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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

WENDELL G. MOEN, et al,

Plaintiffs/Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al,

Defendants/Respondents.

No. RG10-530493

TENTATIVE ORDER (1) GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AND (2) GRANTING MOTION FOR AWARD OF FEES AND COSTS.

Date: 4/10/20  
Time: 10:00 a.m.  
Dept.: 21

The motion of plaintiffs for final approval of class action settlement and the motion of plaintiffs for award of attorneys' fees and costs came on for hearing on 4/10/20, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding. Counsel appeared on behalf of Plaintiff and on behalf of Defendant. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of plaintiffs for final approval of class action settlement is GRANTED. The motion of plaintiffs for award of attorneys' fees and costs is GRANTED.

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1 BACKGROUND

2 The complaint alleges claims regarding an alleged contractual right to health care benefits  
3 during retirement. There are approximately 9,080 members of the class.

4 On 8/11/10 plaintiffs filed the case. On 12/21/11, the court sustained the demurer to the  
5 complaint with leave to amend. On 5/26/11, the court sustained the demurer to the First  
6 Amended Complaint without leave to amend. On 12/31/12, the Court of Appeal reversed.  
7 (*Requa v. Regents of University of California* (2012) 213 Cal.App.4th 213.)

8 The case returned to the trial court. On 2/21/14, plaintiffs filed a motion for class  
9 certification, and on 10/30/14 the trial court granted class certification. On 4/3/15, the court set  
10 a Phase I trial for 9/11/15. Following a bench trial on a written record, on 12/7/15, the court filed  
11 its statement of decision on the Phase I trial.

12 On 2/22/17, the court ordered The Regents to produce information on the identity of the  
13 members of the class. On 10/27/17, the court denied the motion of plaintiffs for summary  
14 adjudication of the first cause of action. On 11/21/17, the court granted the motion of The  
15 Regents to decertify the class. On 11/27/17, the court denied the motion of The Regents for  
16 summary adjudication of the first cause of action. On 8/1/18, the Court of Appeal reversed to  
17 order decertifying the class. (*Moen v. Regents of the University of California* (2018) 25  
18 Cal.App.5th 845.)

19 The case returned to the trial court. On 10/19/18, the court denied the motion of the class  
20 for trial preference under CCP 36. On 10/23/18, the court set trial for 2/11/19. On 1/8/19, the  
21 court entered an order on subclasses. On 1/16/19, the court set trial for 5/6/19. In April 2019,  
22 the parties filed motions in limine. On 5/13/19, the parties submitted a stipulation to continue the  
23 trial so they could continue pursuing resolution through mediation.

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1 MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

2 The motion of plaintiffs for final approval of class action settlement is GRANTED.  
3 (CRC 3.769.)

4 The case preliminarily settled for a total of \$84,500,000 for the class and an additional up  
5 to \$12,000,000 in fees and costs for counsel, for a potential total of \$96,500,000. There will be  
6 no service awards for the named class representative. \$500,000 is allocated to settlement  
7 administration costs.

8 The settlement was mediated with the assistance of Judge Maria Elena-James (Ret). The  
9 court gives "considerable weight to the competency and integrity of counsel and the involvement  
10 of a neutral mediator in [concluding] that [the] settlement agreement represents an arm's length  
11 transaction entered without self-dealing or other potential misconduct." (*Kullar v. Foot Locker  
12 Retail, Inc.* (2008) 168 Cal.App.4th 116, 129.) (See also *In re Sutter Health Uninsured Pricing  
13 Cases* (2009) 171 Cal.App.4th 495, 504.)

14 The proposed class notice form and procedure was adequate. Class members made  
15 approximately 1,500 telephone calls to the claims administrator. (Deady Dec. para 16.)  
16 Approximately 90 persons contacted class counsel. (Sinclair Dec. No. 2, para 80.) This reflect  
17 the interest and active participation of the absent members of the class.

18 There are no objections. (Deady Dec. para 20.) There are no opt-outs. Following class  
19 certification, notice was sent on or about 1/21/15 and 150 persons opted out. (Sinclair Dec., para  
20 28.) Supplemental notice was sent on or about 8/4/17 and approximately 50 persons opted-out.  
21 (Sinclair Dec., para 46.) The time for opting out has passed. (Notice of Settlement section 7.)

22 The proposed class is appropriate for class certification.

23 The motion makes an adequate analysis required by *Kullar v. Foot Locker Retail, Inc.*  
24 (2008) 168 Cal.App.4th 116.

1 The scope of the release is appropriately limited to the claims arising out of the claims in  
2 the complaint. (Agt, page 8.) The release of claims by the class is limited by the “factual  
3 predicate rule.” (*Hesse v. Sprint Corp.* (9<sup>th</sup> Cir. 2010) 598 F.3d 581, 590.)  
4

5 The Settlement does not anticipate any unclaimed funds and states that in the year 2040  
6 all funds will be distributed. (Settlement Agt , page 19, para 14.) The court usually requires the  
7 identification of a beneficiary for unclaimed funds and a declaration regarding any relationship  
8 with that beneficiary. (CCP 382.4, 384.) On the peculiar facts of this case where the funds will  
9 not be distributed for 20 years, the court retains jurisdiction to address the disposition of any  
10 residual funds. (CCP 664.6.)  
11

#### 12 MOTION FOR APPROVAL OF ATTORNEYS’ FEES AND COSTS

13 The Court approves attorneys' fees and litigation costs in the total amount of \$12,000,000,  
14 which is 12.4% of the aggregate settlement, fees, and costs total of \$96,500,000.

15 On the issue of attorney’s fees, “Because absent class members are not directly involved  
16 in the proceedings, oversight to ensure settlements are fair and untainted by conflict is the  
17 responsibility of both the class representative *and the court.*” (*Mark v. Spencer* (2008) 166  
18 Cal.App.4<sup>th</sup> 219, 227.)

19 “In any class action there is always the temptation for the attorney for the class to  
20 recommend settlement on terms less favorable to his clients because a large fee is part of the  
21 bargain. ... [T]horough judicial review of fee applications is required in all class action  
22 settlements and the fairness of the fees must be assessed independently of determining the  
23 fairness of the substantive settlement terms.’ ... “ ‘The evil feared in some settlements-  
24 unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate  
25 settlement for the client—can best be met by a careful ... judge, sensitive to the problem, properly  
26

1 evaluating the adequacy of the settlement for the class and determining and setting a reasonable  
2 attorney's fee....' ” (*Consumer Privacy Cases* (2009) 175 Cal.App.4<sup>th</sup> 545, 555-556.)

3 When using the percentage of recovery approach, the court's benchmark for fees is 30%  
4 of a total fund. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495; *Schulz v.*  
5 *Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175; *Consumer Privacy Cases* (2009)  
6 175 Cal.App.4th 545, 557 fn 13; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 fn 11.)

7 With a settlement value of \$96,500,000, this case qualifies as a megafund case. The  
8 percentage of recovery decreases for megafund cases. (*Laffitte v. Robert Half Internat. Inc.*  
9 (2016) 1 Cal.5th 480, 495-496; *In re Bluetooth Headset Products Liability Litigation* (9<sup>th</sup> Cir.,  
10 2011) 654 F.3d 935, 942-943; *In re Transpacific Passenger Air Transportation Antitrust*  
11 *Litigation* (N.D. Cal., 2019) 2019 WL 6327363 at \*4.) Considering the case law and data  
12 summarized in *Transpacific Passenger Air Transportation Antitrust Litigation*, the court would  
13 be inclined to a fee award of 15%-20% of the total recovery. Using the percentage of recovery  
14 approach, the court's benchmark would result in an award of \$14,475,000 - \$19,300,000.

15 When cross-checking with the lodestar/multiplier, the court will evaluate the lodestar  
16 based on reasonable fees that would have been charged at hourly rates and then apply a  
17 multiplier. The multiplier includes contingent fee risk and other factors.

18 The court finds the asserted 9,495 hours from 3/2009-8/2018 is reasonable for the filing  
19 of the case, the two demurrers, the many motions, the initial trip to the Court of Appeal, the  
20 Phase I bench trial, and the second trip to the Court of Appeal. The court is not persuaded that  
21 7,323 hours from 8/2018 to 1/2020 for mediation, trial preparation, and settlement was  
22 reasonable. (Fees Brief at 3 and supporting evidence.)

23 The court finds the asserted hourly rates of \$225 to \$975 are reasonable. (Fees Brief at 9  
24 and supporting evidence.) On the facts of this case and considering the already considerable  
25 experience of the higher billing counsel when the case started, the court accepts the current  
26 hourly rates as reasonable for the entire case rather than looking at reasonable contemporaneous

1 rates when the work was performed with an increase for inflation. (*Robles v. Employment*  
2 *Development Dept.* (2019) 38 Cal.App.5th 191, 205.)

3 Reducing asserted lodestar of \$12,147,505.50 by 15% to account for the court's concerns  
4 regarding the asserted 7,323 hours from 8/2018 to 1/2020 results in a lodestar of \$10,325,379.

5 The court considers a multiplier. The court would apply a multiplier of 1.5 for risk. The  
6 contingent risk multiplier is higher than the court's usual 1.2-1.3 because counsel had three  
7 relevant decision points for assessing risk - the filing of the case, the filing of the first appeal, and  
8 the filing of the second appeal. Counsel continued despite the risk at each stage. (*Ketchum v.*  
9 *Moses* (2001) 24 Cal. 4th 1122, 1132, 1138; *Greene v. Dillingham Constr. N.A.* (2002) 101 Cal.  
10 App. 4th 418, 428-429.)

11 The risk was not diminished by a fee shifting statute because there was no fee shifting  
12 statute. Counsel's potential fees were limited by and coupled to the monetary recovery.  
13 (Compare *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 419 ["The  
14 law does not mandate ... that attorney fees bear a percentage relationship to the ultimate recovery  
15 of damages in a civil rights case"].)

16 The court does not apply a multiplier based on skill of counsel, time commitment, and  
17 preclusion of other employment because those are reflected in the baseline lodestar. The Court is  
18 aware of the danger of "double counting." (*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1138-  
19 1139.)

20 The lodestar/multiplier results in fees of \$15,488,068 (\$10,325,379 x 1.5).

21 The court awards total fees and costs of \$12,000,000 because that is the agreed maximum  
22 in the Settlement Agreement, Section XII.A. This amount is below both the suggested  
23 percentage of recovery fees of \$14,475,000 - \$19,300,000 and the suggested lodestar/multiplier  
24 fees of \$15,488,068. Given that defendants tend to be concerned only with the aggregate cost of  
25 settlement and not the allocation between class and counsel, this reflects counsel putting the  
26 interests of their clients above their own interests in fees.

1 Plaintiffs do not seek a separate award of litigation costs.

2 Plaintiffs do not seek a service/incentive award for the named plaintiffs. (Compare *Clark*  
3 *v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.)

4 The court has a practice of ordering that 10% of any fee award to be kept in the  
5 administrator's trust fund until the completion of the distribution process and Court approval of a  
6 final accounting. This encourages counsel to be attentive in the event any of their clients have  
7 complications in the claims process and ensures that the members of the class are paid in full  
8 before counsel are paid in full.

9 On the peculiar facts of this case where the funds will not be distributed for 20 years, the  
10 court will ORDER that \$500,000 of the fee award be kept in the administrator's trust fund until at  
11 least one year after the final approval of the settlement. (Settlement Agreement para 15.) This  
12 will encourage counsel to be attentive in the event any of their clients have complications with  
13 the initial \$1,000 payment or if the settlement administrator or the members of the class have  
14 questions or concerns as the settlement administrator sets up the mechanism for distributing the  
15 settlement funds over the following 20 years. If the system is running smoothly after one year,  
16 then the court will be inclined to release the hold-back of attorney fees.

17 The court will sign the proposed "Final Approval Order and Judgment." The court  
18 retains jurisdiction over the implementation of the settlement. (Settlement Agreement para 30;  
19 CCP 664.5; CRC 3.769(h).)

20  
21 Dated: April \_\_, 2020

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22 Winifred Y. Smith  
23 Judge of the Superior Court  
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