

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Bonnie Berthiaume, Robert Berthiaume,
Doris Burnham, Richard Burnham, Nancy
Mayer-Gosz, Fletcher Lewis, and Carole
Lewis,

Court File No.: 27-CV-17-15118
Case Type: Other Contract / Other Civil
Judge Laurie J. Miller

Plaintiffs,

vs.

Allianz Life Insurance Company of North
America and Imeriti, Inc. d/b/a Imeriti
Financial Network,

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR AN
ORDER APPROVING CLASS
REPRESENTATIVES' ATTORNEYS'
FEES, COSTS, AND SERVICE AWARDS**

Defendants.

INTRODUCTION

After years of extensive litigation, Class Representatives request that the Court approve an award of their attorneys' fees and expenses. Class Representatives served Allianz Life Insurance Company of North America and Imeriti, Inc. ("Defendants") with a Complaint on October 4, 2016. On October 3, 2017, Class Representatives filed an Amended Complaint. The Court denied Defendants' motions to dismiss on April 12, 2018, and issued an order certifying this litigation as a class action on February 15, 2019. The Parties reached an agreement on class settlement relief on May 8, 2020, and on September 21, 2020, the Court granted preliminary approval of the Settlement.

Class Counsel's fees and expenses are both reasonable and warranted. Their work resulted in a settlement that provides substantial, meaningful monetary

compensation and economic benefits to Class Members. After negotiating the relief provided in the Stipulation of Settlement (“Settlement Stipulation”) over many months, the Parties negotiated an agreement on Class Counsel’s fees and expenses. The agreed-upon amount of \$1,750,000.00 reflects the reasonable number of hours expended by Class Counsel, and the risk of non-payment undertaken by Class Counsel in accepting this litigation on a contingency basis. Class Representatives also request that the Court approve service awards in the amount of \$15,000.00 for each Class Representative. The record demonstrates that the requested service awards fairly compensate the Class Representatives for their efforts culminating in a favorable settlement.

FACTUAL BACKGROUND

The allegations in the Amended Complaint focus on Sean Meadows, a former financial advisor previously associated with Defendants, who sold all of the Allianz Life annuities at issue in this matter. The Class Representatives purchased Allianz Life annuities through Meadows, and Imeriti received compensation for each policy purchased by the Class Representatives. The Class Representatives allege that they and Class Members were injured because Meadows directed them to buy and surrender annuities in what the Amended Complaint characterizes as a pattern of churning, leading them to pay surrender charges, and to invest funds into Meadow’s fraudulent investment scheme. The Amended Complaint further alleges that Defendants allowed Meadows to operate with impunity.

The Amended Complaint asserts six causes of action against Allianz Life: (i) Count One – Minn. Stat. § 325F.69, Consumer Fraud Act; (ii) Count Two – Minn. Stat. §

325F.67, False Statement in Advertising Act; (iii) Count Three – Minn. Stat. § 325D.44, Uniform Deceptive Trade Practices Act; (iv) Count Four – Minn. Stat. § 325F.71, Deceptive Acts Perpetrated Against Senior Citizens and Disabled Persons; (v) Count Five – Negligence; and (vi) Count Six – Aiding and Abetting Fraud. It asserts two causes of Action against Imeriti, Count Seven – Negligence and Count Eight – Aiding and Abetting Fraud.

Before serving the Complaint, Class Counsel conducted a thorough investigation of the facts relating to the claims asserted in the Action. Class Counsel interviewed numerous Class Members and collected and analyzed documents provided by the Class Representatives and other Class Members. Additionally, they worked with the Minnesota Department of Commerce and the United States Attorneys' Office to review and analyze documents collected as part of the criminal and civil investigations into Meadows' conduct. Finally, they interviewed Meadows himself in order to obtain details of his scheme.

After the Amended Complaint was filed, the parties engaged in extensive litigation, including motions to dismiss, the exchange of more than 16,000 documents, 18 fact depositions, expert discovery involving the exchange of seven expert reports and three expert depositions, a motion for class certification, two requests for review by the Minnesota Court of Appeals, and a Petition for Review by the Minnesota Supreme Court. Throughout the course of the litigation, the parties engaged in multiple rounds of settlement talks, including four mediations with two retired federal magistrate judges. With the assistance of retired Judge Arthur Boylan, the parties reached an

agreement on class settlement relief on May 8, 2020. The history of this litigation demonstrates that the parties vigorously advocated their respective positions and that the settlement was the product of extensive, arm's length negotiations that took place over the course of many months.

Under the Settlement Stipulation,¹ Defendants agreed to not oppose an application of up to \$1,750,000.00 for attorneys' fees and costs. Olson Decl. Ex. 1 ¶ 37. The Settlement Stipulation further provides that Defendants will not oppose incentive awards of up to \$15,000.00 for the Class Representatives Robert Berthiaume, Doris Burnham, Richard Burnham, Nancy Mayer-Gosz, and Fletcher Lewis. *Id.* ¶ 38.

On September 21, 2020, the Court granted preliminary approval of the Settlement, and directed issuance of the Class Settlement Notice.

ARGUMENT

I. Class Counsel's attorneys' fees and costs are reasonable and should be approved.

Class Representatives are entitled to reasonable attorneys' fees to compensate their counsel for their work in recovering damages on behalf of the class. The time spent and expenses incurred, the contingent fee agreement, the complexity of the litigation, and the successful outcome justify their request for attorneys' fees and

¹ A copy of the Settlement Stipulation was attached as Exhibit 1 to the Declaration of Jennifer Olson in Support of Class Representatives' Unopposed Motion for Preliminary Approval of Class Settlement and Order Directing Issuance of Class Notice ("Olson Decl."), filed on September 1, 2020. To the extent that defined terms of the Settlement Stipulation are used within this memorandum and the motion it accompanies, it is intended that such terms shall have the meaning set forth in the Settlement Stipulation.

expenses. In light of these circumstances, Class Representatives' request is reasonable and should be granted.

The starting point in evaluating attorneys' fees is the application of the lodestar method. See *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 949 (D. Minn. 2016) (“[t]ypically, courts award attorney fees via the lodestar method”);² *Green v. BMW of N. Am., LLC*, 826 NW.2d 530, 535 (Minn. 2013) (“Generally, Minnesota courts have used the lodestar method for determining the reasonableness of statutory attorney fees.”); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542-43 (Minn. 1986) (holding that “the analysis of the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)] provides a sensible and fair approach”). The Court calculates the initial lodestar by multiplying the reasonable number of hours expended by a reasonable hourly rate. *State by Comm'r of Transportation v. Krause*, 925 N.W.2d 30, 33 (Minn. 2019). Then the court may consider other factors to enhance or decrease the lodestar amount, but “many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.” *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 & n.9 (1983)).³

² “Minnesota law regarding the calculation of attorneys’ fees is not unlike the calculation of attorneys’ fees under federal law[,]” and therefore, Class Representatives rely on analysis from both Minnesota courts and federal courts. *Gopher Oil Co. v. Union Oil Co. of Cal.*, 757 F. Supp. 998, 1014 (D. Minn. 1991).

³ Rule 119.01 of the Minnesota General Rules of Practice requires a party who seeks an award of attorneys’ fees to apply for the award by motion. Rule 119.02 requires the motion to be accompanied by an affidavit of an attorney of record that establishes: (1) a description of the work performed, the date it was performed, the amount of time spent on each item of work, the identity of the person performing the work, and the hourly

When analyzing whether a fee is reasonable, Minnesota courts consider all relevant circumstances, including: (1) the time and labor required; (2) the nature and difficulty of the legal questions; (3) the amount involved and results obtained; (4) customary fees for similar services; (5) the experience, reputation, and ability of counsel; and (6) the fee arrangement existing between counsel and client. *See Krause*, 925 N.W.2d at 34–35; *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 621 (Minn. 2008); *see also Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983). Because the relevant circumstances here are included in the calculation of the reasonable hourly rate, Class Representatives are not requesting that the Court increase the initial lodestar. *See Krause*, 925 N.W.2d at 33. These circumstances demonstrate that Class Representatives’ request for attorneys’ fees is reasonable.

A. Time and labor required and reasonable costs.

Class Counsel have expended 5,451.85 hours of attorney time and 640.14 hours of paralegal time on this litigation, and have incurred an initial lodestar amount of \$2,724,294.70. *See Decl. of Amy S. Conners in Supp. of Class Representatives’ Unopposed Mot. For Attys. Fees (“Conners Decl.”)* Ex. A. This litigation involves multiple statutory and common law claims with complex legal and factual issues, including the statute of limitations, scienter, duty, and numerous elements of several

rate sought for the work; (2) the normal hourly rate for the person who performed the work; (3) an itemization of amounts sought for costs and disbursements; and (4) the affiant has reviewed the time records, the work was actually performed for the benefit of the client and was necessary for the proper representation of the client, and that charges for any unnecessary or duplicative work were eliminated from the motion. The Declaration of Amy Conners filed in support of Class Representatives’ motion includes all of the required information to support their motion for an award of attorneys’ fees.

statutory claims. Before filing the Complaint, Class Counsel conducted a thorough investigation of the facts relating to the claims asserted in the Action. Class Counsel interviewed numerous Class Members and collected and analyzed documents provided by the Class Representatives and other Class Members. Additionally, they worked with the Minnesota Department of Commerce and the United States Attorneys' Office to review and analyze documents collected as part of the criminal and civil investigations into Meadows' conduct. Finally, they interviewed Meadows himself in order to obtain details of his scheme.

After the Amended Complaint was filed, the parties engaged in extensive litigation, including motions to dismiss, the exchange of more than 16,000 documents, 18 fact depositions, expert discovery involving the exchange of seven expert reports and three expert depositions, a motion for class certification, two requests for review by the Minnesota Court of Appeals, and a Petition for Review by the Minnesota Supreme Court. Throughout the course of the litigation, the parties engaged in multiple rounds of settlement talks, including four mediations with two retired federal magistrate judges. Before each mediation, Class Representatives prepared confidential mediation letters that focused the issues and analyzed the strengths and weaknesses of their claims. Attorney time was also required for the preliminary motion seeking the Court's approval the class settlement agreement. As shown in the Billing Detail submitted with this motion, Class Counsel reasonably expended 6,091.99 hours over five years, at a total reasonable value of \$2,724,294.70. *Id.* Ex. A.

In addition to the time spent on this litigation, Class Counsel have incurred unreimbursed costs and expenses related to this matter totaling \$235,058.05. *Id.* These costs include filing fees, expert fees, costs associated with uploading and analyzing documents, mediation costs, deposition costs, and other expenses directly related to the prosecution of this case. Class Counsel advanced all of these costs and expenses with no guarantee they would ultimately be recovered, and most were paid out of pocket to third-party vendors, court reporters, and experts. These costs are reimbursable. *See Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1036 (8th Cir. 2008) (approving reimbursement of costs normally charged to a fee paying client); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1067 (D. Minn. 2010) (approving reimbursement of filing fees, expert fees, mediation costs, and costs associated with uploading and analyzing documents).

Particularly in light of the fact that the reasonable value of the reasonable hours Class Counsel expended, along with their costs and expenses, is \$2,959,352.75, Class Counsel's request for an award of \$1,750,000.00 is reasonable.

B. The nature and difficulty of the legal questions.

Class Representatives' case was complex and included many challenges. Some of these challenges were logistical, such as collecting information from Meadows' files while he was in prison and collecting information from Class Members whose documents had been destroyed by Meadows. Legal complexities included questions about when the statute of limitations began to run, a novel negligence theory, proximate cause questions, and certifying and managing the class. Defendants challenged Class Representatives' theories at every opportunity, including motions to

dismiss, a hard-fought class certification process, objections to mailing the class notice after the class was certified, a challenge to Class Representatives' liability expert, and two requests for review of interlocutory orders by the Minnesota Court of Appeals.

If the litigation continued, the Parties would need to brief additional motions regarding expert witnesses, a motion to decertify the class, and summary judgment before a trial. All of those motions would require extensive briefing, hearings, and a substantial investment of the Parties' and Court's time and resources. And, even if the Class Representatives prevailed at trial, which is uncertain, they still would face the risk of reversal on appeal.

C. Amount involved and results obtained.

The Settlement Stipulation is a successful result for Class Representatives and the Class Members. As set forth in detail in Class Representatives' Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement and Order Directing Issuance of Class Notice, the Settlement will: (i) provide substantial benefits to Class Members; (ii) put Class Representatives' claims and the underlying matters to rest; and (iii) avoid the substantial expense, burdens, risks, and uncertainties associated with the continued litigation of the Action. Given that Class Representatives' ultimate victory at trial was by no means certain, and even if achieved, would have been a lengthy and costly affair for class members, an immediate payment is a successful outcome for Class Members.

D. Experience, reputation, and ability of counsel.

As the Court concluded in its February 15, 2019 order appointing them Class Counsel, Class Counsel have significant experience in handling class actions and complex litigation, and are well qualified to litigate this matter. Further, on August 2, 2018, the Court approved a settlement negotiated by the same team of Best & Flanagan attorneys in a class action related to Meadows' scheme against a third defendant.

Amy Conners has been practicing in litigation for 17 years, and has extensive experience in litigating complex class action lawsuits, including defending securities class actions and consumer class actions. *See* Conners Decl. Ex. C. Jennifer Olson has been practicing in litigation for over nine years, and has defended clients in multiple class action lawsuits, each of which was successfully settled before trial. *See* Conners Decl. ¶ 6; *id.* Ex. E. Thomas Heffelfinger served as the United States Attorney for the State of Minnesota from 1991-1993, and again from 2001-2006. *See* Conners Decl. ¶ 5; *id.* Ex. D. Best & Flanagan also utilized paralegals and other associates charging rates of \$100-\$430. *Id.* Ex. B.

E. Customary fees for similar legal services.

The hourly rates sought for each attorney and paralegal are consistent with market rates in the Minneapolis legal community for similar services by lawyers of comparable skills, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (finding reasonable hourly rate is prevailing market rate in relevant legal community for similar services by lawyers of comparable skills, experience and reputation); *Bell v. Am. Accounts & Advisers, Inc.*, Civ. No. 18-2474 (MJD/ECW), 2018

WL 6718573, at *2 (D. Minn. Nov. 15, 2018) (same); *Reome v. Gottlieb*, 361 N.W.2d 75, 77-78 (Minn. Ct. App. 1985) (same).

Best & Flanagan charged rates ranging from \$310 for associate time to \$660 for the time of senior partners. *See* Connors Decl. Ex. B. The hourly rates charged by Best & Flanagan attorneys and paralegals are commensurate with their experience in the legal industry, and are within the range of what Minnesota courts consider to be reasonable for similar work. *See Roth v. Life Time Fitness, Inc.*, Civ. No. 16-2476 (JRT), 2019 WL 3283172, at *3 (D. Minn. July 22, 2019) (finding rates ranging from \$280 for associates to \$730 for partners reasonable); *Austin v. Metro. Council*, Case No. 11-cv-03621-DWF-SER, at ¶ 57 (D. Minn. Mar. 27, 2012) (finding hourly rate of \$500 “at the lower end of complex class action rates approved in [the District of Minnesota]”);⁴ *Yarrington*, 697 F. Supp. 2d at 1066 (finding rates ranging from \$325 for an associate to \$750 for a partner reasonable).⁵

As discussed in detail below, Minnesota courts recognize that the risks inherent in a contingent-fee class action justify an increase in attorneys’ fees. *See Hashw*, 182 F. Supp. 3d at 951 (finding increased fee “justified for a number of reasons, including the risks inherent in contingent-fee litigation, which is the typical manner in which class actions are started”).

⁴ A copy of the *Austin* order is attached as Exhibit F to the Connors Declaration.

⁵ A copy of a declaration setting out the rates approved in *Yarrington* is attached as Exhibit G to the Connors Declaration.

Additionally, it is reasonable to use timekeepers' current rates for all of the hours included in the fee petition. As the United States Supreme Court has observed, when attorneys are not paid until years after completing the work, it is appropriate to base an attorneys' fee award on current rates to compensate for the decreased value of the delayed payment:

When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later[.] Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.

Missouri v. Jenkins by Agyei, 491 U.S. 274, 282 (1989) (internal quotation and citation omitted); *see also White v. Martin*, 290 F. Supp. 2d 986, 991 (D. Minn. 2003) ("where fees have risen over the duration of a case, it is appropriate to apply current rates rather than historical ones."); *Gopher Oil Co. v. Union Oil Co. of Cal.*, 757 F.Supp. 998, 1010 (D. Minn. 1991), *remanded in part on different grounds by* 955 F.2d 519 (8th Cir. 1992) (finding it appropriate to calculate attorneys' fees using present rather than historical rates to account for delay in payment). The prevailing market rates, contingent fee arrangement, and decreased value of the delayed payment thus demonstrate that the award sought by Class Counsel is reasonable. *See* Connors Decl. ¶¶ 2-3, Exs. A-B.

F. Fee arrangement between counsel and client.

Class Counsel undertook this litigation on a contingency basis, including advancing all fees and expenses during the litigation. Class Counsel thus faced the very real risk that they would devote a significant amount of time and incur substantial

expenses in prosecuting this action without any assurance of being compensated for their efforts. Courts consistently recognize that the risk inherent in contingent fee agreements of receiving little or no recovery justifies an increase in attorneys' fees. *See, e.g., Hashw*, 182 F. Supp. 3d at 951 (recognizing increased fee was appropriate because of contingency fee agreement); *Yarrington*, 697 F. Supp. 2d at 1062 ("Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees.") (internal quotation and citation omitted); *In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d 1151, 1159 (D. Minn. 2009) (increasing attorney fee in recognition of "counsel's high quality work in the face of considerable risk and uncertainty" caused by contingent fee agreement); *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1083 (D. Minn. 2009) ("Plaintiffs' counsel assumed the risk this case would produce no fee, and courts see fit to reward such gambles.") (internal quotation and citation omitted). Class Counsel are not seeking an increase in fees and in fact have agreed to accept a discount on their fees. The award sought by Class Counsel is reasonable in light of the increased risk they assumed as part of their contingent fee agreement.

II. Class Representatives are entitled to service awards.

Class Representatives are deserving of the service awards provided in the Settlement Agreement because of their efforts in obtaining a favorable settlement on behalf of the class. *See* Connors Decl. ¶ 7. The Settlement Stipulation provides that Defendants will not oppose incentive awards of \$15,000 each for Class Representatives

Robert Berthiaume, Doris Burnham, Richard Burnham, Nancy Mayer-Gosz, and Fletcher Lewis. Olson Decl. Ex. 1 ¶ 38.

In Minnesota, service awards are routinely granted. *See, e.g., Yarrington*, 697 F. Supp. 2d at 1068 (upholding service awards and stating that "unlike unnamed Class Members who will enjoy the benefits of the Settlement without taking on any significant role, the Named Plaintiffs [make] significant efforts on behalf of the Settlement Class and [participate] actively in the litigation"); *Zilhaver*, 646 F. Supp. 2d at 1085 (awarding two lead plaintiffs \$15,000 incentive awards). When granting service awards, courts consider what "actions a plaintiff took to protect [the] class's interest, the degree to which [the] class has benefitted from those actions, and the amount of time and effort a plaintiff expended in pursuing the litigation." *Netzel v. W. Shore_Grp., Inc.*, No. 16-CV-2552 (RHK/LIB), 2017 WL 1906955, at *7 (D. Minn. May 8, 2017).

In this case, Class Representatives contributed considerable effort gathering information to develop the Amended Complaint, provide documents and other information, and attend multiple mediations, and have been in frequent contact with counsel to pursue and investigate this matter. The Class Representatives also participated in crafting responses to written discovery and all Class Representatives sat for depositions. Because of this extensive participation, and the favorable settlement obtained as a result of their hard work, the Court should approve these service awards to the Class Representatives. Without their efforts, this case would have not been brought and this settlement would have not been achieved.

CONCLUSION

Because the attorneys' fees requested are a fair and reasonable reflection of the work done by Class Counsel, Class Representatives respectfully request that the Court grant their motion for an order approving attorneys' fees and reimbursement of expenses. Additionally, because of the Class Representatives' participation in the litigation and the favorable settlement achieved, Class Representatives respectfully request that the Court grant their motion for the service awards set forth in the Settlement Stipulation.

BEST & FLANAGAN LLP

Dated: October 23, 2020

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