

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

JUAN RAMON TORRES and EUGENE §  
ROBISON, §  
*Plaintiffs,* §

v. §

CIVIL ACTION NO. 4:09-CV-2056

SGE MANAGEMENT, LLC; STREAM GAS & §  
ELECTRIC, LTD.; STREAM SPE GP; *et al.,* §  
*Defendants.* §

**[PROPOSED] ORDER AWARDING ATTORNEYS’ FEES AND EXPENSES FOR ASSOCIATED CLASS COUNSEL JEFFREY W. BURNETT AND JEFFREY W. BURNETT PLLC**

After considering Plaintiffs’ Application for Attorneys’ Fees and Expenses for Associated Class Counsel Jeffrey W. Burnett and Jeffrey W. Burnett PLLC [Dct. 292], the Court, under Federal Rules of Civil Procedure 23(h) and 54(d)(2), finds that the attorneys’ fees and expenses requested by Associated Class Counsel Jeffrey W. Burnett and Jeffrey W. Burnett PLLC (collectively, “Burnett”) are fair and reasonable. By separate order, the Court determined that the proposed class-action settlement reached by the parties is fair, reasonable, and adequate, and is finally approved. [Dct. 317]. The Court also awarded Plaintiffs \$10,275,000 in attorneys’ fees and expenses. [*Id.*].

As discussed below, the Court finds that the fee award of \$10,275,000 is reasonable, and Burnett is entitled to \$1,661,750 in attorney’s fees and \$974.72 in costs and reimbursable litigation expenses from that aggregate fee award.

**A. LEGAL STANDARD**

Courts may award reasonable attorneys’ fees as part of a class action settlement. FED. R. CIV. P. 23(h). The Court “may award reasonable attorney’s fees . . . that are authorized by law or by

the parties' agreement." *Id.* Here, Plaintiffs are entitled to attorneys' fees under the parties' agreements, as well as under RICO, 18 U.S.C. § 1961 *et seq.*

As part of its duty to review and approve a class action settlement, the Court must determine whether the agreed-upon attorneys' fees are reasonable. *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998). Courts encourage litigants to resolve fees by agreement. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974). When the amount of fees is agreed upon, is separate and apart from the class settlement, and has been negotiated after the other terms have been agreed, the attorneys' fee is presumed to be reasonable. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322–23 (W.D. Tex. 2007). That is what happened in this case; the parties reached a settlement and then negotiated a separate fund for attorneys' fees and expenses. Nevertheless, the Court must independently analyze the reasonableness of the fee.

Courts in the Fifth Circuit typically use one of two methods for calculating attorneys' fees in class actions: (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642–43 (5th Cir. 2012). The "flexibility to choose between the percentage and lodestar methods in common fund cases, with [its analysis] under either approach informed by" the 12-factor test that is outlined in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Id.* at 644; *see also Evans v. TIN, Inc.*, CIV.A. 11-2067, 2013 WL 4501061 (E.D. La. Aug. 21, 2013).

The twelve *Johnson* factors are: (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services properly, (4) the preclusion of

other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

**B. ANALYSIS OF REQUESTED ATTORNEYS’ FEES AND EXPENSES.**

**1. The percentage-of-the-fund calculation justifies the requested fee award.**

In this case, there is not a single “common fund,” but instead two separate settlement funds—one for the Class and one to pay attorneys’ fees and costs. This “is a well-recognized variant of a common-fund arrangement” which has been called a “constructive common fund.” *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1072 & n.22 (collecting cases). Importantly, because of this arrangement, Class Counsel’s fee request does not diminish the recovery by the Class. *Cf. In re Vitamins Antitrust Litig.*, Misc. Action No. 990197, 2001 WL 34312839, at \*12 (D.D.C. July 16, 2001).

Because this settlement is a variation on a common fund, the fees and costs are properly included in the settlement valuation. *See, e.g., Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245–46 (8th Cir. 1996). (“The award to the class and the agreement on attorney fees [and costs] represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class’ recovery.”); *see also Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349, 364 (D.D.C. 2007) (explaining that “because the attorneys’ fees are borne by defendants and not plaintiffs, they represent a valuable part of the settlement”).

As discussed in its order finally approving the settlement, the Court finds that the settlement is worth at least \$46,000,000 to \$92,296,000 to the Class (excluding the value of attorneys’ fees and expenses). Defendants then agreed to establish a separate fund for attorneys’ fees and

expenses “up to \$10,275,000.” Most common-fund fee awards fall between 20% and 30% of the fund. *See Gooch v. Life Invs. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012). The Ninth and Eleventh Circuit generally use a 25% benchmark for common-fund cases. *See, e.g., Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011); *In re Mercury Interactive Corp. Securities Litig.*, 618 F.3d 988, 992 n.1 (9th Cir. 2010)). The Second and Third Circuits caution district courts not to use a rigid benchmark but instead to consider the circumstances of each case based on factors like the Fifth Circuit’s *Johnson* factors. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 (3d Cir. 2011). A benchmark may be used as a starting point and then adjusted up or down under the *Johnson* factors, or those factors can be applied as part of deciding the benchmark. *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1080.

After considering the caselaw, the empirical studies provided by Plaintiffs, the settlement in this case, and the evidence presented to it, the Court finds that a fee award of \$10,275,000—or, 10% to 18% of the recovery—is fair and reasonable and falls within the appropriate benchmark. The Court also finds that the *ex-ante* fee-sharing agreements among the Plaintiffs, Burnett, and the other Class Counsel entitle Burnett to at least 17% of the fee award after deducting expenses. “The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney’s fee expectations when he accepted the case.” *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 824 (5th Cir. 1996) (internal quotation marks omitted).

In this case, the multiple *ex-ante* fee-sharing agreements demonstrate the expectations of the clients and attorneys related to the recovery of fees. Accordingly, the Court finds that Burnett is entitled to 17% of the fee recovery after deducting expenses, which results in a fee award to Burnett of at least \$1,661,750, which the Court finds to be fair and reasonable given the evidence presented and as confirmed by the *Johnson* factors.

**2. The lodestar calculation justifies the requested fee award.**

The Court can also use the lodestar method to determine a reasonable fee or cross-check the percentage analysis. *Strong*, 137 F.3d at 850. The Court calculates the lodestar by multiplying the reasonable hours expended by a reasonable fee. *Id.* Once the lodestar has been calculated, the Fifth Circuit applies the *Johnson* factors to assess the reasonableness of the fee and may use a multiplier to adjust the lodestar upward or downward. *Id.*

Burnett provided detailed contemporaneous time records of the work he performed on behalf of the Class. As of July 30, 2018, Burnett performed at least 1,200.25 hours of work at a blended rate of \$750 per hour, for total fees of \$900,187.50. Burnett also recorded \$974.72 in expenses, which the Court finds to be fair and reasonable.

Burnett's hours and fees are reasonable considering the length and complexity of this case. This case involved nearly a decade of complex litigation, including certification of the class, multiple attempts to dismiss the case by Defendants, two interlocutory appeals to the Fifth Circuit by Defendants, a rehearing *en banc* at the Fifth Circuit, and yet another request for interlocutory appeal by Defendants. During that time, the parties conducted extensive discovery, including numerous depositions and review of more than 600,000 pages of documents. The case also required considerable motion practice, including class certifications, motions to dismiss, and discovery disputes. Additionally, Burnett exercised billing judgment by, for example, omitting hours spent on routine administrative tasks, time related to fee discussions with co-counsel, and time spent preparing his fee application.

Burnett's hourly rates are reasonable. "An attorney's requested hourly rate is *prima facie* reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates, and the rate is not contested." *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1087 (internal citation omitted); *see also Slipchenko*

*v. Brunel Energy, Inc.*, No. H-11-1465, 2015 WL 338358, at \*19 (S.D. Tex. Jan. 23, 2015) (hourly rates ranging from \$100 to \$600 per hour “are well within the prevailing market rate in the Houston legal community” and hourly rates ranging from \$635–\$775 for partners “are generally comparable to the rates charged by the Texas-based defense counsel”).

Burnett seeks reimbursement of attorneys’ fees based on his current and past blended rates which he bills to fee-paying clients, and the Court finds his blended hourly rate of \$750 per hour (adjusted downward for this litigation) to be reasonable.

### **3. Application of the *Johnson* Factors.**

Given that the hours expended and hourly rates are reasonable, the Court now assesses the reasonableness of the lodestar in light of the *Johnson* factors. The *Johnson* factors support a fee of \$900,187.50, which the Court will enhance.

This action involved novel and difficult issues. Plaintiffs’ claims involve complex legal issues applying the RICO statute to an alleged multi-level marketing pyramid scheme. The case also involved complex factual issues, including complex hierarchical and pay structures. The multiple interlocutory appeals in this case, including a rehearing *en banc* at the Fifth Circuit, are further indication of the case’s complexity and novelty.

Skilled attorneys were necessary to perform the legal services properly. This was a complex action in a specialized area of law. Defendants put forth a vigorous defense. Burnett and other Class Counsel are experienced, reputable, and able, and brought their various legal expertise to bear in successfully litigating this action.

Burnett and other Class Counsel obtained excellent results in this case. Burnett and other Class Counsel have successfully vindicated Class members’ rights; not only does the Class have the option of receiving 20% of its net loss and completely disassociating itself from Defendants, but the Class also has the option of attempting the business venture anew, with much lower

associated costs. Depending on the elections of Class members, the monetary value of the settlement to the Class is substantial.

The time and labor required in this case were significant, Burnett and other Class Counsel took the case on a contingent basis, and Burnett's and other Class Counsel's litigation of this case precluded other employment. As discussed previously, there has been extensive discovery, motion practice, and appellate practice in this case. Burnett alone spent over 1,000 hours on this case, at the expense of other employment opportunities. Notably, Burnett devoted those hours with no guarantee of eventual compensation.

Given their complexity and difficulty, cases like this one are often seen as undesirable by attorneys. These cases are often costly, time-consuming, and difficult. This case is complex and required nearly a decade of effort by Burnett, without assurance of final success on the merits and recovery of fees. When the case was initiated and for the many years thereafter, Burnett faced the distinct possibility that he would receive nothing for his time and labor.

Despite the length and complexity of this case, Burnett maintained a strong relationship with his clients and spent many hours discussing the case with them, developing the facts, working on discovery, and ensuring a successful working relation between Plaintiffs and Class Counsel.

Because of the novelty of this case, similar awards are difficult to find. Given the empirical data presented by Plaintiffs, however, the Court finds that the fee award here is reasonable and fair compared to other consumer class actions and similar types of cases.

#### **4. Enhancement of lodestar.**

While the lodestar is relevant to determining a fee award, it is not the sole basis for determining that award. Indeed, the *Johnson* factors, as just discussed, apply to deciding whether the lodestar is reasonable, as well as to adjusting that award by a multiplier once the lodestar is calculated. *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 536 (5th Cir. 1986). District

courts within the Fifth Circuit have found upward adjustments (or, enhancements) appropriate if counsel took the case on a contingency basis. *See, e.g., Klein v. O'Neil, Inc.*, 705 F. Supp. 2d 632, 678 (N.D. Tex. 2010) (percentage method); *DeHoyos*, 240 F.R.D. at 330 (lodestar).

As discussed above, the relevant *Johnson* factors support an enhancement of Burnett's lodestar consistent with his *ex-ante* fee agreements. Thus, the Court applies a modest 1.85 multiplier and enhances Burnett's lodestar from \$900,187.50 to \$1,661,750 in fees. If Burnett incurs additional fees or expenses in his representation of Plaintiffs or the certified Class, or if other circumstances warrant the Court's further attention, Burnett may file amended or supplemental applications for fees or expenses, if necessary.

Accordingly, the Court **GRANTS** the Motion and **AWARDS** Burnett \$1,661,750 in attorney's fees and \$974.72 in costs and reimbursable litigation expenses.

Signed on \_\_\_\_\_, 2018.

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HON. KENNETH M. HOYT  
UNITED STATES DISTRICT JUDGE