

LM FEB 25 2013

At 3:40 P.M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-13- 000193

DR. GARY CAIN and BARRY
EDELSTEIN,

Plaintiffs,

v.

MICHAEL McDERMOTT,

Defendant,

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

**FINAL ORDER AND JUDGMENT APPROVING CLASS SETTLEMENT AND CLASS
COUNSEL FEES AND EXPENSES**

A hearing was held on February 21, 2013, during which time the Court heard Plaintiffs/Class Representatives Dr. Gary Cain and Barry Edelstein (collectively, "Class Representatives") Motion for Final Approval of Class Action Settlement. Immediately prior to entry of this Order, on February 21, 2013, the Court signed an Agreed Order Severing Class Representatives' Claims against Defendant, Michael McDermott ("McDermott" or "Mr. McDermott") from Cause No. D-1-GV-10-000454; *The State of Texas v. Retirement Value, LLC, et al.*; In the 126th Judicial District of Travis County, Texas. The Court had previously entered an Order of Preliminary Approval appointing Class Counsel, approving notice to the Class, establishing deadlines for objections, setting a date for a final fairness hearing, certifying the Class and preliminarily approving the Settlement Agreement. Having considered the written submissions of the parties and the lack of objections submitted by any Class Member, and having held a final fairness hearing and having considered the evidence and argument offered at the final fairness hearing, it is hereby ORDERED that the class is finally certified and the settlement is finally approved as follows:

I. CLASS CERTIFICATION

A class may be certified if all four prerequisites of Rule 42(a) of the Texas Rules of Civil Procedure are met and one or more of the provisions of Rule 42(b) is satisfied. Tex. R. Civ. P.

42. Here, the proposed Class is defined as:

Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program or (ii) signed a Retirement Value Policy Participation Agreement.

A. Rule 42(a) Criteria

Rule 42(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity - 42(a)(1)

This class encompasses 1,007 Class Members, too many for joinder of all to be practicable. *See Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding that a class of 100 and 150 satisfies the numerosity requirement).¹ Numerosity is satisfied.

2. Commonality - 42(a)(2)

The commonality requirement of rule 42(a)(2) mandates there be at least one factual or legal issue which is common to all or substantially all of the class members. Tex. R. Civ. P.

¹ Because Texas Rule of Civil Procedure 42, governing class actions, was patterned after the federal equivalent, Federal Rule of Civil Procedure 23, Texas courts rely on both Texas precedent and persuasive federal decisions and authorities in interpreting class action requirements. *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007) (citing *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452 (Tex. 2000)); *Hall v. Pedernales Elec. Coop., Inc.*, 278 S.W.3d 536, 545 (Tex. App.—Austin 2009, no pet).

42(a)(2); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 438 (Tex. 2007). Commonality is not a demanding test and is met when the resolution of at least one issue will affect all or substantially all of the putative class members. *Mullen*, 186 F.3d at 625. Class Members' claims are based on a general policy by Defendant and it is upon that policy that the litigation is focused. *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 442 (W.D. Tex. 1999) (holding that "[a]s long as class members are allegedly affected by a defendant's general policy, and the general policy is the crux or focus of the litigation, the commonality prerequisite is satisfied"). Commonality is satisfied.

3. Typicality – 42(a)(3)

Rule 42(a)(3)'s typicality requirement is satisfied "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Southwestern Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 920 (Tex. 2010). Class Representatives' claims arise from the same practice and course of conduct as do the claims of other members and their claims are based on the same legal theory. Typicality is satisfied.

4. Adequacy of Representation – 42(a)(4)

Rule 42(a)(4) requires the class representatives and their counsel to "fairly and adequately protect the interests of the class." Tex. R. Civ. P. 42(a)(4). To meet this requirement, plaintiffs must show "[1] the zeal and competence of the representative[s]' counsel and [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002). These requirements are met here. Class Counsel in this case is skilled, competent, and experienced and has significant experience in class actions in general. The evidence reflects that

Class Representatives have taken an active role in the litigation, consulted extensively with Class Counsel, personally participated in the settlement negotiations, and have reviewed and approved of all settlement documents. Class Counsel and Class Representatives are adequate.

B. Rule 42(b)(3).

In addition to complying with the prerequisites of Rule 42(a), a putative class action must also satisfy at least one subsection of Rule 42(b). Class Representatives here seek certification under rule 42(b)(3), which requires the Court to find that common questions of law and fact predominate over any questions affecting only individual members and a class action is superior to each individual class member bringing a separate claim.

Class Representatives allege in their Motion for Final Approval of Class Action Settlement that the substantive issues that control the outcome of litigation are (1) whether Retirement Value was registered to sell and did sell an unregistered security; and (2) whether McDermott was reckless with the law or facts when he, directly or indirectly, materially aided an unregistered RV in the sale of an unregistered security. These issues will predominate in the trial on the merits of the case and the 42(b)(3) requirements are met here.

II. NOTICE WAS APPROPRIATE

In accordance with the procedures approved in the Preliminary Approval Order, the Class was provided with the Class Notice regarding the proposed Settlement Agreement and the deadlines and procedures for objecting. The Court finds that the Class Notice and measures taken by Class Counsel in mailing the Class Notices were adequate to inform Class Members of the proposed settlement and that such actions provided sufficient notice for Class Members' due process rights to be adequately protected.

III. SETTLEMENT APPROVAL

Having determined the class is properly certified and that notice was appropriate, the Court must next address the proposed Settlement Agreement. To approve the settlement, the Court must find the proposed settlement is “fair, reasonable and adequate.” Tex. R. Civ. P. 42(e)(1)(C); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 958 (Tex. 1996). The Texas Supreme Court has held that courts should apply the following six-factor test in determining the appropriateness of the proposed settlement: (1) evidence, if any, that the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the factual and legal obstacles to the plaintiffs’ success on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members. *Id.* at 955 (citing *Ball v. Farm & Home Sav. Ass’n*, 747 S.W.2d 420, 423-424 (Tex. App.—Fort Worth 1988, writ denied).

A. Factor 1 - There is no evidence of fraud or collusion behind the Settlement.

There is a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary. 4 Newberg on Class Actions § 11:51 (4th ed. 2002). Here, there are no allegations or indications of fraud or collusion. Indeed, the parties engaged in a lengthy, arms’ length settlement process overseen by an experienced mediator. Based on the undisputed record, the Court determines the proposed settlement was the product of arms’ length negotiations, free of fraud or collusion. This factor weighs in favor of approving the settlement.

B. Factor 2 - The complexity, expense and likely duration of the litigation.

This Court recognizes that it is important to be mindful of the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere

possibility of relief in the future, after protracted and expensive litigation. Specifically, as counsel for the parties have concluded, the probability of further protracted litigation, including appeals, would be a near certainty in the absence of a settlement. Additional litigation would likely include: (1) contested class certification proceedings; (2) an appeal under Texas Rule of Procedure 42(f); (3) dispositive motions; (4) extensive pretrial filings; (5) a lengthy trial; (6) post-trial proceedings in this Court; and (7) further appeals. Having considered the complexity, expense, and likely duration of the litigation, the Court concludes this factor weighs in favor of approving the proposed settlement.

C. Factor 3 – The stage of the proceedings and the amount of discovery repeated.

The evidence reflects that the parties shared substantial documents and data. In light of this discovery and statistical analysis, Class Counsel determined the proposed settlement is fair, adequate and reasonable. The Court determines the stage of the proceedings and the amount of discovery completed have provided the information necessary to permit the parties and the Court to make an informed judgment on the merits of the settlement. This factor therefore weighs in favor of accepting the proposed settlement.

D. Factors 4 and 5 – Factual and legal obstacles and the range of possible recovery and certainty of damages.

Litigating the case to trial also presents substantial risks to the Class Representatives and Class Members. Although Class Representatives and Class Counsel believe Class Members' claims are strong, it is clear that Defendant would put on a vigorous defense, and it would ultimately be up to the fact-finder to determine whether Defendant acted negligently. Class Representatives would have to obtain certification outside the settlement process. This would have been challenging.

In addition, the ability of the Class Members to obtain any recovery will be hotly contested and it is not certain that all class claims would prevail on the merits. This settlement also obtains monetary relief that is to be used to pay insurance premiums on policies that would otherwise lapse. In other words, this settlement accomplishes more and provides more funds to the RV Portfolio than could be provided after a successful trial. This factor therefore weighs in favor of accepting the proposed settlement.

The Court also acknowledges that Mr. McDermott has been making payments toward completion of this settlement, and will, following formal settlement approval, tender such payment to Eduardo S. Espinosa, in his capacity as court-appointed Receiver for Retirement Value, LLC, c/o Cox Smith Matthews, Inc. The Court acknowledges Mr. McDermott's initial payment, as is currently held by his counsel, will be in an amount not less than \$258,319.17. The Court also acknowledges that the parties to the settlement have entered into a Modified Payment Plan, which only changes the payment terms of the settlement, not the amount and provides protections to the investors in the event complete payment does not occur. The Court finds that the Modified Payment Plan is necessary to effectuate the settlement, and necessary and in the best interests of the Receivership and Investors.

E. Factor 6 – Opinions of Class Counsel, Class Representatives and absent Class Members.

Class Counsel has engaged in numerous class action lawsuits and possesses a substantial amount of experience and expertise, and has concluded that the settlement is fair, reasonable, and adequate. The Class Representatives also strongly support the settlement. In addition to the opinions of Class Counsel and Class Representatives, the Court has considered the opinions of absent class members. In this case, *no* class members objected. The complete lack of opposition from absent class members weighs heavily in favor of approving the settlement.

The Court finds the opinions of Class Counsel, the Class Representatives, and the absent Class Members weigh in favor of approval. The Court finds the Settlement Agreement to be fair, reasonable and adequate.

IV. AWARD OF CLASS COUNSEL FEES AND EXPENSES

In a certified class action, the Court may award reasonable attorneys' fees and non-taxable costs that are authorized by law or the parties' agreement. Tex. R. Civ. P. 42(h). The Settlement Agreement provides that Class Counsel is to be paid \$50,000.00 in attorneys' fees and expenses not to exceed \$10,000.00. Class Counsel has paid all administrative expenses and its own fees to date. The request by Class Counsel for attorneys' fees and expenses was set forth in the notice and was met with no opposition from absent Class Members. Class Counsel, at this stage of the settlement only seek a proportionate amount of the fee and expenses, namely 34.44% $(\$258,319.17/\$750,000.00) \times \$50,000.00 = \$17,221.27$.

A. Attorneys' Fees.

Rule 42(i) of the Texas Rules of Civil Procedures provides that "[i]n awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure." The lodestar figure is to be adjusted up or down based on a variety of factors, such as the benefits obtained for the class, the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to acceptance of the class action suit, and the hourly rate customarily charged in the region for similar legal work. *General Motors*, 916 S.W.2d at 960 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). The Court's award is generally not to exceed 400% of the lodestar figure. *Id.*

1. Class Counsel's Hourly Rates

In determining the reasonableness of hourly rates, courts consider the experience, reputation and ability of the attorney, and the skill required by the case. *Shipes*, 987 F.2d at 320. Here, Class Counsel is an experienced and skilled practitioner in class actions. Considering the complex nature of this case and Class Counsel's experience, reputation and skill, the Court finds Class Counsel's rates are reasonable.

2. The Hours expended by Class Counsel.

The Court has also reviewed the evidence submitted concerning the number of hours expended. The Court is required to determine not only that the hours claimed by Class Counsel are reasonable, but also that the hours were reasonably expended. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995). Having reviewed the evidence submitted, the Court concludes that the hours spent by Class Counsel were reasonably expended.

3. Adjustment of the lodestar using the *General Motors* factors.

The second step in establishing attorneys' fees is to consider whether the lodestar should be adjusted due to the circumstances of the case. *General Motors*, 916 S.W.2d at 960. The lodestar factors support adjusting the fees upward in this case.

Class Counsel incurred a substantial amount of time in investigating and prosecuting this case to resolution. Class Counsel's efforts were all reasonable and necessary, particularly that class actions are extremely complex and challenging. The time and labor factor weighs in favor of adjusting the lodestar.

Counsel has indicated that his involvement in this case has substantially diminished, and perhaps in some cases foreclosed, the acceptance of other employment or business opportunities. This preclusion of other employment weighs in favor of adjusting the lodestar.

Counsel has indicated that he handled this case on a contingency fee. Given the complex legal and factual issues confronting Class Counsel, Class Counsel undertook a considerable risk with no guarantee any fees or expenses would be recovered.

The results obtained by the Settlement were quite significant and greatly to the benefit of the Class Members. These results were largely due to Class Counsel's experience, reputation and ability.

In sum, having reviewed the request in light of all the *General Motors* factors, the Court finds that the factors are either neutral or support an upward adjustment of the multiplier. The fees sought are fair and reasonable and justified by the *General Motors* factors.

B. Expenses.

The appropriate analysis to apply in determining which expenses are compensable in a class action case is whether such costs are of the variety typically billed by attorneys to clients. *Abrams v. Lightolier*, 50 F.3d 1204, 1225 (3d Cir. 1995) (determining expenses are recoverable if it is customary to bill clients for these expenses). In this case, Class Counsel has incurred expenses through the date of filing the final approval motion and award of fees and expenses motion of slightly in excess of \$3,288.00. These expenses include costs for filing and service fees, photocopies, mailing notices and travel. The expenses also include compensable costs for computerized factual and legal research (i.e., Pacer and Lexis). The Court finds the requested costs to be reasonable and, therefore, the Court finds Class Counsel should be reimbursed for these litigation related expenses.

Overall, the requested attorneys' fees and expenses are reasonable under the lodestar method of calculations. Accordingly, the Court awards \$17,221.27 in attorneys' fees and \$3,288.00 in expenses to Class Counsel to be paid by the Receiver pursuant to the Settlement Agreement.

V. CONCLUSION

Based on the foregoing analysis, the settlement, as evidenced by the parties' agreement, is hereby determined to be fair, reasonable and adequate. THE COURT FURTHER FINDS AND ORDERS AS FOLLOWS:

1. On December 12, 2012, the Court entered an Order Preliminarily Approving Settlement in this cause based upon a Settlement Agreement entered into by the Parties.

2. The Court hereby adopts all of the findings contained in its Order Preliminarily Approving Settlement. In addition, this Final Order and Judgment Approving Class Action Settlement incorporates by reference the definitions contained in the Settlement Agreement, and all capitalized terms used in this Final Order and Judgment Approving Class Action Settlement will have the same meanings as set forth in the Settlement Agreement, unless otherwise defined in this Final Order and Judgment Approving Class Action Settlement.

3. This matter satisfies the prerequisites for certification of a settlement class under Rule 42(a) and (b)(3) of the Texas Rules of Civil Procedure.

4. The Court finds that the Class satisfies Rule 42(b)(3) of the Texas Rules of Civil Procedure in that common questions of law and fact predominate over any questions affecting only individual members and a class action is superior to each individual class member bringing a separate claim, thereby making appropriate final relief with respect to the class as a whole.

5. The interests of the Class Members in this Settlement are cohesive and homogeneous, Class Representatives seek class-wide relief for common questions of law and fact. The relief offered in the Settlement is not dependent on adjudication of facts particular to any subset of the class nor does it require a remedy that differs materially among Class members.

As a result, all Class Members may properly be bound by the release and final judgment to be entered pursuant to the Settlement.

6. Notice to the Settlement Class has been provided in accordance and compliance with this Court's Order Preliminarily Approving Settlement, and notice has been given in an adequate and sufficient manner; constitutes the best notice practicable under the circumstances; and satisfies the requirements of due process. Full opportunity has been afforded to members of the Class to participate in this Fairness Hearing. Accordingly, the Court determines that all members of the Class are bound by this Order and Final Judgment Approving Class Action Settlement.

7. Plaintiffs' Motion for Final Approval of Class Action Settlement and Entry of Final Judgment is GRANTED.

8. Pursuant to Rules 42(a) and (b)(3) of the Texas Rules of Civil Procedure, the following Settlement Class is certified:

"Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program or (ii) signed a Retirement Value Policy Participation Agreement."

9. The Settlement Agreement submitted by Class Representatives is finally approved as fair, reasonable and adequate and in the best interests of the Class, and the parties are directed to consummate and to implement the Settlement Agreement in accordance with its terms. The provision of equitable relief shall take place in accordance with the Settlement Agreement.

10. Dr. Gary Cain and Barry Edelstein are hereby certified as the Class Representatives of the Class defined above.

11. Geoffrey D. Weisbart, Esq. of WEISBART SPRINGER HAYES LLP, 212 Lavaca Street, Suite 200, Austin, Texas 78701 is appointed Class Counsel for the Settlement Class and shall act on behalf of the Class Representatives and all members of the Settlement Class.

12. Class Representatives' Motion for Award of Class Counsel Fees and Expenses is GRANTED.

13. Class Counsel has applied for an award of attorneys' fees and expenses to be paid pursuant to the terms of the Settlement Agreement. This Court awards Class Counsel attorneys' fees of \$17,221.27 and expenses of \$3,288.00 to be paid by the Receiver pursuant to the Settlement Agreement. Said fees and expenses are determined by the Court to be fair, reasonable and appropriate. Further, the Receiver is authorized to make such payment to Class Counsel, and further is authorized to pay Class Counsel a pro-rata portion of its fee upon receipt of any further settlement proceeds paid by Mr. McDermott.

14. Any person wishing to appeal this Final Order and Judgment Approving Class Action Settlement shall post a bond with this Court to cover the costs of appeal as a condition of prosecuting the appeal. The amount of the appeal bond will be set if, as, and when a notice of appeal is filed.

15. The Class Representatives, the Class Members, and Defendant having so agreed, good cause appearing, and there being no just reason for delay, it is ordered that this Final Order and Judgment Approving Class Action Settlement, is hereby entered as a final and appealable order.

16. This Action is dismissed with prejudice. Without affecting the finality of this Order, this Court retains exclusive jurisdiction over the consummation, performance, administration, effectuation and enforcement of the Settlement Agreement, and this Order.

SIGNED this 21 day of February, 2013.

Giisela D Triana

HONORABLE GISELA D. TRIANA