

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL and KRISTEN BARKER, h/w,	:	CIVIL ACTION
et. al.,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	NO. 13-5081
WILMER L. HOSTETTER, et al.,	:	
	:	
Defendants.	:	

**MEMORANDUM OPINION**

This matter has been referred to this Court by the Honorable Thomas J. Rueter for a binding arbitration on the Plaintiffs' Application for an Award of Attorneys' Fees (Doc. No. 100) (the "Application"). Order (May 18, 2017) (Doc. No. 99). Upon consideration of Plaintiffs' Application and the briefing in support thereof and in opposition thereto, the Court will grant Plaintiffs attorneys' fees in the requested amount of \$1,647,695.41 and costs in the amount of an additional \$100,000.

**I. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

The present action was brought by 44 individuals who collectively own 23 separate residential properties, which constitute the Wyndham Creek Development in East Nottingham Township in Chester County, Pennsylvania (the "Development"). Plaintiffs commenced suit on August 29, 2013, asserting claims against the Defendants, who were the owners, developers, builders and sellers of their properties. Plaintiffs alleged that Defendants materially misrepresented the quality of the well water for their properties and failed to disclose that the

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<sup>1</sup> The factual summary contained herein is based upon facts stated in Plaintiffs' Application and not contested by Defendants.

septic systems installed on those properties were considered experimental by the Pennsylvania Department of Environmental Protection (the “DEP”). Plaintiffs asserted various claims, including violations of the Interstate Land Sales Act (“ILSA”), Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (the “UTPCPL”), fraud and misrepresentation.

The litigation continued for several years until the parties eventually entered into a March 27, 2017 Settlement Agreement. Application Ex. A. In the Settlement Agreement, Defendants agreed to provide the following benefits to Plaintiffs:

- Payment of \$25,000 to each homeowner;
- Payment of \$25,000 to fund the Development’s homeowner association;
- Inspection, servicing and maintenance of the EnviroServer septic systems on the Plaintiffs’ properties for a period of two years;
- Within two years’ time, Defendants will take all necessary steps to obtain an amended Waste Water Management Permit from the DEP, which will not have any testing or monitoring requirements and will not be considered an experimental permit;
- In the event Defendants are not successful in obtaining the required Waste Water Management Permit within two years’ time, Defendants will buy back each of the Plaintiffs’ homes at the greater of the appraised value or the amount Plaintiffs paid for the Home. Defendants will cover all costs of settlement, including transfer taxes and fees;
- If Defendants are required to purchase a Plaintiff’s property, they shall pay each Plaintiff an additional \$15,000 to cover moving expenses.
- Defendants will, at their sole expense, install public water service to every home in the community so that no home is dependent on well water for any purpose.

Application at 5-6.

Additionally, Defendants agreed to pay “the reasonable attorney’s fees and litigation expenses incurred by [Plaintiffs], the reasonable amount of which shall be mediated before Magistrate Judge Rueter.” Application Ex. A, at 11. The Settlement Agreement provided that “In the event the amount of such fees and expenses cannot be resolved by mediation, then the matter shall be submitted to Magistrate Judge Rueter or another Magistrate Judge by way of a

Fee Petition and/or binding arbitration to determine the reasonable amount of fees." Id. When the parties were, in fact, unable to agree on the amount of attorneys' fees to be awarded, Magistrate Judge Rueter referred their fee dispute to this Court for binding arbitration. Order (May 18, 2017).

Plaintiffs' counsel undertook this litigation under an agreement for a contingent fee of 40%. Application at 4-5. Plaintiffs assert that the monetary value of the benefits they have obtained for their clients, not including any potential future benefits that will accrue if Defendants are required to purchase Plaintiffs' properties, amounts to \$2,337,969.10.<sup>2</sup> Id. at 6. Defendants have not challenged that assertion.<sup>3</sup> The litigation involved extensive motion practice, including a motion to dismiss that resulted in a 59-page opinion authored by the Honorable Ronald Buckwalter. Id. at 3. Plaintiffs obtained 43,293 pages of documents in discovery and completed 53 depositions. Id. Plaintiffs' counsel allege that they advanced \$133,574.02 of their own funds in litigation expenses, although Defendants dispute the validity of those expenses. Id. at 5. Plaintiffs' counsel contend that they spent a total of 2,028.55 hours prosecuting the case. Id. at 18. Based on their standard hourly rates, they assert that the value of

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<sup>2</sup> The parties agreed that the initial application for attorneys' fees and expenses would cover the period through the execution of the Settlement Agreement. The Settlement Agreement authorizes Plaintiffs to obtain compensation in the future for any additional fees and costs incurred by them in connection with ensuring the performance of Defendants' ongoing obligations. Accordingly, the Court will not consider in evaluating the instant Application the value of any benefit Plaintiffs' counsel claims to have obtained for Plaintiffs that may, or may not, accrue after the submission of their current Application.

<sup>3</sup> Defendants' contention that in light of Plaintiffs' contingent fee arrangement, the Court may only consider the actual dollars recovered by the Plaintiffs in determining reasonable attorneys' fees is meritless. See In re Condemnation by Redevelopment Auth. of Lawrence Cnty., No. 2774 C.D. 2010, 2013 WL 3961143, at \*7 (Pa. Commw. Ct. Feb. 22, 2013) (holding that the fact the amount of fees and costs may not have been readily ascertainable under the terms of the contingent fee agreement did not affect the court's ability to award such fees). Defendants' argument that any fee award should be measured based on the actual sum the Plaintiffs received as cash because Plaintiffs' contingent fee agreements called for fees to be a percentage of the amounts collected, Defs.' Br. (Doc No. 101) at n.3, is similarly meritless. Id.

that time would amount to \$986,990.50. Id. Defendants maintain, based on a review of Plaintiffs' counsel's billing records, that various of Plaintiffs' counsel's claimed expenditures of time are unnecessary, unreasonable, or not properly related to the litigation. Defs.' Br. Ex. 3. They contend that, subtracting for hours that should not properly be included, Plaintiffs' counsel's fee claim, measured at Plaintiffs' counsel's stated hourly rates, should be reduced by \$338,182.75. Id. ¶ 48. In addition, Defendants object to Plaintiffs' counsel's hourly rates as unreasonable. Defs.' Br. at 7-10.

## II. DISCUSSION

Plaintiffs' counsel assert that they should be entitled to receive their agreed-upon 40% contingent fee based on the monetary value of the benefits that they obtained for their clients under a "common fund" theory. They have not cited, however, and this Court has not found, any precedent for the application of a common fund theory to attorneys' fees in the absence of a settlement agreement or judgment creating an actual, definite fund of money out of which attorneys' fees are to be paid. The present case is more akin to awards of attorneys' fees on a cost-shifting basis, where the defendant is required by statute to pay the plaintiff's attorneys' fees. See generally Sullivan v. DB Investments, Inc., 667 F.3d 273, 330 (3d Cir. 2011); In re Diet Drugs, 582 F.3d 524, 540 (3d Cir. 2009). Accordingly, this Court will apply a "lodestar" analysis.

Defendants contend that the analysis should not take into account the risk inherent in Plaintiffs' counsel's willingness to undertake the case on a contingent fee basis because one of the Plaintiffs' numerous claims against them was brought under a federal statute, ILSA. Defs.' Br. at 2-5. Under federal law, awards made pursuant to federal fee shifting statutes cannot

include a fee enhancement to compensate counsel for the risk of a contingent fee.<sup>4</sup> City of Burlington v. Dague, 505 U.S. 557, 567 (1992). The parties did not agree, however, to an award of fees as they would be calculated under federal fee-shifting statutes, but to reasonable fees in relation to the case as a whole. The determination of a reasonable fee in this case is not subject to limits that would apply if the fee were to be measured solely for the ILSA claim.

Defendants' assertion that "there are no cases interpreting the attorney fees provision of the UTPCPL which have applied . . . a contingency fee multiplier to determine a 'reasonable' fee," Defs.' Br. at 5, is incorrect. The standard test applied by the Pennsylvania courts in determining the amount of an award of reasonable attorneys' fees provided under the UTPCPL, 73 Pa. Cons. Stat. § 201-9.2, requires a court to consider the following factors: "(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case; (2) The customary charges of the members of the bar for similar services; (3) The amount involved in the controversy and the benefits resulting to the clients from the services; and (4) **The contingency or certainty of the compensation.**" Dibish v. Ameriprise Fin., Inc., 134 A.3d 1079, 1092 (Pa. Super. Ct. 2016) (emphasis added).

Pennsylvania courts apply a multiplier to lodestar amounts in UTPCPL cases in order to compensate counsel for the risk they undertook in pursuing the case on a contingent fee basis. See, e.g., Neal v. Bavarian Motors, Inc., 882 A.2d 1022, 1031 & n.8 (Pa. Super. Ct. 2005) (applying contingent fee multiplier in UTPCPL action); Carruthers v. Messner Enterprises

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<sup>4</sup> The Dague Court reasoned that a contingency enhancement "would likely duplicate in substantial part factors already subsumed in the lodestar" calculation. 505 U.S. at 562. The Pennsylvania legislature disagrees. See Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 535 (3d Cir. 1997) (recognizing that Pennsylvania courts are required by Pa. R. Civ. P. 1717 to consider contingent risk in determining reasonable attorneys' fees).

Northgate, No. CI-09-07812, 2013 WL 10872127, at \*13 (Pa. Ct. Com. Pl. Lancaster Cnty. Nov. 19, 2013) (same).

Indeed, Pennsylvania law also provides for an attorney fee recovery for other causes of action, and in those instances, it also recognizes that a contingent fee risk should be taken into account in determining the amount of reasonable attorneys' fees: "[i]n all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider . . . whether the receipt of a fee was contingent on success."<sup>5</sup> Pa. R. Civ. P. 1717; see, e.g., 41 Pa. Cons. Stat. § 503(b)(4) (contingent fee a factor in calculating reasonable attorneys' fees in usury actions); Kane v. Cnty. of Chester, No. 12-6649, 2016 WL 3997528, at \*2-4 (E.D. Pa. July 25, 2016) (applying Pennsylvania law to consider contingent risk in approving fee award in minor's tort settlement); Birth Ctr. v. St. Paul Cos., Inc., 727 A.2d 1144, 1160-61 (Pa. Super. Ct. 1999) (contingent fee is a factor in calculating reasonable attorneys' fees in insurer bad faith actions, where bad faith statute, 42 Pa. Cons. Stat. § 8371, provides for reasonable attorneys' fees, but does not specify factors to consider in awarding them), aff'd, 787 A.2d 376 (2001); Milkman v. Am. Travelers Life Ins. Co., 61 Pa. D. & C.4th 502, 566-67 (Pa. Ct. Com. Pl. Phila. Cnty. 2002) (applying multiplier in class-action context); see also Polsell, 126 F.3d at 535 (recognizing that Pennsylvania courts are required by Pa. R. Civ. P. 1717 to consider contingent risk in determining reasonable attorneys' fees).

In Neal, the court approved a fee award for a UTPCPL claim that applied a multiplier of 11.5 times the actual jury award, which was 3.5 times the treble damages the trial court had awarded. Neal, 882 A.2d at 1031 n.8. In Carruthers, the court granted an award that was five

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<sup>5</sup> The Pennsylvania Rules of Civil Procedure were renumbered effective July 1, 2012, so that the current Rule 1717 is cited in precedent issued before that date as Rule 1716. Pa. R. Civ. P. 1717 (Credits).

times the amount that it awarded in damages on the UTPCPL claim. 2013 WL 10872127, at \*13. Other courts determining awards of reasonable attorneys' fees under Pennsylvania law in contingent fee cases have also applied multipliers to compensate for that risk. See, e.g., Milkman, 61 Pa. D. & C.4th at 566-67 (approving multiplier of three times the lodestar amount in class action because "courts have often found a multiplier of three or higher to be reasonable in a class action setting").

Here, Plaintiffs' counsel assert that their requested fee of \$1,647,695.41 also is justified under a lodestar analysis. Application at 17-19. Defendants challenge both the reasonableness of the hourly fees claimed by each of Plaintiffs' counsel and of the total hours Plaintiffs' counsel recorded for the case. Defs.' Br. at 6-14. The Court has reviewed the rates claimed by Plaintiffs' counsel in light of the supporting and opposing declarations and of the Court's own knowledge and experience with the rates charged for complex litigation matters, such as the present case, by lawyers in the Philadelphia market of the experience and reputation of Plaintiffs' counsel and finds those rates to be reasonable.

As for Defendants' challenge to the appropriateness of the various hours billed and the experience level of the attorney employed for particular tasks, the Court will accept for the purposes of this analysis all of Defendants' contentions regarding hours that should be deducted from the total lodestar amount. Thus, the Court will accept arguendo Defendants' assertion that Plaintiffs' counsel's claimed lodestar amount of \$986,990.50 should be reduced by \$338,182.75. Defs.' Br. Ex. 3 ¶ 48. That reduction results in a lodestar amount of \$648,807.75. Pursuant to Pa. R. Civ. P. 1717 and the precedent cited above, Plaintiffs' counsel are entitled to be fairly compensated for their risk in undertaking this matter on a contingent fee basis. They invested considerable time and expense in the case, the case was a complex matter with numerous parties

and they achieved very substantial benefits for clients that may not have been able to vindicate their rights absent counsel's willingness to take the case on a contingent fee basis. Their fee request represents a multiplier of approximately 2.54 of the lodestar amount. The Court finds that a multiplier of 2.54 is reasonable and appropriate for this litigation. See Neal, 882 A.2d at 1031 & n.8; Milkman, 61 Pa. D. & C.4th at 566-67. Therefore, Plaintiffs' counsel's fee request will be approved.

Defendants also challenge Plaintiffs' counsel's request for reimbursement of costs in the amount of \$133,574.02. While none of the specific charges Defendants point to appear unreasonable,<sup>6</sup> Plaintiffs' counsel's submission is deficient in identifying the purpose of each expenditure, some of which are not apparent from the identity of the vendor. Under these circumstances, the Court finds that a reduction of \$33,574.02 is appropriate to account for such charges. Furthermore, the Court finds that a cost expenditure of \$100,000 was reasonable in litigation involving so many parties and such complexity and lasting more than three years. Accordingly, the Court will award Plaintiffs' counsel \$100,000 in costs. An appropriate Order will follow.

Dated: July 28, 2017

BY THE COURT:

/s/ Marilyn Heffley  
MARILYN HEFFLEY  
UNITED STATES MAGISTRATE JUDGE

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<sup>6</sup> For example, a payment to Precise, Inc. for litigation support services, including data hosting, organization of over 43,000 documents for searching and retrieval and videotaping 53 depositions is not unreasonable. Similarly, the relatively minimal charges for travel and meals are not unreasonable.