IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH LEYBA, et al.,

Plaintiffs,

vs. No. CIV-05-0036 BB/ACT

SANTA FE COUNTY BOARD OF COMMISSIONERS; et al.,

Defendants.

Memorandum in Support of Approval of Reasonable Attorneys Fees, Costs and Incentive Payments

I. INTRODUCTION

As set forth in the Joint Unopposed Motion for Final Approval of Class Action Settlement Agreement, the Plaintiffs, the MTC Defendants and the Santa Fe County Defendants (the "Parties") have agreed that $2,000,000 of the Settlement Fund will be allocated to Plaintiffs' attorneys' fees, gross receipts tax on fees, and litigation expenses, subject to approval of the Court. This amount breaks down as follows: attorneys fees: $1,756,098; gross receipts tax on fees: $133,902; litigation expenses: $110,000. In addition, the Parties have agreed that $470,250 of the Settlement Fund, representing $42,750 per Class Representative, will be allocated to incentive payments to the Class Representatives for their contribution to the investigation and prosecution of this case.

As demonstrated below, and as supported by the separately submitted Affidavits of Paul Bardacke, John C. Bienvenu, Robert R. Rothstein, Mark H. Donatelli and Elizabeth Leyba, these amounts are consistent with well-settled federal law governing the determination of reasonable attorneys' fees and incentive payments in class action litigation. The amount sought for fees is

supported by every method used to analyze an award of fees: (1) it is less than the standard "bench-mark" common fund recovery of 25 – 30 % approved by federal courts in New Mexico and across the nation; (2) it is less than a market-replicating contingency fee recovery of 33.33 – 40 %; and (3) when cross-checked by a lodestar analysis, it results in a multiplier of 3.26, which is well within the range of commonly approved multipliers in similar litigation. The incentive payments are similarly supported by the law and facts. For all these reasons, the Plaintiffs respectfully request that the Court approve the Parties' agreed-upon allocation formula.

II. BACKGROUND FACTS

A. The course of the litigation

Plaintiffs filed this lawsuit on January 12, 2005, on behalf of themselves and all other persons similarly situated, alleging that they were unlawfully subjected to strip searches performed pursuant to the policies, practices and customs of Defendants of conducting strip searches of all incoming pre-arraignment detainees without individualized reasonable suspicion.

All the Defendants denied Plaintiffs' claims. The MTC Defendants contended that the admissions search policies at the Santa Fe County Adult Detention Center were reasonably related to legitimate penological interests in deterring the introduction of weapons, drugs and other contraband into the detention center and were entitled to deference under the law, and that the policies should not be found to violate the Constitution or any state law. The MTC Defendants denied that all of the Plaintiffs were subject to strip searches upon admission to the detention center, and they denied that all pre-arraignment detainees were strip searched during the period of time in question. The MTC Defendants further denied that searches of the Plaintiffs violated any state or federal statutory or common law.

The Santa Fe County Defendants filed a separate answer, similarly denying any and all liability for their own acts and omissions and denying any liability for the acts and omissions by independent contractor MTC and MTC's employees. The Santa Fe County Defendants contended that the Plaintiffs' claims failed to state a claim upon which relief can be granted under the New Mexico Tort Claims Act. In addition, Defendant Solano and Defendant Sisneros affirmatively asserted that they had no role whatsoever in the formulation or implementation of MTC's strip search policies and have no individual responsibility or liability for any of the allegedly unconstitutional policies, practices or acts of the MTC Defendants, and they also asserted qualified immunity.

Between January 2005 and November 2005, the Parties engaged in extensive discovery, including the exchange of voluminous documents, inspection of the detention center facility, and depositions of all eleven named Plaintiffs, Defendants Kerry Dixon and Greg Solano, and other correctional officers and officials. In addition, the Plaintiffs obtained and analyzed the voluminous database maintained by the Defendants for all persons booked into the detention center during the relevant class period (numbering in excess of 31,000 individual bookings).

B. The course of settlement negotiations

In mid-2005, the Parties agreed to enter into settlement discussions. The Parties engaged in six days of mediation sessions with retired United States District Judge Raul A. Ramirez of Sacramento, California. *See* Affidavit of Attorney John C. Bienvenu, filed separately, ¶ 9. Additionally, the Parties engaged in a number of additional sessions among counsel for the Parties. Arms-length, contentious, and non-collusive settlement negotiations continued through June 2006 when the Settlement Agreement was finally reached.

From the very beginning of these negotiations, Plaintiffs made it clear that they would not simultaneously discuss settlement of the class recovery and attorneys' fees, but instead would only address the issue of attorneys fees after reaching agreement on all other terms for the benefit of the class. Bienvenu Aff., ¶ 10. This approach is not mandated, but is preferable under certain circumstances to avoid any possibility of a conflict of interest. *See e.g. In re Prudential Ins. Co. of America Sales Practices Litig.,* 962 F.Supp. 572, 577 (D.N.J. 1997) (divorcing discussion of attorneys fees from negotiation of relief provided to class is preferred procedure as it "obviate[s] the danger or an actual or apparent conflict of interest on the part of class counsel"); *In re Mfrs. Life Ins.Co. Premium Litig.,* No. 1109, 96-CV-230 BTM (AJB), 1998 WL 1993385, at *6, *10 (S.D. Cal. Dec. 21, 1998) (noting the importance of "carefully avoid[ing] the discouraged practice of simultaneous negotiation of fees and the merits" and encouraging the practice of "secur[ing] attorneys' fees and expenses without dipping into the class's recovery"); MANUAL FOR COMPLEX LITIGATION (FOURTH), § 21.7 (separate negotiation of the class settlement before an agreement on fees is generally preferable).

The terms of the settlement are summarized as follows:

1. Monetary Relief to Settlement Class Members

a. Payments to the Settlement Class

Pursuant to the terms of the Settlement Agreement, the MTC Defendants have deposited the sum of $8,000,000 into an interest-earning qualified settlement fund account ("Settlement Fund") for payments to Class members, for payments of incentive compensation for each Class Representative, and for Plaintiffs' reasonable attorneys' fees and costs. In addition, the Santa Fe

County Defendants agreed to pay an additional amount up to $500,000 for claims administration expenses. Thus, the total settlement fund created for the benefit of the class is $8,500,000.

The Claims Administrator will pay out of the Settlement Fund to each Settlement Class member who submits a valid and timely Claim Form a Settlement Payment calculated for that Settlement Class member under the proposed Plan of Allocation (attached to the Settlement Agreement as Exhibit 4). Those payments range from a minimum of $200 to a maximum of $3,500. The Parties have agreed that the amount allocated for payment of claims is $5,529,750. In the event that the total amount of verified claims exceeds the amount available in the Settlement Fund, the amount payable to each Settlement Class member will be reduced proportionately. In the event that the total amount of verified claims is less than the amount available in the Settlement Fund, the balance will be refunded to the MTC Defendants.

b. Incentive Payments

Under the Settlement Agreement, the Parties have agreed that the Class Representatives are eligible to receive compensation for their contribution to the investigation and prosecution of this case, in addition to the amounts to which they are entitled under the Plan of Allocation. The Parties have agreed that $470,250 of the Settlement Fund will be allocated for this purpose, subject to approval of the Court, representing $42,750 per Class Representative.

c. Attorneys' Fees, Gross Receipts Tax and Costs

The Parties have agreed that $2,000,000 of the Settlement Fund will be allocated to Plaintiffs' attorneys fees, gross receipts tax on fees, and litigation expenses, subject to approval of the Court. Litigation expenses incurred by Plaintiffs through November 27, 2006 are approximately $110,000. Bienvenu Aff., ¶ 19. Thus, the amount to be allocated to Plaintiffs'

attorneys fees is $1,756,098, and the amount to be allocated to gross receipts tax on Plaintiffs' attorneys fees is $133,902 (at the current Santa Fe rate of 7.625%).

2. Equitable Relief

The Parties have stipulated and agreed that the strip search policies at the Santa Fe County Detention Center were changed as a result of Plaintiffs' and Class Counsel's efforts preceding and during this lawsuit.

C. Claims Administration

19,927 notice and claim form packages were sent to potential Class Members on September 7, 2006. In addition, information regarding the settlement agreement was published in the Albuquerque Journal, the Santa Fe New Mexican, and the Rio Grande Sun, in both English and Spanish. Announcements were also made in English and Spanish on KABQ, KDCE, KKSS, and KJFA. A website and toll-free telephone number were established to provide further information to potential Class Members. *See*, Affidavit of Mark Patton, filed separately, ¶¶ 5-12.

In addition, Class Counsel undertook extensive outreach efforts in an effort to locate potential Class Members and inform them of the settlement and the procedure for filing claims. Class Counsel developed a database to track contacts with all potential Class Members. Class Counsel hired staff dedicated to making telephone and in-person contacts with potential Class Members. Class Counsel mailed thousands of additional notice packages and claim forms to potential Class Members. Class Counsel published additional advertisements in various newspapers, and placed additional radio advertisements in a number of radio stations in Santa Fe and Rio Arriba Counties. Class Counsel invested many hundreds of hours in staff time and

approximately $60,000 in these outreach efforts. Class Counsel believe that these efforts directly resulted in doubling or tripling the number of Claim Forms received. Bienvenu Aff., ¶ 26.

As of November 29, 2006, 3,402 individuals had filed Claim Forms. No Class Members objected to the settlement; three individuals opted out of the settlement. Class Counsel estimate that the total amount of claims to be paid will be greater than $4,000,000, but somewhat less than the amount allocated for payment of claims ($5,529,750). Bienvenu Aff., ¶ 27.

The balance remaining in the Settlement Fund after payment of claims will revert to the MTC Defendants. The amounts allocated to attorneys fees, costs and incentive payments, then, will not reduce or otherwise affect the recovery to the Class Members who have filed claims, but instead will in effect be paid directly by the Defendants, as agreed by the Parties.

III. THE PARTIES' ALLOCATION OF ATTORNEYS FEES AND COSTS IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Two methods may be utilized to determine reasonable attorneys' fees: (1) the percentage of the fund method (awarding fees based on a reasonable percentage of the overall recovery); and (2) the lodestar method (determining fees based on the hours worked, multiplied by a reasonable hourly rate and adjusted as appropriate by a multiplier). As set forth below, federal courts, including the Tenth Circuit Court of Appeals, have expressed a decided preference for the percentage of the fund method, and in the absence of any agreement to the contrary, that is presumptively the method to be used in determining a reasonable fee. Under either approach, however, the fee agreed upon by the Parties in the present case is reasonable.

A. The percentage of recovery method of awarding attorneys fees is the preferred method in common fund cases

The Tenth Circuit has observed that despite advantages and disadvantages to the lodestar

and percentage of the fund methodologies, the "recent trend has been toward utilizing the percentage method in common fund cases." *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994); *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995) ("[w]e have recently implied 'a preference for the percentage of the fund' method in common fund cases"); MANUAL FOR COMPLEX LITIGATION (FOURTH), § 14.121 (the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases).

In 1985, the Third Circuit Task Force studied this issue and recommended that in common fund cases, fees should be based on the percentage-of-the-fund method and not on the lodestar method, finding numerous problems with use of the lodestar method in common fund cases. *Court Awarded Attorneys' Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (1986). The lodestar method has been criticized by courts, commentators, and members of the bar because it is difficult to apply, time-consuming to administer, inconsistent in result, and creates an inherent incentive to prolong litigation. MANUAL FOR COMPLEX LITIGATION, *supra*, §14.121; *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1108 (D.N.M. 1999).

After reviewing criticisms of the lodestar method and the findings of the Third Circuit Task Force, the Eleventh Circuit announced that the percentage of the fund, as opposed to the lodestar, would apply to all common fund cases. *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). The District of Columbia Circuit has followed suit, finding that the percentage-of-the-fund method is preferred as it rewards prompt and efficient resolution of class action litigation, while the lodestar approach's reliance on attorney work hours conversely encourages inefficiency and resistance to prompt settlement. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C.Cir. 1993). The D.C. Circuit further found that "a percentage-of-the-fund

approach more accurately reflects the economics of litigation practice . . . and most closely approximates the manner in which attorneys are compensated in the marketplace for these types of cases." *Id*. at 1269 (citations omitted); *see also*, HIRSCH & DIANE, FED. JUDICIAL CTR., AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 65 (noting that the percentage method "ensure[s] that the fee award will simulate the marketplace, since most common fund cases are the kinds of cases normally taken on a contingency fee basis, with counsel promised a percentage of any recovery").

The percentage of the fund method is an appropriate method for determining reasonable fees even in the settlement of class actions involving fee-shifting statutes. *See e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967-68 (9th Cir. 2003) (common fund principles apply where a fee-shifting case settles before judgment); *Brytus v. Spang & Co.*, 203 F.3d 238, 246-47 (3rd Cir. 2000) (common fund fees are appropriate in both settled and litigated cases where statutory fees are available); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (approving fees based on common fund rather than statutory principles, even where statutory fees were available).

B. Twenty-one percent of the common fund falls well within the normal range of fee awards in common fund settlements

In calculating the percentage, it is appropriate to compare the fee to the total amount recovered for the benefit of the class, even if some of the fund ultimately reverts to the Defendants because some class members choose not to claim their share. *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (attorneys fees must be based on the value of the entire common fund, even if some beneficiaries make no claim); *accord*, *Waters v. Intern. Precious Metals Corp*., 190 F.3d 1291 (11th Cir. 1999); *Williams v. MGM-Pathe Communications Co*., 129 F.3d 1026 (9th Cir. 1997). It is also appropriate to include the amount of the attorneys fees in the

common fund when calculating the proper percentage. *See* MANUAL FOR COMPLEX LITIGATION, *supra*, § 21.7 (proper calculation of settlement benefits includes all fee amounts paid by defendant in addition to class relief.) Thus, the $1.75 million fee agreed upon by the Parties represents 20.6% of the $8,500,000 common fund recovered for the benefit of the class.

A leading commentator on class action litigation concluded as of 1992 that "no general rule" can be articulated as to what is a reasonable percentage of a common fund, but "[u]sually fifty percent of the fund is the upper limit on a reasonable fee award . . . though somewhat larger percentages are not unprecedented." 3 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 14.03 (3d ed. 1992). Most courts that have surveyed fee awards in common fund settlements have reached similar conclusions. *See e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 455 (10th Cir. 1988) (surveying cases in which the percentage fee awarded ranged between 22% and 37.3%); *Swedish Hosp. Corp.,* 1 F.3d at 1272 (surveying cases and observing that common fund awards typically range between 20 and 30%); *Camden I Condominium Ass'n,* 946 F.2d at 774 (a majority of common fund class action fee awards fall between 20 and 30%); *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1377 (N.D.Cal. 1989) (surveying cases and finding average award of 30%); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985) (surveying cases with percentage fee awards averaging 30.6%, and finding that traditionally courts have awarded fees in the 20 to 50% range in class actions); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 372 (S.D. Ohio 1990) (fee awards in common fund cases generally range from 20 to 50% of the common fund created); *Manual for Complex Litigation*, *supra*, §14.121(attorneys fees awarded in common funds are often between 25% and 30% of the fund).

Some courts refer to 25% of the fund as a "benchmark" award, to be adjusted upwards or downwards based on the circumstances. *See e.g. Ramah Navajo Chapter,* 50 F. Supp. 2d at 1108. Factors to be considered in adjusting this benchmark include the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), discussed below. *See e.g., Ramah Navajo Chapter*, 50 F. Supp. 2d at 1108 (applying *Johnson* factors); *Vizcaino v. Microsoft*, 290 F.3d 1043 (9th Cir. 2002) (applying similar factors). Other courts refer to higher "benchmarks." *See e.g., In re Activision,* 723 F. Supp. at 1377 (reviewing numerous cases to conclude that "in most recent cases the benchmark award is closer to 30%").

Regardless of which benchmark or method is used, courts typically approve fee awards at the higher end of the scale in an approximation of typical contingency fees in non-class actions of one-third or higher. *See e.g., In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D.La. 1997) (noting that courts have awarded percentages in common fund cases of approximately one-third contingency fee, and awarding fees of $45,952,560, representing 36% of settlement fund); *Shaw v. Toshiba America Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D.Tex. 2000) (observing that attorneys fees of 25 to 33.33% have been routinely awarded in class actions; citing empirical studies showing that, regardless whether percentage method or lodestar method is used, fee awards in class actions average around one-third of recovery); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding fees in excess of $32,000,000, representing 27.5% of the fund); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (awarding 33% of the common fund as attorneys fees due to the complexity of the issues and the risks); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150 (E. D. Pa. 2000) (awarding fees of 33.33% as consistent with other recent cases awarding the same or more from the common fund); *Uselton v.*

Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993) (awarding fees of 29% of common fund); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D.Pa. 2000) (finding fees of 30%, or $32,404,744.33, to be appropriate measure despite large amount of settlement); *Waters v Intern. Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (adjusting 30% "benchmark" upward and finding appropriate percentage of the fund to be 33.33%).

Federal courts within the Tenth Circuit, including the District of New Mexico, have consistently approved class action fee amounts that are in accord with these percentages:

- *In re Boston Chicken, Inc., Sec. Lit.*, 2006 WL 2338188 (D. Colo. 2006) ($6.5 million fee, representing 28% of fund);
- *Millsap v. McDonnell Douglas Corp.*, 2003 WL 21277124 (N.D. Okla. 2003) ($8.75 million fee, representing 25% of fund);
- *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) ($5.8 million fee, representing 20% of fund);
- *Law v. National Collegiate Athletic Ass'n*, 108 F. Supp. 2d 1193 (D. Kan. 2000) ($18.2 million fee, representing 33.4% of fund);
- *In re Horizon/CMS Healthcare Corp. Sec. Lit.*, 3 F. Supp. 2d 1208 (D.N.M. 1998) ($4.2 million fee, representing 20% of fund);
- *Feerer v. Amoco Production Co.*, Civ. No. 95-012 JC/WWD (D.N.M. 1998) ($20.54 million fee, representing 29.5% of fund);
- *In re Storage Technology Sec. Lit.*, No. 92-V-750 (D. Colo. 1995) ($16.5 million fee, representing 30% of fund);
- *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) ($10.8 million fee, representing 24.5% of fund);
- *Fuss, et al., v. Diagnostek, et al.*, No. 92-1274 JC/WWD (D.N.M. 1994) ($5 million fee, representing 31.2% of fund);
- *In re United Tel., Inc., Sec. Lit.*, 1994 WL 326007 (D. Kan. 1994) ($9.33 million fee, representing 33.33% of fund);

- *Cimarron Pipeline Const., Inc., v. Nat'l Council on Compensation Insurance*, 1993 WL 355466 (W.D. Okla. 1993) ($11.77 million fee, representing 33.33% of fund);

- *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849 (10th Cir. 1993) ($507,500 fee, representing 29% of fund);

- *In re Public Service Company of New Mexico*, 1992 WL 278452 (S.D. Cal. 1992) (litigated in part in New Mexico federal court) ($10.5 million fee, representing 33% of fund).

State Courts in New Mexico, relying on federal precedent, have also consistently approved fees in this same range:

- *In re New Mexico Indirect Purchasers: Microsoft Corporation Antitrust Litigation*, 2006-NMCA-____ (affirming $6.1 million fee award, representing 25% of fund);

- *Dichter v. BP America Production Co.*, No. D-0101-CV-2000-01620 (Judge Vigil, First Jud. Dist., 5/12/06) ($7 million fee, representing 24.5% of fund);

- *Berry v. Federal Kemper Life Ass. Co.*, No. D-0101-CV-2000-2602 (Judge Hall, First Jud. Dist., 6/2/06) ($4.77 million fee, representing 25% of fund);

- *Mareau v. Regents of the University of California*, No. SF-96-2430(c) (Judge Hall, First Jud. Dist., 01/25/02) ($2.66 million fee, representing 25% of fund).

C. Twenty-one percent is consistent with the market rate as reflected by the contingent fee agreements negotiated with the Plaintiffs

As the authorities cited above demonstrate, the agreed-upon fee of 20.6% of the common fund is at the lowest end of the percentage recoveries routinely approved by federal and state court judges in New Mexico and across the nation. *See also*, Affidavit of Paul Bardacke, filed separately, ¶¶ 12-14. A 20.6% fee is also well below the 33.33% contingency fee negotiated between the Plaintiffs and Class Counsel. Bienvenu Aff., ¶ 22. Judge Posner of the Seventh Circuit has stated that in awarding attorneys fees to class counsel, courts should attempt to

replicate the market rate. *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (in awarding fees, courts should "determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.") Thus if the market rate is a contingent fee percentage of recovery, "class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *Id.* at 572; *see also Ikon,* 194 F.R.D. at 193 (holding that, in setting the percentage to be awarded from a common fund, the court may consider the percentage likely to have been negotiated between private parties in a similar case). Here, the requested fee is equivalent to or below the market rate, and it is extremely unlikely that any rational private lawyer would have taken this case for less than a one-third contingency fee. *Cf. Millsap v. McDonnell Douglas Corp.*, 2003 WL 21277124, *6 (N.D.Okla. May 28, 2003) (NO. 94-CV-633-H(M)) (market rate of one-third set forth in contingency fee agreement informs determination of reasonable percentage to be awarded from the common fund as attorneys' fees, leading court to determine that 25% of total recovery – or $8.75 million – is a proper and even conservative percentage of the fund to be awarded to Class Counsel).

D. Application of the *Johnson* factors confirms the reasonableness of a twenty-one percent attorneys fee

Although the percentage method is now the predominant method used by virtually all courts in common fund cases, courts often verify the reasonableness of the percentage fee awarded by analyzing class counsel's work under the specific factors set forth in *Johnson*, and adopted by the Tenth Circuit in *Brown*. *See Brown*, 838 F.2d at 454. The *Johnson* factors enable the trial court to articulate specific reasons for a finding that the percentage fee awarded is fair and reasonable. *Uselton,* 9 F.3d at 853. The *Johnson* factors also enable the court to

determine whether any "benchmark" being applied should be adjusted upwards or downwards. *Ramah Navajo Chapter,* 50 F.Supp. 2d at 1108 (applying *Johnson* factors); *Vizcaino,* 290 F.3d at 1048-51 (applying similar factors). In common fund cases, however, primary consideration is given to the results obtained. *Brown*, 838 F.2d at 456.

The twelve factors evaluated under the *Johnson* test include: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (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.

Rarely are all of these factors applicable, and the weight to be given to each factor varies. In a common fund case, the greatest weight is to be given to the monetary results achieved. In fact, the monetary results may be considered "decisive." *Brown,* 838 F.2d at 456. The time and labor involved is a "relevant" factor, but should be assigned a lesser weight than the monetary results achieved, risks undertaken, and other factors that "predominate." *Id.*

1. *The time and labor required*

By the time this litigation is concluded, it will have lasted well over two years. Class Counsel have managed and funded this case for its entirety. This case required, and continues to require, a substantial amount of dedicated time and labor. As of the date of this brief, Class Counsel has reasonably expended the following hours on this litigation:

TIMEKEEPER	TOTAL HOURS	HOURLY RATE	TOTAL
RRR	356	$300.00	$106,800
MHD	238	$300.00	$71,400
JCB	805	$300.00	$241,500
JD	.5	$200.00	$100
JLS	21	$200.00	$4,200
SJF	25	$200.00	$5,000
FTA	70	$200.00	$14,000
BJ	24	$100.00	$2,400
RAM	137	$100.00	$13,700
LES	89	$100.00	$8,900
JC	659	$100.00	$65,900
JB	8	$75.00	$5,100
MB	8	$75.00	$225
	2,441	**TOTAL**	**$539,225**

(Bienvenu Aff., ¶ 17.)

In addition, Class Counsel continues to commit significant time and labor to the administration of the settlement, for which no additional compensation will be received. This future time and labor is likely to be substantial, including legal services to be rendered in connection with the distribution process, and ongoing communications with Plaintiffs and the members of the class. Bienvenu Aff., ¶ 17.

Also to be taken into consideration is the future time and labor which would have been required if settlements had not been reached. *See e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) (taking into consideration the future time which class counsel committed to carrying through the conclusion of litigation by trial and appeal). Otherwise, Class Counsel would be penalized for the efficient resolution of these claims by settlement. *See also*, *Manual for Complex Litigation*, *supra*, §14.121 ("one purpose of the percentage method is to

encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation").

Class Counsel faced many obstacles and took major risks in handling this litigation on a contingency basis. To restrict Class Counsel to the hourly rates they customarily charge for non-contingent work, where payment is assured, would deprive them of any financial incentive to accept complex contingent fee cases that may produce nothing. Taking into account the amount of time invested in this case to date, the time that will be invested in the future, and the time saved by successfully settling these claims, the requested fee is fair and reasonable.

2. The novelty and difficulty of the questions

By accepting this case, Class Counsel took on issues of law and fact that were complex, challenging, and hotly contested. Such complex cases require more time and effort on the attorneys' part and the attorneys should be appropriately compensated for accepting the challenge. *Johnson,* 488 F.2d at 718. In the face of these novel and difficult questions of fact and law, Class Counsel negotiated settlements on behalf of the Class that provide concrete and substantial benefits. Class Counsel's acceptance of the challenge posed by these issues supports the fees requested.

3. *The skill requisite to perform the legal service properly*

This case presented a complex, challenging set of factual and legal issues that required counsel with special skills in the difficult areas of large scale class action litigation and civil rights law. Class Counsel are among the few attorneys in this locality with the skills, experience and expertise in these areas necessary to succeed in performing these services. Bienvenu Aff., ¶¶ 5-7. For this additional reason, the requested fee is fully justified.

4. *The preclusion of other employment by the attorneys due to acceptance of the case*

A review of the number of hours invested in this litigation by Class Counsel demonstrates that other employment was precluded. The total number of attorney hours invested to date is over 1,500 hours. This equates to a year of full-time legal employment on this one case alone. The affidavits also establish that other employment was in fact foregone due to the time constraints of this litigation. Bienvenu Aff., ¶ 24.

5. *The customary fee*

The customary fee in a case such as this (outside the context of a class action) is the contingent fee arrangement wherein counsel receives a percentage – 33.33% in this case – of the recovery, if any, and no fee if there is no recovery. Bienvenu Aff., ¶ 21. In the class action context, the customary fee is established by the common fund doctrine as discussed above, in the range of 25 - 33.33% (or more) of the recovery. Thus, the requested fee is well within the customary fee in a case such as this.

6. *Whether the fee is fixed or contingent*

Class Counsel undertook significant financial risk in accepting this case on a contingency basis. The risk undertaken by Class Counsel is second only to the result achieved in assessing the performance of counsel for purposes of the fee award. As one court stated:

> In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical.

In re King Resources Co. Sec. Litig., 420 F.Supp. 610, 636-37 (D.Colo. 1976).

Class Counsel would be paid absolutely nothing unless the class was successful in

obtaining monetary relief by trial or settlement. In addition, even if there was a recovery, the extent of Class Counsel's compensation would depend directly on the amount of any monetary benefits obtained.

Class Counsel have devoted more than two years to this litigation. They have invested thousands of hours of attorney and staff time and advanced over $100,000 in litigation expenses, without any compensation. Bienvenu Aff., ¶¶ 16-20. Though not required to do so, Class Counsel advanced these expenses on behalf of the Class, knowing that in a case such as this the expenses were prohibitive for the Class Representatives. Class Counsel's investment has meant not only that they risked non-payment for the years that they devoted to this case and loss of the money advanced, but they also accepted a significant "lost opportunity cost" from other work that could not be taken because of the demands of this complex case. Bienvenu Aff., ¶ 19.

In addition, Class Counsel's investment to date represents only a portion of the total risk of non-payment that Class Counsel undertook by accepting the case. If settlement had not been reached, the remaining discovery, motions briefing and hearings, and pre-trial preparation would have consumed many more months and more likely years of additional time devoted exclusively to this litigation by Class Counsel. Trial of this case would have required many months, involving numerous lawyers, staff support, experts, witnesses, exhibits and demonstrative aids. All of these future costs are part of the financial risk that Class Counsel assumed when they agreed to take this case on a contingency basis.

7. *Time limitations imposed by the client or the circumstances*

The settlement achieved by Class Counsel, if approved, will avoid years of protracted litigation that lay ahead if this settlement had not been reached. This settlement avoids the

lengthy discovery and pre-trial proceedings yet to be completed. The settlement avoids the delay and uncertain outcome of the trial itself. Finally, the settlement avoids appeals on the merits that may have been taken following trial. Class Counsel's avoidance of these delays in favor of prompt cash payments to class members supports the fee award requested.

8. *The amount involved and the results obtained*

The monetary result obtained is the most important factor in determining the reasonableness of class counsel's fee request. *See Brown,* 838 F.2d at 456. Here, Class Counsel obtained significant monetary benefits for the class members. Unlike many class action settlements that provide little if any actual monetary benefits to the class members, the settlements reached herein provide real and substantial monetary recovery to the class. The amounts expected to be allocated to individual class members are equal to or greater than those obtained in other such class action suits, and comparable to the awards that have been obtained in similar cases through individual lawsuits. In short, the monetary results obtained for the class is substantial and noteworthy, fully supporting the requested fee award. Bardacke Aff., ¶¶ 11-19.

9. *The experience, reputation, and ability of the attorneys*

This factor is intended to reward counsel for devoting the talent, experience and specialization needed to successfully try a complex class action case. *Johnson,* 488 F.2d at 718-19. Here, Class Counsel included attorneys with extensive experience in complex civil litigation, civil rights, and class actions. (Bienvenu Aff., ¶¶ 4-7; Rothstein Aff., ¶¶ 2-4; Donatelli Aff., ¶¶ 2-5. Class Counsel's dedication of their expertise to this litigation, and the skill required to obtain the substantial settlement fund created for class members, supports the requested fee.

10. ***The "undesirability" of the case***

This litigation presented difficulties that would make it undesirable to most lawyers. First, the MTC Defendants are well-funded and well-insured, enabling them to hire the best defense counsel available, who are then allowed to defend the litigation with no expense spared. Second, the human resources required to properly handle litigation of this magnitude are significant. Many firms simply would not be able to keep up with the necessary document and witness investigation and review, wide array of legal research, and the sheer procedural complexities of such a class action Third, this litigation required thousands of hours of attorney and staff time and more than two years of litigation to date. Few attorneys are willing to accept a difficult case of this type when it requires foregoing other employment and the lost opportunity cost that comes with such lengthy litigation. Fourth, this case required the out-of-pocket expenditure of over one hundred thousand dollars in litigation expenses. The case could not proceed without advancing these costs, and such costs were essential to the success achieved. Fifth, this case could only be pursued on a contingency basis, as the Plaintiffs did not have the resources to hire counsel on an hourly fee basis. Because of the complexity and difficulty of the litigation, any attorney contemplating undertaking this case on a contingency basis faced the prospect of no recovery for the money, manpower, and time that would be invested.

Class Counsel were willing to accept this case on behalf of the Plaintiffs and the members of the Class notwithstanding these factors. The undesirability of the case further supports the fee award requested.

11. ***The nature and length of the professional relationship with the client***

This factor is meant to reflect any discounted rate that a lawyer might ordinarily charge to

a long-standing client from whom the lawyer might expect continued or repeat business. *Johnson*, 488 F. 2d at 719. Here, Class Counsel had no previous relationship with the class or the class representatives. Thus, no discount should be applied to the requested award.

12. ***Awards in similar cases***

A review of fee awards in other class action lawsuits establishes that a 20.6% fee is well within the range of such awards, and in fact is on the low end of such awards. *See*, *supra*, Part III.B. This final factor therefore also confirms the reasonableness of the requested award.

E. Application of the lodestar method also confirms the reasonableness of the percentage fee

Some courts have used the lodestar/multiplier method instead of the *Johnson* test as a "cross-check" to confirm the reasonableness of a percentage fee award. *See e.g., In re Immunex Sec. Litig.*, 864 F.Supp. 142, 142-143 (W.D.Wash. 1994) (lodestar method used as a "cross-check" in affirming 30% fee award). Application of the "multiplier" part of the lodestar test typically involves a review of the same factors evaluated under the *Johnson* test, including the results achieved, the risks undertaken by class counsel, and the skill and quality of the representation. *See e.g., Sumitomo,* 74 F. Supp. 2d at 398. In this case, use of the lodestar method would result in the same fee award as use of the percentage method.

As of the date of this brief, the raw lodestar in this case is $539,225 (not including gross receipts tax).[1] Bienvenu Aff., ¶ 17. Thus, a fee of 20.6% of the common fund, or $1,756,098, is equivalent to applying a multiplier of 3.26 to the raw lodestar. This multiplier is well within the

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[1] Class Counsel's billing records will be made available for the Court's *in camera* inspection upon request.

range commonly applied in other class actions, and further establishes the reasonableness of the requested fee. *See*, 1 CONTE, ATTORNEY FEE AWARDS § 2.06 at 39 (1993) (multipliers of 5-10 are common); 3 NEWBERG ON CLASS ACTIONS § 14.03 (multipliers ranging from one to four "frequently are awarded in common fund cases," and citing multipliers of five and ten in "large" common fund cases); *In re Miniscribe Corp.,* 309 F.3d 1234, 1245 (10th Cir. 2002) (approving multiplier of 2.57 as supported in other lodestar multiplier cases); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 123 (2nd Cir. 2005) (approving multiplier of 3.5, resulting in a fee of $220,290,160.42, and noting that such a multiplier "has been deemed reasonable under analogous circumstances"); *Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65, resulting in fee of $27,127,000); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (applying multiplier of 5.5, resulting in fee of $19,154,144.62); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("A multiplier of 3.97 is not unreasonable in this type of case").

Federal and state courts in New Mexico have approved similar multipliers; *e.g.*:

- *Feerer v. Amoco Production Co.*, Civ. No. 95-012 JC/WWD (D.N.M. 1998) ($20.54 million fee, representing multiplier of 4.27);
- *In re New Mexico Indirect Purchasers: Microsoft Corporation Antitrust Litigation*, 2006-NMCA-____ (affirming $6.1 million fee award, representing multiplier of 3.0);
- *Berry v. Federal Kemper Life Ass. Co.*, No. D-0101-CV-2000-2602 (Judge Hall, First Jud. Dist., 6/2/06) ($4.77 million fee, representing multiplier of 2.38);
- *Dichter v. BP America Production Co.*, No. D-0101-CV-2000-01620 (Judge Vigil, First Jud. Dist., 5/12/06) ($7 million fee, representing multiplier of 10.17).

In sum, application of the lodestar method also confirms that a fee representing 20.6% of

the common fund is fair and reasonable. *See also In re Activision,* 723 F.Supp. at 1377 (surveying cases and concluding that "nearly all common fund awards range around 30% even after thorough application of either the lodestar or [*Johnson*] method.")

F. Gross receipts tax is properly added to the amount of attorneys' fees under New Mexico law

New Mexico imposes gross receipts tax on services. It is customary for gross receipts tax to be added to any fee for attorneys' services rendered, whether on an hourly fee basis or a contingency fee basis. Accordingly, gross receipts tax of 7.625 % is properly added to the amount of attorneys' fees. *See Ramah Navajo Chapter,* 50 F. Supp. 2d at 1109 (awarding New Mexico gross receipts tax on award of fees in class action common fund).

G. Plaintiffs' necessary and reasonably incurred litigation expenses are properly reimbursed

It is well-settled that class counsel are entitled to an award of their litigation expenses reasonably and necessarily incurred:

> Lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover . . . expenses reasonable in amount, that were necessary to bring the action to a climax.

NEWBERG ON CLASS ACTIONS at § 14.03. To date, Class Counsel and Plaintiffs have incurred costs in the total amount of approximately $110,000, summarized as follows:

AMOUNT	DESCRIPTION OF COSTS
$1,535.29	Electronic Research
$938.36	Long Distance and Conference Calling
$469.97	Postage and Federal Express
$4,177.75	Document Reproduction
$159.00	Facsimiles
$10,056.52	Court Reporters and Videographers

$1,659.77	Food and Travel
$4150.00	Filing Fees
$22,453.76	Mediation
$28,448.29	Claims Administration/Outreach
$3,500.00	Expert Witness
$33,000.00	Outstanding Claims Administration/Outreach (estimated)
$110,548.71	**TOTAL**

Bienvenu Aff., ¶¶ 19-20.

These costs were reasonably and necessarily incurred in the successful prosecution of this lawsuit and are properly reimbursed in full.

IV. THE PROPOSED INCENTIVE PAYMENTS ARE FAIR AND REASONABLE AND SHOULD BE APPROVED

Class representative incentive awards are intended to recognize the significant time and efforts expended by the class representatives on behalf of the class and the risks that they undertook in bringing a lawsuit. *Ingram v. The Coca Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001)(awarding incentive awards of $300,000 to each plaintiff and holding that "courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation" (*quoting In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)); *see also, Huguley v. Gen. Motors Corp*., 128 F.R.D. 81, 85 (E.D. Mich. 1989) ("Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne."). In considering incentive awards, the Court may consider the risk to the class representatives, financial and otherwise; the personal difficulties encountered by the class representatives; the amount of time and effort spent on litigation; the duration of the litigation;

and the personal benefit—or lack thereof—enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atlantic Richfield Co*., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

In the present case, these factors weigh in favor of the agreed-upon incentive awards for the Class Representatives. They were all willing to allow their names to appear on the Complaint, which all parties knew would receive significant publicity. They made personal sacrifices in order to pursue this case on behalf of the Class. Each of the Class Representatives had particularly strong individual cases that would likely have resulted in significant awards if these cases had been pursued individually. Instead, the Class Representatives chose to pursue a recovery that, while less beneficial to them, provided a benefit to thousands of others. Affidavit of Elizabeth Leyba, filed separately, ¶¶ 3-11; Bienvenu Aff., ¶ 25; Rothstein Aff., ¶ 7; Donatelli Aff., ¶ 10.

The Class Representatives were required to submit to depositions and other public scrutiny into embarrassing details of their personal lives, including their arrests. In addition, they collectively spent hundreds of hours reviewing information provided in discovery, providing information to Class Counsel, participating in depositions, answering written discovery, attending mediations, and assisting Class Counsel in countless other ways in the pursuit and eventual settlement of this case. Leyba Aff., ¶¶ 3-11; Bienvenu Aff., ¶ 25; Rothstein Aff., ¶ 7; Donatelli Aff., ¶ 10.

In sum, given the circumstances presented in this case and the work performed by the Class Representatives on behalf of the class, the requested incentive award of $42,750 for each Class Representative is reasonable and should be approved.

V. THE ABSENCE OF OBJECTIONS SUPPORTS THE REASONABLENESS OF THE AGREED-UPON ALLOCATION

Notices of the settlement were sent by first class mail to over 19,000 potential class members, informing them of the details of the Settlement Agreement, including the proposed allocation of attorneys fees, costs and incentive payments. No class members objected to any aspect of the Settlement Agreement. Patton Aff., ¶ 14. That no objections were received strongly supports the reasonableness of the agreed-upon allocation. *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, *5 (E.D.Pa. June 2, 2004) (No. MDL 1261, Civ.A. 98-5055, Civ.A. 99-1000, Civ.A. 99-1341) ("The absence of objections supports approval of the Fee Petition") (and citing holding of *In re Cell Pathways, Inc., Sec. Litig., II*, 2002 U.S. Dist. LEXIS 18359 (E.D.Pa. September 23, 2003) that existence of only one objection shows class does not object to thirty percent requested by attorneys and supports approval of fee petition). Similarly, the fact that not one class member out of the 19,000 to whom notices were given objected to the amount of the incentive awards provides further indication that the members of the Class readily appreciate the risk and sacrifice undertaken by the Class Representatives.

In addition, the amount of the attorneys fees and incentive payments was the outcome of lengthy negotiations with the Defendants, who ultimately must pay these awards. That the parties who bear these expenses do not object further demonstrates that these amounts are fair and reasonable.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the Parties agreed-upon allocation of attorneys fees, costs and incentive payments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2006, I caused to be delivered a true and correct copy of the foregoing on the following counsel by U.S. mail, postage prepaid:

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