts in this case were undertaken almost ten years ago and from that time until 2013 they litigated this case without receiving any payment of fees, and in 2013 they only recovered what was then approximately 50% of the lodestar accumulated to that date. Since that time, not only was the remaining 50% of their time incurred through 2013 at risk, but they invested over 17,000 additional hours, all of which was entirely at risk.

(4) Antitrust cases like this one pursue important societal goals, and hence it is important that attorneys be provided with an appropriate incentive to take on such matters.

(5) Antitrust cases, in general, are recognized as raising particularly complex issues, and this case has been no exception. Indeed, due to the somewhat unusual nature of the claims to be tried – a wage exchange conspiracy subject to the Rule of Reason, rather than the typical *per se* price fixing agreement – this case could fairly be viewed as being more complicated even than the typical antitrust class action. Plaintiffs' Counsel have been required to litigate numerous complex issues over the life of this litigation and have done so diligently and effectively.

(6) Both Plaintiffs' Counsel and counsel for the eight defendants are highly experienced practitioners in complex litigation generally and antitrust litigation in particular.

The Court also notes that a fee award of 33% of the DMC settlement, or roughly 29% of the overall common fund, is well within the bounds of what courts have found appropriate in comparable cases. Plaintiffs' Counsel have provided the Court with a lengthy list of cases in this Circuit and elsewhere that have awarded attorney's fees of 33% in recent antitrust class actions, and many more cases that have awarded 30% or more in antitrust class actions or other complex class actions within this Circuit. For these reasons, the Court finds that a fee equal to 33% of the DMC settlement amount, and less than 29% of the total common fund created by this litigation, is "reasonable under the circumstances." *Rawlings*, 9 F.3d at 516.

As to the reimbursement of costs, Plaintiffs' Counsel have provided documentation supporting the expenditures claimed, which reflect reasonable and appropriate expenditures associated with preparing for trial in a complex case like this. The Court, therefore, agrees that Counsel should be reimbursed for expenditures in the amount $1,816,086.26 (this being the amount of expenditures incurred over and above the amount this Court allowed to be withheld from previous settlements), and that the sum of $100,870 should be set aside to pay anticipated costs of the claims process.

As to the incentive awards to the named Plaintiffs, for all the reason stated in this Court's prior Order Awarding Reimbursement of Costs and Incentive Payments (ECF No. 720), in the instant motion, and on the record, the Court finds that an additional award of $18,000 to each named Plaintiff is appropriate in light of the services provided by Mr. Suhre and Ms. Cason-Merenda to the Class. Plaintiffs' request for incentive awards of $1,000 to the four nurses who stepped forward to offer testimony at trial is denied, for the reasons stated on the record.

IT IS THEREFORE ORDERED that the Plaintiffs' motion is GRANTED IN PART AND DENIED IN PART AS SET FORTH ABOVE.

Dated: January 29, 2016

s/Gerald E. Rosen
United States District Judge

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 29, 2016, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5135