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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN, et al.,

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., f/k/a ALIERA HEALTHCARE, INC., a Delaware corporation; TRINITY HEALTHSHARE, INC., a Delaware corporation; and ONESHARE HEALTH, LLC, formerly known as UNITY HEALTHSHARE, LLC and as KINGDOM HEALTHSHARE MINISTRIES, LLC, a Virginia limited liability corporation,

Defendants.

Case No. 2:20-CV-00867-TLN-KJN

PLAINTIFFS' MOTION FOR ATTORNEY FEES, COSTS, AND CLASS REPRESENTATIVE CASE CONTRIBUTION PAYMENTS

Hearing
Date: January 11, 2024
Time: 2:00 p.m.
Courtroom: 2
Hon. Troy L. Nunley

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I. INTRODUCTION

The settlement in this case resolves claims filed against Defendant OneShare Health in three different class action lawsuits and establishes a fund of over six million dollars for payment of claims to a nationwide class who have been waiting for years for relief. This Court entered an Order preliminarily approving the nationwide class settlement with OneShare Health on June 15, 2023. ECF No. 111. That Order also did the following:

(1) appointed Corlyn and Bruce Duncan, Rebecca White, Ellen Larson, Jaime and Jared Beard, Hanna Albina, and Austin Willard as "Class Representatives," and

(2) appointed Sirianni Youtz Spoonemore Hamburger PLLC, Feinberg, Jackson, Worthman and Wasow, LLP, Handley Farah & Anderson, PLLC, Myers & Company, PLLC, Mehri & Skalet, PLLC, Garmer & Prather, PLLC; and Varellas & Varellas PLLC as "Class Counsel" for the Settlement Class. That Order also set August 24, 2023—70 days after entry of the Order—as the date by which Plaintiffs could move for an approval of attorney fees, costs, and service awards for the Class Representatives.

Plaintiffs now move, pursuant to Fed. R. Civ. P. 23(h)(3) and 54(d)(2), for an attorney fee award of 28% of the settlement fund and for reimbursement of costs and expenses of $61,521.42. They also move for a case contribution award of $10,000 each, or $60,000 total, for the Duncans, Ellen Larson, Rebecca White, the Beards, Hanna Albina, and Austin Willard. This Motion is supported by the Omnibus Declaration of Richard E. Spoonemore in Support of Plaintiffs' Motions for Final Approval of Settlement Agreement and for Attorney Fees, Costs, and Class Representative Case Contribution Payment, and the Declarations in Support of Plaintiffs' Motion for Attorney Fees and Costs of Nina Wasow, Cyrus Mehri, Jerome P. Prather, James J. Varellas III, Michael Myers, and William H. Anderson, and all exhibits attached thereto.

II. BACKGROUND

Aliera and its insiders perpetuated a nationwide fraud that ensnared thousands of vulnerable people who believed they were purchasing legitimate health care plans that, like

insurance, would cover their health care costs. When the fraud inevitably crumbled, many victims were, sadly, left with thousands of dollars of unpaid medical bills.

Aliera initially perpetrated this fraud by convincing Defendant OneShare's parent to authorize Aliera to design, sell, and administer Unity plans. Aliera sold the Unity plans from late 2016 through August 2018, when Defendant's parent terminated its agreement with Aliera and demanded Aliera stop selling new Unity plans. The parties sued each other in Georgia state court in *Aliera Healthcare v. Unity Healthshare, LLC, et al.,* No. 2018CV308981 (Fulton County Super. Ct.) (the "Georgia Lawsuit").

Aliera then created a new entity, Trinity Healthshare, which it falsely claimed was a Healthcare Sharing Ministry (HCSM) exempt from insurance regulation. In December 2018, Aliera attempted to transfer the members to whom it had sold Unity plans to virtually identical Trinity plans. On December 28, 2018, the court in the Georgia Lawsuit entered a temporary restraining order preventing Aliera from doing so. ECF. No. 38-2. After an evidentiary hearing, that court, on April 26, 2019, entered a preliminary injunction that prevented Aliera from automatically moving Unity members into new Trinity plans, but allowed both Unity and Aliera to solicit the Unity members. ECF No. 19-1. As a result, many Unity members became Aliera/Trinity members. For the members themselves, whether they were Trinity or Unity members was unclear—all they knew was that at all times they dealt with Aliera. *See, e.g.,* ECF No. 44-3 (Declaration of Corlyn Duncan), ¶ 12.

Class Counsel first began representing Aliera members from Washington State after Aliera failed to pay their medical claims. Counsel researched the facts and issues thoroughly before filing an action, including obtaining documents from Washington's Office of the Insurance Commissioner through a public records requests. Counsel filed a class action lawsuit on behalf of a class of Washington residents in federal district court in the Western District of Washington against Aliera and Trinity on August 14, 2019, *Jackson, et al., v. The Aliera Companies,* et al, No 2:19-cv-1281 (W.D. Wash.) ("Washington Lawsuit"). Declaration of Richard E. Spoonemore ("Spoonemore Decl."), ¶ 2.

After the Washington Lawsuit was filed, members from other states whose medical bills had gone unpaid, including Corlyn and Bruce Duncan, contacted Counsel. Counsel investigated their claims along with relevant California law and sought records from California's attorney general. After being contacted by Colorado resident Ellen Larson, Counsel investigated her claim and relevant Colorado law, and sought records from Colorado's insurance commissioner. In investigating the claims and pursuing these lawsuits, Counsel also reviewed the extensive pleadings filed in the Georgia Lawsuit, which included valuable testimony from insiders at Aliera and OneShare, allowing Counsel to glean crucial facts about Aliera, OneShare, and Trinity. Spoonemore Decl., ¶¶2, 3.

Counsel filed this lawsuit against Aliera and Trinity on behalf of the Duncans and a class of California members on April 28, 2020 ("California Lawsuit"). ECF No. 1. They also filed a lawsuit against Aliera and Trinity on behalf of Ms. Larson and a class of Colorado members (the "Colorado Lawsuit"). Spoonemore Decl., ¶ 3. In both cases, defendant Trinity claimed that the named plaintiffs' unpaid health care costs were incurred while those plaintiffs were members of Unity, not Trinity, and that Trinity had no liability for the claims. In Ms. Larson's case, Trinity claimed she had never been a Trinity member (even though she had received documentation suggesting otherwise). Trinity moved to dismiss both the California and Colorado Lawsuits for lack of standing. *Id*., ¶ 3; ECF No. 14, at 7. On behalf of the Duncans and the class, Counsel amended the complaint here to add OneShare on June 26, 2020. ECF No. 19. In Colorado, Counsel refiled the case with additional members as plaintiffs, including Rebecca White, f/k/a Rebecca Smith and Jared and Jaime Beard, who had been covered both by both Unity and Trinity plans, and adding OneShare as a defendant. That Lawsuit was litigated in the District of Colorado under the caption *Smith, et al v. The Aliera Companies, et al,* Case No. 1:20-cv-02130-RBJ (D. Colo.). Spoonemore Decl., ¶ 3.

Kentucky residents Hanna Albina and Austin Willard also reached out to Class Counsel because Aliera had wrongly denied coverage for their healthcare claims. After much legal and factual investigation and research, including interviews of former employees and others, by a

licensed professional investigator on the staff of Class Counsel HFA, on December 14, 2020, Counsel filed a lawsuit on behalf of Messrs. Albina and Willard and a class of Kentucky residents, against Aliera, OneShare and Trinity in *Albina, et al v. The Aliera Companies, Inc., et al,* Case No. 5:20-cv-00496-JMH (E.D. Kentucky) (the "Kentucky Lawsuit").[1] Spoonemore Decl., ¶ 4; Anderson Decl., ¶ 2.

In each of the Lawsuits filed against OneShare, Aliera, and Trinity, all three Defendants immediately moved to dismiss because they claimed the named plaintiffs had agreed to arbitrate any dispute. *See* ECF Nos. 36, 37, 38; Spoonemore Decl., ¶ 6. Counsel spent a significant amount of time researching the law, drafting oppositions to the three motions, communicating with the plaintiffs regarding the facts, and obtaining declarations from them. *See, e.g.,* ECF Nos. 44, 44-3. Counsel prepared and served discovery requests on Defendants in the Colorado Lawsuit. Counsel also drafted and filed an opposition to Defendants' motion to stay the proceedings pending this Court's decision on the arbitration motion, filed a sur-reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss, and filed several notices of additional authority relating to that Motion, as similar motions were decided around the country. *See, e.g.*, ECF Nos. 50, 52, 53, 54, 57, 60, 66, 74. In the Colorado Lawsuit, the court denied Defendants' motion to arbitrate, and all Defendants appealed to the Tenth Circuit. Spoonemore Decl., ¶ 6.

On July 8, 2021, while the arbitration motions were pending in the California and Kentucky Lawsuits, and the Tenth Circuit appeal was pending in the Colorado Lawsuit, Trinity filed for bankruptcy in Delaware, proceeding as *In re Sharity Ministries, Inc.,* Case No. 21-11001 (TMH) (Bankr. D. Del). That bankruptcy filing automatically stayed any further legal action in the Lawsuits against Trinity. On Aliera's motion, this Court stayed the case against Aliera and

[1] Class Counsel also filed a class action lawsuit against Aliera and Trinity in Missouri on April 15, 2020, as *Kelly, et al v. The Aliera Companies, Inc., et al,* Case No. 3:20-cv-05038-MDH (W.D. Missouri) (the "Missouri Lawsuit"). Spoonemore Decl., ¶ 3.

OneShare, pending Trinity's bankruptcy, on September 10, 2021, *see* ECF No. 88, and similar orders were entered in the Kentucky and Colorado Lawsuits.

In October 2021, Aliera's counsel withdrew from this and the other Lawsuits. *See* ECF No. 89. Class Counsel soon discovered that Aliera had commenced an assignment for benefit of creditors proceeding in Georgia and was attempting to quietly go out of business. Spoonemore Decl, ¶ 7. On behalf of the named plaintiffs in the Washington and Kentucky Lawsuits, Class Counsel obtained default judgments against Aliera and on December 3, 2021, commenced an involuntary bankruptcy action against Aliera, now pending as *In re The Aliera Companies Inc.,* Case No. 21-11548-JTD (Bankr. D. Del). *Id.* OneShare is Aliera's largest trade creditor, with a claim of $3.75 million in the Aliera bankruptcy. A plan of liquidation was confirmed by the bankruptcy court in the Aliera matter on August 17, 2023. Through the efforts of Class Counsel and Named Plaintiffs, a class of Unity members was certified by the bankruptcy court, and that class was allowed a claim in the Aliera bankruptcy. Spoonemore Decl., ¶ 8, and ***Exh. 1.***

After both Aliera and Trinity were in bankruptcy, OneShare was the only remaining solvent defendant in the California, Colorado, and Kentucky Lawsuits. OneShare and Plaintiffs then entered into serious settlement negotiations. One of the parameters to any settlement was that OneShare would only settle on a nationwide basis, so that all claims that members had against OneShare for the period when Aliera sold and administered the Unity plans would be resolved. Spoonemore Decl., ¶ 9. Through counsel, the parties entered into a Confidentiality Agreement for the purpose of sharing information in connection with exploring settlement and resolution of the three Lawsuits. *Id.,* ¶ 10.The parties agreed upon a mediator—retired Judge Thomas B. Griffith, formerly of the D.C. Circuit Court. Class Counsel prepared lengthy mediation memoranda for the mediator and reviewed financial information OneShare provided pursuant to the Confidentiality Agreement. Class Counsel traveled to Washington D.C. for a full day of mediation on April 28, 2022. *Id.*

Although the parties left the mediation without an agreement, they arrived at a framework to continue negotiations. Class Counsel continued to engage in extensive negotiations with

OneShare's attorneys, exchanging numerous proposals and counterproposals. By December 2022, after lengthy negotiations, OneShare and Plaintiffs had agreed upon the critical terms of the settlement and executed a term sheet. A final agreement was executed by Plaintiffs and OneShare in April 2023. By that time, OneShare had deposited the first $3 million of the required settlement payments in Class Counsel's trust account. Spoonemore Decl., ¶ 11.

In addition to the $3 million already paid under the settlement, OneShare must pay at least $3 million more, if paid by December 31, 2024. If that amount is not paid by then, the amount it owes will increase to a maximum of $7 million, depending on date of payment. This incentivizes OneShare to make the payments early. It is obligated, however, to pay at minimum $400,000 per year. If OneShare defaults on payment, Plaintiffs can accelerate the entire $7 million balance. *See* ECF No. 100-2, ¶¶ 3.3, 4.

As part of the settlement, OneShare also agreed to assign its $3.75 million claim in the Aliera bankruptcy to the class. ECF No. 100-2, ¶ 3.2.That assignment has value beyond its monetary value. Because OneShare is Aliera's single largest unsecured creditor, the assignment gave the Unity members clout in the Aliera bankruptcy and helped to secure the plan recognizing the Unity Class as an Aliera creditor with a claim in the bankruptcy. Spoonemore Decl., ¶ 8. Although it is doubtful that the full $3.75 million will be paid from the bankruptcy, the Aliera bankruptcy plan projects unsecured claimants like OneShare would receive between 15% and 35% of their claims, or in other words, between $562,500 and $1,312,500 of OneShare's bankruptcy claim may be paid. *Id.* Thus, the total monetary value of the settlement ranges between $6,562,500 and $7,312,500, depending on the amount of the payment for the assignment of the claim, and assuming OneShare makes its final payment by December 31, 2024, which it has indicated that it intends to do. Spoonemore Decl., ¶ 14.

III. LAW AND ARGUMENT

A. The Requested Fees Are Reasonable and Should Be Awarded

1. Attorney Fees in the amount of 28% of the Common Fund Created Should Be Awarded

Under Ninth Circuit law, when a class action settlement creates a common fund, a district court has discretion to choose either the percentage-of-the-fund or the lodestar method in calculating a fee award. *Vizcaino v. Microsoft Corp.,* 290 F. 3d 1043, 1047 (9th Cir. 2002); *Stetson v. Grissom,* 821 F. 3d 1157, 1165 (9th Cir. 2016). Typically, however, courts apply the percentage-of-the-fund method where the settlement involves a common fund. *Kinney v. Nat'l Express Transit Servs. Corp.,* Case No. 2:14-cv-01615-TLN-DB, 2018 U.S. Dist. LEXIS 10808, *11 (E.D. Cal, Jan. 22, 2018). *Accord*, MANUAL FOR COMPLEX LITIGATION (4th), § 14.121 ("[T]he factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded.'").

In the Ninth Circuit, 25% of the settlement amount is the benchmark percentage applied in class action common fund cases.[2] It is only a "starting point for analysis," however, and "selection of the rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F. 3d at 1048. As this Court has noted, in "most common fund cases the award exceeds that [25%] benchmark." *Kinney*, 2018 U.S. Dist. LEXIS 10808, at *11 (citing *Johnson v. General Mills, Inc.,* 2013 U.S. Dist. LEXIS 90338, at *20 (C.D. Cal. June 17, 2013) (*quoting Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 491 (E.D. Cal. 2010)).

Selection of the percentage must be supported by findings that take into account all of the circumstances of the case. *Vizcaino*, 290 F. 3d at 1048. Factors that the court should take into consideration in selecting the rate include the results obtained for the class, the risk counsel

[2] Fees are awarded on the total amount of the fund made available to the class, regardless of whether class members actually claim the entire amount. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 479-482, 100 S. Ct. 745 (1980); *Williams v. MGM-Pathe Commn's. Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997) (fees based on total value of fund secured by class counsel, not amount of claims made by class members on fund).

undertook in pursuing the case, the complexity of the issues, and benefits generated for the class beyond the cash settlement fund. *Vizcaino*, 290 F. 3d at 1048-1049. In *Vizcaino*, the Ninth Circuit affirmed the district court's 28% fee award. The "typical range" of acceptable attorney fee awards in the Ninth Circuit is 20%-33% of the total settlement value. *Barbosa v. Cargill Meat Solutions Corp.,* 297 F.R.D. 431, 448 (E.D. Cal. 2013). *See also, In re Activision Sec. Litig.,* 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%"). *Mauder v. Aurora Loan Servs., LLC,* Case No. 10-3118 SBA, 2015 U.S. Dist. LEXIS 8123, *4 (N.D. Cal. Jan. 21, 2015) (finding 30% fee award reasonable in a mortgage workout class action lawsuit). A higher percentage is often awarded when the amount of the fund created is relatively small, or less than $10 million. *Miller v. CEVA Logistics USA, Inc.,* Case No. 2:13-cv-01321-TLN-CKD, 2015 U.S. Dist. LEXIS 104704, *18 (E.D. Cal. Aug. 10, 2015) (finding fees of 33 1/3% of settlement amount less than $10 million reasonable), and citing *Craft v. County of San Bernardino,* 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008) (cases below $10 million are often more than the 25% benchmark).

Through the efforts of Class Counsel and the Class Representatives, a common settlement fund of at least $6,000,000 in cash, plus an estimated minimum of $562,500 from the assignment of OneShare's claim in the Aliera bankruptcy, will be established, for a total of $6,562,500. Applying the preferred percentage-of-the-fund approach at 28%, the requested fee here totals $1,837,500.

OneShare will have made a total of $3.4 million into Plaintiffs' trust account by the end of 2023, sufficient for an initial distribution to be made to the Class Members in early 2024. Spoonemore Decl., ¶ 14. A second distribution will be made after OneShare has made the remaining payments and the payment on the assignment from the Aliera bankruptcy is received.[3] As a result, Class Counsel's requested 28% attorney fee award would only be calculated on any

[3] If payment on the assignment is made from the trustee in the Aliera bankruptcy prior to the first distribution, then those sums would be included in that initial payment.

amount distributed at the time it is distributed. In other words, Class Counsel requests approval of payment of 28% of the initial distribution, or $952,000 of the of the initial $3.4 million expected to be distributed in early 2024, and approval of 28%, of the future distributions ($885,500 if the residual fund totals $3,162,500). The total fees at 28% are estimated to be $1,837,500.

The factors identified in *Vizcaino* above, justify bumping up the award slightly from the benchmark 25% to 28%, consistent with the majority of cases in this Circuit.

First, Class Counsel obtained an excellent result for the class in this case by obtaining this settlement with OneShare, the only remaining solvent defendant. Although the settlement will not afford full recovery to the class, the settlement will provide real relief to class members who have been waiting for years for some payment of their medical expenses. It represents a payment from which class members can begin to resolve claims from their medical providers and collection agencies. The settlement was vigorously negotiated over the course of many months and represents the best possible result for the class from this defendant.

Second, Class Counsel undertook significant risk in pursuing these claims. They agreed to pursue the Lawsuits on a contingency basis, with no guarantee of success. They have paid costs and expenses out-of-pocket for which they would have received no reimbursement absent a recovery for the Class. They have litigated these Lawsuits for over three years with no compensation. Spoonemore Decl., ¶ 12.

Defendants sold health plans that they claimed were not insurance, and their business model relied on that claim. Plaintiffs' case struck at the heart of that business model, and Class Counsel knew they would face stiff opposition to their efforts to prove the plans were, in fact, insurance. It was clear that Defendants' strategy was to first seek arbitration based upon language at the back of the member guides and pursue automatic interlocutory appeals of any adverse ruling on the motions to compel arbitration, which meant years before any of these cases proceeded into discovery. This was borne out by the appeals to the Tenth Circuit of the District Court's denial of Defendants' motions to compel arbitration in the Colorado Lawsuit, and there is no question that the same would have occurred in the California and Kentucky Lawsuits. By doing so, they could

avoid judicial scrutiny of the fundamental insurance issue for as long as possible. After exhausting appeals, Defendants would have spared no effort in pursuing a discovery strategy aimed at not only the underlying claims, but also presenting for defeating class certification irrespective of the merits of any individual claims. Trinity and Aliera's bankruptcies did not result in OneShare becoming any less capable and willing to defend itself and pursue this strategy, even as a lone defendant. Had this settlement not been achieved, Class Counsel would potentially be facing many more years of litigation against OneShare, during which they would receive no compensation for the many hundreds of hours spent, while these issues were being resolved. Class Counsel also recognized that by the time a class was certified and ultimately prevailed on its claims, the toll of the litigation might leave defendants financially depleted and unable to pay a large verdict.

Third, this case is complex and required a great deal of skill in achieving the settlement. Because insurance law varies from state to state, the fundamental insurance question needed to be analyzed on a state-by-state basis. Health care sharing ministries have only become large entities in recent years, and there is scant reported case law covering their operation and practices. Although Plaintiffs believe that they would ultimately prove that the products sold were illegal insurance and were not exempt as from health care sharing ministries, they knew that defendants would spare no expense defending against these clams and any class treatment, and that it would be years before any recovery could be made.

The complexity of obtaining relief for the members was further complicated when Trinity filed for bankruptcy and Aliera went out of business, ultimately ending up in bankruptcy as well. These bankruptcies forced Class Counsel to pursue those entities through the bankruptcy court while separately pursuing OneShare in these class action Lawsuits. Aliera was the party that controlled all the member data for Unity members, as well as all documents regarding marketing, sales, and administration of the claims, and its bankruptcy magnified the problems with obtaining discovery. Simply obtaining a list of Unity members for purposes of providing notice through bankruptcy counsel and their outside vendors was a lengthy process. Spoonemore Decl., ¶ 17.

Fourth, this settlement generates benefits for the class beyond the cash settlement fund. OneShare has agreed to cooperate with the class in pursuing claims in the Aliera bankruptcy. Already, the assignment of the OneShare claim to the Unity class has increased the Unity Class's clout in the bankruptcy, supporting the bankruptcy court's recognition of a Unity Class with a claim against Aliera, and the assignment of OneShare's claim in the Aliera bankruptcy also makes the Class a direct unsecured creditor in that case, able to assert OneShare's claim.

Finally, Class Counsel have gone above and beyond what is necessary in this litigation to help the class members. During the course of the litigation, Class Counsel and their staff have responded to hundreds of calls and emails from class members who have been left with tens or even hundreds of thousands of dollars in unpaid medical bills that should have been paid by defendants. Class Counsel have, without charge to the members and in order to assist them, written letters to their health care providers explaining the status of the litigation and requesting that collection efforts be put on hold while the litigation moves forward. Spoonemore Decl., ¶ 18.

2. The Requested Fees Represent a Negative Multiplier From the Lodestar

After applying the percentage-of-the-fund approach to award attorney fees in class action cases, district courts then often use the lodestar method as a cross-check on the percentage method in order to ensure a fair and reasonable result. *Vizcaino*, 290 F. 3d at 1043. The lodestar is figured by "multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate." *McCown v. City of Fontano Fire Dept.,* 565 F.3d 1097, 1102 (9th Cir. 2009). The hours include time "reasonably expended in pursuit of the ultimate result achieved in a manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Hensley v. Eckerhart,* 461 U.S. 424, 431 (1983). As a general rule, "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Moreno v. City of Sacramento,* 534 F.3d 1106, 1112 (9th Cir. 2008).

For purposes of the lodestar cross-check, detailed cataloging of hours spent is not necessary, and declarations from attorneys attesting to their experience and qualifications, their hourly rates, and the hours expended have been found sufficient. *In re Immune Response Sec. Litig.,* 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007), citing *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 306-07 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."). *See also Schiller v. David's Bridal, Inc.,* Case No. 1:10-cv-AWI-SKO, 2012 U.S. Dist. LEXIS 80776, *57 (E.D. Cal. June 11, 2012) (an "exhaustive cataloging and review of counsel's hours" is not necessary when performing a lodestar cross-check); *Sutter Health Uninsured Pricing Cases,* 171 Cal. App. 4th 495, 512, 89 Cal. Rptr. 3d 615 (2009) (where lodestar is used to cross-check percentage approach, documentation of the lodestar figure is often submitted in summary or declaration form, without submission of full-time records).

A lodestar multiplier may then be applied to the resulting amount to adjust it up or down, depending on the complexity of the case, the risks involved, and the length of the litigation. *Vizcaino*, 290 F. 3d at 1051. Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation. *Miller*, 2015 U.S. Dist. LEXIS 104704, at *21, citing *Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294 (N.D. Cal 1995). *See also, Gonzalez v. NCI Grp., Inc.,* Case No. 1:18-cv-00948-AWI-SKO, 2023 U.S. Dist. LEXIS 12310, *23 (E.D. Cal. Jan. 24, 2023) (applying a multiplier of 1.43 to arrive at the requested fee amount).

For purposes of the lodestar cross-check here, each of the seven Class Counsel law firms has reported the time it spent on the three Lawsuits—this California Lawsuit, the Colorado Lawsuit, and the Kentucky Lawsuit—included in this class action settlement with OneShare, and time spent in connection with mediation and settlement. *See* Spoonemore Declaration, and Declarations of Nina Wasow, Jerome P. Prather, Cyrus Mehri, James J. Varellas III, William H. Anderson, and Michael Myers, submitted with this Motion. Class Counsel have already submitted declarations attesting to their experience and qualifications. *See* ECF Nos. 100-4 (Hamburger), 100-5 (Varellas), 100-6 (Wasow), 100-7 (Myers), 100-8 (Prather), 100-9 (Mehri), and 100-10

(Anderson). The total amount of time documented by Class Counsel is 3,010.16 hours. *See* Spoonemore Decl., ¶ 25.

The amount of time spent was reasonable. This case resolves a dispute on a nationwide basis. The nationwide reach of the several lawsuits required substantial coordination among different law firms in different states in addition to coordination with the two bankruptcy cases. Because of the close relationship of the cases being settled here and those other cases and bankruptcies, the attorneys have used discretion in reducing their fees to assure that only time directly related to the three Lawsuits and the OneShare settlement resolving them is included in this fee request. The lodestar includes time spent researching the facts and issues, reviewing documents and publicly available information, communicating with the Class Representatives, drafting and amending complaints and related motions, opposing the motions to dismiss or for arbitration and to stay the proceedings, preparing discovery requests, analyzing issues and strategy, mediating and negotiating with OneShare, drafting and revising the terms of settlement and the ultimate settlement agreement, moving for class certification and approval of the settlement, and communicating with class members, including creation of web pages, https://www.symslaw.com/aliera and https://www.symslaw.com/unitysettlement, that inform members of the efforts to obtain recovery from the defendants.

The time reported only goes through the end of July 2023, and does not include the considerable time Class Counsel will spend in seeking final approval of the settlement, making this motion for fees, costs and case contribution awards, and overseeing the distribution of the settlement fund. Moreover. Class Counsel have already received and responded to calls or emails from over 390 class members in response to the class notice and anticipate additional time that they will have to spend in finalizing this settlement and assuring the payment of claims to class members. *See* Spoonemore Decl., ¶ 19. None of this time is included in the lodestar.

Class Counsels' Declarations also identify the usual and customary rates billed by each attorney or paralegal at that firm. In some cases, that rate is, or approximates, the Laffey rate, the rate identified as the going rate for firms in the Washington D.C. area, available at

http://www.laffeymatrix.com/see.html (last visited 08/23/24). *See* Declarations of Cyrus Mehri, ¶ 3, William H. Anderson, ¶ 3, Jerome P. Prather,¶ 3, and James J. Varellas III, ¶ 4. For Class Counsel from Washington state, the customary rate is lower. *See* Spoonemore Decl., ¶ 23, Myers Decl., ¶ 3. For California counsel, the rates are consistent with those in the San Francisco Bay Area, where counsel is located. *See* Wasow Decl., ¶ 3. Because the case here settles nationwide claims, Class Counsels' customary rates are appropriate. There was no local counsel that had investigated and researched the unique legal issues and facts concerning HCSMs as Class Counsel had done, and that would also be willing to undertake the risks Class Counsel have taken here. Specifically, Class Counsel first became involved in investigating Aliera because of their extensive expertise in health insurance and ERISA matters, and Plaintiffs here sought out Class Counsel because of their experience in pursuing the particular defendants in other jurisdictions. Based on Class Counsels' customary rates, the total lodestar is $2,130,428.04. This lodestar is more than the 28% fee of $1,837,500 requested and represents a negative multiplier.

Plaintiffs recognize, however, that the Laffey rate is not generally followed in this District. Rather, the courts in this District look to rates billed locally. Counsel note, however, that court cases in this District from 10 years ago approved hourly rates of $280–$560 for attorneys with two to eight years of experience, and $720 for those with 21 years of experience, *Barbosa v. Cargill Meat Sols. Corp.* 297 F.R.D. 431, 452-53 (E.D. Cal. 2013). Those rates are only slightly less than the Laffey matrix rates in effect for 2013. For example, the Laffey hourly rate in 2013 for an attorney with 20 or more years of experience was $771, and $567 for an attorney with 8–10 years of experience. http://www.laffeymatrix.com/see.html. These rates are only marginally higher than the $720 and $560 approved in *Barbosa* for attorneys of similar experience. More recently, this District has approved hourly rates of $910 for an attorney with more than 35 years of litigation experience, and $1,005 with the highest for an attorney with over 40 years' experience while approving also $280 for law clerks, and $230 for paralegals and legal assistants. *T.G. v. Kern County,* Case No. 1:18-cv-0257 JLT, 2020 U.S. Dist. LEXIS 99317, *67 (E.D. Cal. June 5, 2020).

Nevertheless, recognizing the wariness of courts in this District to apply the Laffey or other rates customary outside this District, Class Counsel demonstrate that their fees are reasonable. If the Court reduces all rates charged by Class Counsel—even those who charge less than the Laffey rate—by 20% across the board, and ignores the substantial work that lies ahead to finalize the settlement, the lodestar is $1,704,342.43. Spoonemore Decl., ¶ 26.

With this 20% reduction, the lodestar multiplier required to reach 28% of the fund, or $1,837,500, of the anticipated settlement fund is only 1.07. That amount is well below the multipliers of 3-4 found reasonable and allowable, and below the 1.56 multiplier this Court approved in *Miller*.[4] In fact, the fees could be cut across the board by 40% and the result would still result in a 1.43 multiplier—less than the one approved in *Miller*. Based on the lodestar cross-check, 28% of the anticipated Settlement Amount, or $1,837,500, is reasonable and should be awarded.

B. Costs of $61,521.42 Should Be Awarded

Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.,* 327 F.3d 938, 974-75 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.,* 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement."). The prevailing view is that expenses are awarded in addition to the fee percentage. A. Conte, ATTORNEY FEE AWARDS, §§ 2.08, 2.19 (3d ed. 2012); *In re Businessland Sec. Litig.,* 1991 U.S. Dist. LEXIS 8962, *6 (N.D. Cal. June 18, 1991) (same; collecting cases). Reimbursement of the costs is subject to the Court's determination of relevance and reasonableness. *Id*. Costs compensable include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Attorneys generally may recover reasonable

[4] Even if OneShare defaults, but still manages to pay its debt, thereby increasing the fund to $10.7 million under the Settlement Agreement, based on rates reduced by 20%, a 28% award would result in a multiplier of 1.75, still squarely within the range the courts have found reasonable. Under any scenario, the multiplier will be less than 2.

expenses that would typically be billed to paying clients in non-contingency matters. *Harris v. Marhoefer,* 24 F.3d 15, 19 (9th Cir. 1994). The types of costs awarded in class actions include filing fees, copying, postage, document storage, travel, experts, transcripts, computer research, mediator fees, and the cost of the class administrator. *Carlin v. DairyAmerica, Inc.,* 380 F. Supp. 3d 998, 1024 (E.D. Cal. 2019). Reasonable costs also include public relations costs incurred in connection with notifying more members of the class action claims. *United States v. San Francisco,* 748 F. Supp. 1416 (N.D. Cal. 1990) (use of media to publicize an action to class members is compensable).

Counsel in this case incurred a total of $61,521.42 in out-of-pocket expenses in the three class action Lawsuits. Spoonemore Decl., ¶ 27 and ***Exh. 2.*** This amount includes filing fees, cost of service of summons, and pro hac vice application fees, the cost of the mediator and travel to and from Washington D.C. for mediation, legal research and investigative costs, local counsel fees in the Colorado Lawsuit, and $2,500 for public relations costs incurred for purposes of notifying more class members of this Lawsuit. Each of these costs was necessary to arrive at the common fund settlement and should be reimbursed from the common fund.

C. A Case Contribution of $10,000 For Each Class Representative Is Appropriate and Should Be Awarded.

Case Contribution awards—also called "enhancement" or "incentive" awards—are typical in class action cases, *Rodriguez v. West Publ'g Corp.,* 563 F. 3d 948, 958-959 (9th Cir. 2009), and are in the court's discretion to award. *In re Mego Fin. Corp. Sec. Litig.,* 213 F. 3d 454, 463 (9th Cir. 2000). "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming a $25,000 incentive award). *See also*, *Louie v. Kaiser Found. Health Plan, Inc.,* No. 08-cv-0795-IEG-RBB, 2008 U.S. Dist. LEXIS 78314, *18 (S.D. Cal. Oct. 6, 2008) (preliminary approval of a $25,000 incentive award where named plaintiffs "have protected the interests of the class and exerted considerable time and effort by maintaining three separate lawsuits, conducting extensive informal discovery, hiring experts to

analyze discovered data and engaging in day-long settlement negotiations with a respected mediator").

In determining whether to approve an enhancement award, courts may consider the following factors: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atl. Richfield Co.,* 901 F. Supp. at 299 (awarding $50,000 to class representative). Incentive awards are especially appropriate in health care class actions because named plaintiffs not only invest their time and effort to support the litigation, but they also sacrifice their "personal and medical privacy" for the benefit of the class. *McCoy v. Health Net, Inc.,* 569 F. Supp. 2d 448, 479-480 (D.N.J. 2008) (awarding each representative plaintiff $60,000).

Contribution awards of $5,000 per plaintiff are presumptively reasonable, but may be increased depending on the facts. *Richardson v. THD At-Home Servs.,* 2016 U.S. Dist. LEXIS 46784 (E.D. Cal. April 5, 2016) (awarding $15,000 to named plaintiff). *See also*, *Chu v. Wells Fargo Invs., LLC,* No. C05-4526 MHP, 2011 U.S. Dist. LEXIS 15821, *14 (N.D. Cal. Feb. 15, 2011) ($10,000 enhancement award to each named plaintiff was within the acceptable range for a settlement amount of $6.9 million and 2,752 noticed class members); *Reed v. Balfour Beatty Rail, Inc.,* No. 8:21-cv-01846-JLS-ADSx, 2023 U.S. Dist. LEXIS 128546, *24 (C.D. Cal. June 22, 2023) (awarding $10,000 service fee to a named plaintiff who risked suffering reputational risks by placing his criminal history at issue). Courts also consider the percentage of the fund created in determining whether an enhancement award is reasonable. *See Sandoval v. Tharaldson Employee Management,* No. EDCV 08-482-VAP, 2010 U.S. Dist. LEXIS 69799 (C.D. Cal. June 15, 2010) (incentive award not exceeding 1% of total settlement fair and reasonable); *Acosta v. Evergreen Moneysource Mortg. Co.,* No. 2:17-cv-00466-KJM-DB, 2019 U.S. Dist. LEXIS 198728, *53 (E.D. Cal. Nov. 14, 2019) (awarding named plaintiff $10,000 incentive award that represented 2.85% of gross settlement amount).

Each of the Class Representatives made a significant contribution in time toward the settlement in this case. Throughout the course of the litigation, the Class Representatives have been actively involved. They each agreed to pursue the defendants here on behalf of a class, even though they might have reached a better result for themselves had they pursued their claims individually. They each understood and signed agreements recognizing that they owed a fiduciary duty to all other class members, and were responsible for monitoring the litigation, communicating with Class Counsel, and acting in the best interests of the class. Spoonemore Decl., ¶ 28.

They each scoured their files, emails, and papers and provided Class Counsel with relevant documents and information in order to assist in the drafting of the complaints. They reviewed the complaints and provided feedback. They each provided declarations and assistance in responding to and opposing the motions to dismiss or arbitrate. Spoonemore Decl., ***Exhs. 3–7*** and ECF No. 44-3. They each were on call to participate in the mediation. They each carefully considered the proposed settlement terms and executed the initial settlement term sheet and the final long form Settlement Agreement with OneShare. *Id.,* ¶ 28.

Moreover, the Class Representatives' services have gone beyond the lawsuits being settled here. They have followed the activity in the Aliera and Sharity bankruptcies. They have assisted counsel in filing a proof of claim on behalf of the Unity class in the Aliera bankruptcy, to assure that the class has a recovery there as well as here.

Finally, the total Case Contribution request here for all Class Representatives—$60,000—is less than 1% of the anticipated settlement amount of approximately $6.6 million. *See Sandoval* and *Acosta*, above (finding, respectively, that 1% and 2.85% of the settlement amount was reasonable).

IV. CONCLUSION

For the reasons above, Plaintiffs request that the Court award attorney fees of 28% of the final settlement amount and costs of $61,521.42 to Class Counsel, and award $10,000 in Case Contribution awards to each of the following six sets of Class Representatives: (1) Bruce and

Corlyn Duncan, (2) Ellen Larson, (3) Rebecca White, (4) Jared and Jaime Beard, (5) Hanna Albina, and (6) Austin Willard.

DATED: August 24, 2023.

/s/ Richard E. Spoonemore

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