

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

SABRA RENCH, individually and on behalf)
of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
TD BANK, N.A., A-1 ALLERGY RELIEF, INC.,)
and HMI INDUSTRIES, INC.,)
)
Defendants.)

Case No. 3:13-cv-00922-SMY-PMF

**PLAINTIFF’S RULE 54(d)(2) MOTION FOR APPROVAL OF ATTORNEYS’ FEES,
COSTS AND EXPENSES, AND INCENTIVE AWARD FOR CLASS
REPRESENTATIVE
AND MEMORANDUM OF LAW IN SUPPORT**

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Class Counsel

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INTRODUCTION

After approximately six years of contentious litigation, Class Counsel and Defendant HMI Industries, Inc. (“HMI”) reached a settlement agreement (the “Settlement Agreement”) that provides approximately 3,000 Class Members with a combination of monetary, coupon, and injunctive relief. *See* Doc. 267-1. The Settlement Agreement provides that Class Counsel will petition this Court for an award of attorneys’ fees and Rule 54 and 23 Costs (the “Fee Award”). Doc 267-1, Settlement Agreement, ¶¶ 1.18, 1.19, 10.4. The Settlement Agreement also provides that Class Counsel will petition this Court for an Incentive Award for Plaintiff Sabra Rench to compensate her for her time and involvement in pursuing this litigation. *Id.* ¶¶ 1.22, 9.2, 10.4.

Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), and as set out in the Settlement Agreement, Class Counsel requests a Fee Award of \$192,500.00¹ as compensation for the 1,348.60 hours it has expended prosecuting the case against HMI.

Class Counsel also requests an incentive award for Plaintiff Sabra Rench in the amount of \$7,500.00 for her substantial time and involvement in pursuing the case against HMI.

For the reasons set forth below, Class Counsel respectfully requests that the Court find that the requested attorneys’ fees, costs, and incentive award are reasonable and direct the Settlement Administrator to pay such amounts pursuant to the Settlement Agreement.

¹ At the Preliminary Approval Hearing, the Court asked that Class Counsel request an incentive award for Plaintiff Sabra Rench of \$7,500.00, rather than \$5,000.00 as contemplated in the Settlement Agreement. Class Counsel agreed to reduce its request for attorneys’ fees by \$2,500.00 in order to account for the increase in Plaintiff’s Incentive Award. The amounts requested in this Motion reflect these changes.

ANALYSIS

I. THE AMOUNT OF CLASS COUNSEL’S REQUESTED FEES AND COSTS IS REASONABLE.

A. The Lodestar Method.

“In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h).

Where, as here, a class action settlement involves a combination of injunctive, coupon, and monetary relief, the lodestar method is an appropriate method to determine the amount of an attorney’s fee award. *See* 28 U.S.C. § 1712(b)-(c); *Levitt v. Sw. Airlines Co. (In re Sw. Airlines Voucher Litig.)*, 799 F.3d 701, 710 (7th Cir. 2015).

The lodestar method entails “multiplying the ‘number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.’” *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 639 (7th Cir. 2011) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). A reasonable hourly rate is “one that is ‘derived from the market rate for the services rendered.’” *Id.* at 640. The Seventh Circuit “presume[s] that an attorney’s actual billing rate for similar litigation is appropriate to use as the market rate. The fee applicant bears the burden of ‘produc[ing] satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community.’” *Id.* (internal citations omitted). “If an attorney uses contingent fee arrangements, the ‘next best evidence’ of the attorney’s market rate is ‘evidence of rates similarly experienced attorneys in the community charge paying clients for similar work and evidence of fee awards the attorney has received in similar cases.’” *Reid v. Unilever United States, Inc.*, No. 12 C 6058, 2015 U.S. Dist. LEXIS 75383, at *43 (N.D. Ill. June 10, 2015) (quoting *Spegon v. Catholic Bishop*, 175 F.3d 544, 555 (7th Cir. 1999)).

“There is a strong presumption that the lodestar calculation yields a reasonable attorneys’ fee award.” *Pickett*, 664 F.3d at 639. However, “[o]nce the lodestar amount has been determined, the court may adjust the award based on a number of factors, including ‘the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation.’” *Reid*, 2015 U.S. Dist. LEXIS 75383, at *8 (citing *Schlacher v. Law Offices of Phillip J. Rotche & Assocs., P.C.*, 574 F.3d 852, 856-57 (7th Cir. 2009)).

B. Class Counsel reasonably expended 1,348.60 hours to achieve the Settlement, for a lodestar of \$492,052.50.

Given the multi-faceted relief the Settlement affords to Class Members, the lodestar method is appropriate to determine the amount of the Fee Award. As set forth in the affidavit of Thomas P. Rosenfeld (the “Rosenfeld Affidavit”) attached hereto as Exhibit 1, Class Counsel has expended 1,348.60 hours prosecuting the case against HMI, for a lodestar of \$492,052.50. This amount does not include 506.2 hours expended by Class Counsel for the specific categories of work identified in the Court’s Order granting Plaintiff’s Motion for Sanctions. *See* Affidavit of Attorneys’ Fees and Legal Expenses, ECF No. 174. Class Counsel has also excluded its time in pursuing Plaintiff’s claims against Defendant TD Bank.

The hourly rates set forth in Table I of the Rosenfeld Affidavit are reasonable. These rates are the same as the regular current rates charged for Class Counsel’s services in similar consumer class action matters and which have been accepted in other complex consumer class action litigation. *See* Exhibit 1, Rosenfeld Affidavit, ¶ 4. The hourly rates are also on par with the average hourly rates of attorneys in the St. Louis, Missouri and Southern Illinois regions, as set forth in the United States Consumer Law Attorney Fee Survey Report 2013-2014 and 2015-

2016² and lower than the rates set forth in the U.S. Attorney's Office Fees Matrix – 2015-2019³ and the Laffey Matrix 2015-2019.⁴ Courts may rely on such sources to determine the market rate for a lawyer's services. *See Vahidy v. Transworld Sys.*, No. 09 C 50067, 2009 U.S. Dist. LEXIS 78984, at *13 (N.D. Ill. Sep. 1, 2009) (utilizing Consumer Law Attorney Fee Survey Report and Laffey Matrix to establish market rate for legal services); *Anderson v. Specified Credit Ass'n*, 2011 U.S. Dist. LEXIS 62410, * 11 (S.D. Ill. 2011) (relying on Consumer Law Attorney Fee Survey Report to establish market rate for legal services).

Moreover, the amount of time expended by Class Counsel pursuing claims against HMI is reasonable in light of the age and complexity of this case, which began in 2013. As set forth in detail in Exhibit A to the Rosenfeld Affidavit, Class Counsel performed, among other things, the following work on behalf of the Classes:

- Class Counsel extensively researched the law and the facts bearing on HMI's use of scratch card tickets before drafting and filing this lawsuit.
- Class Counsel drafted and filed a class action lawsuit against HMI.
- Following the commencement of this action, Class Counsel engaged in extensive discovery involving scrutiny of tens of thousands of pages of documents and numerous depositions of HMI representatives and affiliates.
- Class Counsel successfully obtained certification of the Classes, which involved research on complex legal issues and the drafting of an extensive Motion for Class Certification. Class Counsel also filed a response to HMI's attempt to appeal the Court's certification of the Classes.
- Following extensive research and analysis, Class Counsel filed a Motion for Summary Judgment on behalf of the Classes and filed a response in opposition to HMI's Motion for Summary Judgment.
- Class Counsel engaged in multiple rounds of contentious mediation with HMI, the last of which led to the Settlement with HMI on behalf of the Classes.

² Available at <https://www.nclc.org/images/pdf/litigation/fee-survey-report-2013-2014.pdf>; <https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf>

³ Available at <https://www.justice.gov/usao-dc/file/796471/download>

⁴ Available at <http://laffeymatrix.com/see.html>.

Accordingly, as both the hourly rates and the number of hours set forth in the Rosenfeld Affidavit are reasonable, the lodestar calculation yields a figure of \$492,052.50.

C. **Class Counsel reasonably incurred costs and expenses of \$22,001.33 to achieve the Settlement Agreement.**

As set forth in the Rosenfeld Affidavit, Class Counsel has incurred \$22,001.33 in costs and expenses in connection with Class Counsel's prosecution of this case against HMI. These expenses do not include expenses incurred in connection with the categories of work described in the Court's Order granting Plaintiff's Motion for Sanctions or expenses incurred pursuing Defendant TD Bank.

D. **Class Counsel's request for an award of attorneys' fees and out-of-pocket costs of \$192,500.00 is reasonable.**

As set forth above, there is a strong presumption that the lodestar calculation yields a reasonable attorneys' fee award. *Pickett*, 664 F.3d at 639. Class Counsel seeks an award of fees and costs totaling \$192,500.00, of which approximately \$170,000 are attorneys' fees *representing a 65% reduction from the lodestar amount of \$492,052.50*. Accordingly, Class Counsel's requested award is presumptively reasonable.

Moreover, the complexity of the legal issues involved in this case, the substantial success achieved for the approximately 3,000 Class Members, and the public interest served by this litigation confirm the reasonableness of Class Counsel's requested award. *See Reid*, 2015 U.S. Dist. LEXIS 75383, at *8 (identifying factors that may warrant adjustment of the lodestar calculation).

The 1,348.60 hours expended by Class Counsel to achieve the Settlement Agreement reflect the complexity of this litigation, which involves novel and complex legal questions and which has required extensive factual investigation. Class certification briefing in this litigation

was rigorous, and the parties' cross motions for summary judgment, filed after years of contentious litigation, highlight the factual and legal complexity this litigation involved.

Class Counsel's efforts in the face of such complexity have resulted in substantial success for the Class Members. First, the Settlement provides for the automatic delivery of a \$300.00 voucher for HMI Filtration Products. Class Members will not have to take any action to receive the Voucher, which will remain valid for a two-year period following the effective date of the Settlement. Moreover, the Vouchers will be redeemable in full or in part, and any partial balance remaining on a partially-used voucher will be redeemable so long as the voucher has not expired.

Second, if Class Members prefer to receive money, the Settlement provides a straightforward claims process enabling Class Members to elect to receive a \$100.00 cash payment.

Finally, the Settlement provides permanent injunctive relief that will prohibit HMI from participating in any scratch card programs that allow HMI or HMI's Distributors to gain entry in prospective consumers' homes or promote the sale of HMI Products. This injunctive relief will protect Class Members (and others) against any future injury resulting from HMI's use of scratch card programs, and provides a substantial benefit to the Class Members by permanently ending the very conduct that gave rise to this litigation. By obtaining such injunctive relief, which ends practices that allegedly violate consumer protection statutes, Class Counsel's efforts in this litigation have advanced an important public interest.

Accordingly, Class Counsel's requested award of \$192,500.00 for attorneys' fees and costs is reasonable in light of the complexity of this case, the substantial success achieved for the Class Members, and the public interest advanced by Class Counsel's efforts.

II. THE REQUESTED INCENTIVE AWARD IS REASONABLE.

Incentive awards are “fairly typical” in class actions. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). See *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases). The Seventh Circuit has explained that incentive “awards are justified when necessary to induce individuals to become named representatives.” *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001). In deciding whether an incentive award is proper, and, if so, in what amount, “relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

Here, the named Plaintiff has been an active, hands-on participant in the litigation, expending significant amounts of her own time to benefit the Classes. Plaintiff resides in Greenville, Illinois, which is approximately a forty-five minute drive from Class Counsel’s office. Nonetheless, as set forth in the Rosenfeld Affidavit, Plaintiff met with Class Counsel in person (and via telephone) on several occasion during its pre-litigation investigation. Plaintiff also spent significant time with Class Counsel after the lawsuit was filed; gathered and produced documents; monitored the litigation through telephone calls, in-person meetings, and the review of documents; contributed to the factual development of the case; was deposed on two separate occasions by HMI, and reviewed, approved, and signed the Settlement Agreement.

These facts support Class Counsel’s request for an incentive award for the named Plaintiff, and Class Counsel’s request for \$7,500.00 for Plaintiff Sabra Rench is reasonable.

CONCLUSION

Based on the foregoing, Class Counsel respectfully requests that the Court enter an Order directing the Settlement Administrator to pay, pursuant to Section 10.4 of the Settlement Agreement: (a) Class Counsel's reasonable attorneys' fees and out-of-pocket expenses, in the amount of \$192,500.00; and (b) Plaintiff's incentive award in the amount of \$7,500.00.

Dated: June 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically filed with the United States District Court, Southern District of Illinois, via the Court's CM/ECF filing system, which will send notification of such filing to counsel of record, on June 17, 2019

/s/ Kevin P. Green