UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

v.

COUNTY OF VAN BUREN, et al.,

Defendants.
_____/

No. 1:14-cv-1274

Hon. Paul L. Maloney

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES

Plaintiffs, by and through the undersigned Class Counsel, respectfully move the Court for an Order approving an award of attorney fees.

Dated: September 27, 2023

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR AWARD OF ATTORNEY FEES

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INTRODUCTION

After nearly a decade of litigation, the Parties have entered into a comprehensive Settlement Agreement that provides substantial relief to Class Members. Under the Settlement Agreement, each Class Member with a valid claim will receive up to 80% of the surplus value retained by the Defendant Counties when property in which the Class Member had an interest was foreclosed upon and sold. The Class has resoundingly endorsed the settlement—as of the filing of this Motion, claims have been made for significantly more than 40% of the subject properties, far higher than the typical claims rate for a claims-made class action settlement. The Settlement Agreement provides that Class Counsel may apply for an award of attorney fees equal to 20% of the amount to be paid to each Class Member, an amount which would be deducted from each Class Member's distribution.

Plaintiffs now ask the Court to approve the requested attorney fees because (1) they are reasonable compensation for the significant time, effort, risk and expenses expended by Class Counsel in the successful resolution of this action, and (2) the fees are consistent with the benefits conferred upon Class Members by the Settlement Agreement.

The requested fee of 20% is at the low end of the range of fees awarded in class actions in this Circuit, particularly because it is limited to actual claims made. The amount is warranted in light of the substantial recovery secured for the Class, the efforts of Class Counsel in litigating this case and negotiating the settlement and the significant risks which were inherent in taking on this litigation.

The prosecution and settlement of this case required exceptional legal skill, creativity and the investment of significant time and effort by Class Counsel. As the Court has previously been advised, this case dates back to August, 2014, when James Shek attended the Van Buren County Property Tax Foreclosed Land auction and witnessed the sale of a parcel of land which had been

owned by Wayside Church. That parcel sold for $189,250 more than the past due taxes, penalties, interest and auction expenses. (ECF No. 224, PageID.3738). From that day forward, he worked to advance this case, bringing together a team including Owen Ramey and Ron Ryan from Lewis Reed & Allen, P.C. early in the case, and later adding Fink Bressack to focus on the class action aspects of the case. Working together, Class Counsel have zealously litigated this case in this Court and in the Sixth Circuit for more than nine years. The complexity, uncertainty and risk of this case are well known to this Court. When this case began, nobody could have anticipated all of the legal developments necessary to bring it to fruition, but, fortunately, Class Counsel did foresee a path that ultimately included the decisions in *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), *Rafaeli v. Oakland Cnty*., 952 N.W.2d 434 (Mich. 2020), *Hall v Meisner*, 51 F.4th 185 (6th Cir. 2022), and *Tyler v. Hennepin Cnty., Minn*., 598 U.S. 631 (2023). Eventually, Class Counsel secured the reopening of this case after it had been dismissed, successfully opposed countless challenges to their claims (both from Defendants and from self-described "superior counsel" seeking to commandeer the lawsuit) and negotiated a settlement that could deliver substantial relief to Class Members.

Plaintiffs believe that their claims are strong. However, continued litigation inherently involves risk and delay. The settlement avoids the risk that the Michigan Supreme Court might hold that *Rafaeli* does not apply retroactively, that claims might be barred by various statutes of limitations or the two-year statute of repose in Mich. Comp. Laws § 211.78*l*, or that other equitable defenses might bar relief. The settlement also insures that Class Members are paid promptly, rather than potentially facing another decade of litigation. If the Court grants Final Approval, Class Counsel will have brought significant relief to thousands of property owners, businesses and their heirs and successors.

For the reasons set forth below, and in the Motion for Final Approval, Class Counsel respectfully ask the Court to approve the requested fees.

ARGUMENT

I. The Requested Attorney Fee Award Should Be Granted

A. It is Appropriate to Award Class Counsel a Fee Equal to 20% of Each Claim Paid

In this Circuit, district courts may award attorney fees in a class action using either the lodestar method or the percentage-of-the-recovery method. *Gascho v. Global Fitness Holdings, Inc*., 822 F.3d 269, 279 (6th Cir. 2016). A district court must make "a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fee." *Id*. Here, Class Counsel seek a fee calculated using the percentage-of-the-recovery method. Under the settlement agreement, Class Members are entitled to make a claim for 80% of the surplus value associated with their common property. Class Counsel seek an attorney fee equal to 20% of each claim paid by Defendants. Unlike most class action settlements, which result in the creation of a "common fund," this is a claims-made settlement, in which the Defendants are required to pay only the claims actually submitted. *See* Newberg and Rubenstein on Class Actions (6th ed.) § 13:7. Accordingly, there is no common fund on which to base the traditional percentage-of-the-recovery analysis to determine a reasonable award of attorney fees. *See Rawlings v. Prudential-Bache Props., Inc*., 9 F.3d 513, 516 (6th Cir. 1993) (noting that in common fund cases, either a lodestar or percentage of the fund analysis may be warranted). Here, the recovery consists of the total value of claims actually paid to Class Members.

In determining the size of the recovery from which a percentage fee will be determined in a claims-made settlement, the Court may "reward counsel with a percentage of the monies made available by counsel's work or a percentage of the monies actually claimed by the class members."

Newberg (6th ed.) §15:70. Class Counsel seek an award of attorney fees equal to 20% of the relief actually obtained for the Class. This method of determining attorney fees comports with the Sixth Circuit's instruction that, "[w]hen awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings*, 9 F.3d at 516. As the Seventh Circuit has noted, in determining the reasonableness of attorney fees, "the central consideration is what class counsel achieved for the members of the class[.]" *Redman v. RadioShack, Corp*., 768 F.3d 622, 633 (7th Cir. 2014).

Other courts have approved attorney fee awards consisting of a percentage of the recovery secured for class members in claims-made settlements. *See, e.g*., *Cline v. TouchTones Music Corp*., 765 F. App'x. 488, 492 (2d Cir. 2019) ("[T]he District Court did not exceed the reasonable bounds of its discretion in awarding fees based on song credits actually redeemed, rather than technically awarded under the settlement."); and *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc*., 897 F.3d 825, 831-33 (7th Cir. 2018) (finding that district court did not err in basing attorney fees on benefit actually conferred on class in claims-made settlement.).

Basing the attorney fee award on the recovery actually secured for the class ensures that attorneys are not rewarded for negotiating a poor settlement. In contrast, in the Oakland County settlement in *Bowles v. Wayne County*, at the time of Final Approval, claims submitted by class members were roughly $2.6 million, while plaintiffs' counsel sought and received an award of attorney fees of $11 million.[1] (E.D. Mich. Case No. 2:20-cv-12838, ECF No. 99.) As a number of courts and commentators have recognized, tying attorney fee awards to the results actually

[1] This jumps to $12.6 million when the fees class counsel in *Bowles* ceded to a friendly objectors' counsel are included.

obtained for class members prevents such inequitable results. Tying attorney fees to results ensures that class actions do not merely serve to generate fees for attorneys:

> Simply put, the class action vehicle is broken. While it may not instantaneously or completely resolve the problems that currently inhere in this type of litigation, tying the award of attorneys' fees to claims made by class members is one step that judges can take toward repair. This approach will not only encourage more realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate.

In re TJX Co's. Retail Sec. Breach Litig. 584 F. Supp. 2d 395, 406 (D. Mass. 2008); *see also, Parker v. Time Warner Entm't. Co., L.P*., 631 F. Supp. 2d 242, 267 (E.D. N.Y. 2009), *aff'd*, 378 F. App'x. 63 (2d Cir. 2010) (stating, in the context of determining attorney fees for a claims-made settlement, that "the settlement should be valued on the basis of the number of claims that were made against it."); *Strong v. BellSouth Telecommunications, Inc*., 137 F.3d 844, 852 (5th Cir. 1998) (affirming district court's decision to consider the amount of claims made in determining attorney fee award.); Deborah R. Hensler and Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 Law & Contemp. Probs. 137, 150 (2001) ("The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society. To this end, analysts recommend that judges award fees based on the actual amount paid out by the defendants to class members, notwithstanding contrary case law.") (cleaned up).

As noted by Judge Richard A. Posner, basing attorney fees on the value of claims actually paid to class members, "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually being received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Pearson v. NBTY, Inc*., 772 F.3d 778, 781 (7th Cir. 2014). This

case proves Judge Posner correct. Because Class Counsel's fee is predicated on the value of claims actually paid, the interests of Class Counsel and the Class were aligned. Class Counsel was motivated to design and implement a notice and claims process that encouraged robust participation in the settlement. This alignment of interests made the claims process a resounding success. While the final entry and vetting of all claims is not yet complete, early indications show that at least one claim has been made for more than 3,300 of the 7,299 parcels in the class—an apparent claims rate of more than 45%.[2] The claims rate achieved here is far higher than the 6.3% claims rate in *Bowles* and far higher than the 10% average claims rate for consumer class actions. (ECF No. 345-3, PageID.6340); *Florida Educ. Ass'n. v. Dep't. of Educ*., 447 F. Supp. 3d 1269, 1275 (N.D. Fla. 2020) (noting that "in consumer class actions…claims filing rates average 10% of the class) (citing *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, Federal Trade Comm'n, 2019, at 11).[3]

Federal court have long recognized that fee awards in successful class action cases encourage prosecution of actions on behalf of persons with meritorious claims and thereby promote private enforcement of, and compliance with, important areas of state and federal law. *See, e.g*., *Mashburn v. Nat'l Healthcare, Inc*., 684 F. Supp. 679, 687 (M.D. Ala. 1988) ("[C]ourts also have acknowledged the economic reality that in order to encourage 'private attorney general' class actions…a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time consuming cases for which they may never be paid."). In class actions like this case, competent counsel for plaintiffs

[2] Because the claims review process is not yet complete, it is not possible to provide an exact percentage, but it is clear that the final claims rate will be well in excess of 40%.

[3] To be clear, while the Parties agreed to an attorney fee based upon claims made, nothing in this brief is intended to suggest that fees based upon a common fund irrespective of claims are always inappropriate.

can be retained only on a contingent basis. Consequently, a large segment of the public would be denied a remedy if fees awarded by courts did not fairly and adequately compensate counsel for the services provided, the risks undertaken, and the delay before any compensation is received.

B. Negotiated and Unopposed Fees are Ideal

In some class actions, the defendant vigorously contests the fee award. Here, Class Counsel and the Defendants, with the assistance of the Sixth Circuit Mediation Office, set the acceptable parameters for fees in the Settlement Agreement, as follows:

> The Plaintiffs' Counsel intend to apply for a fee award equal to 20% of the amount to be paid by Court order to each Eligible Claimant, which amount shall be deducted from each Class Member's distribution. The Counties will not object to that application. (ECF No. 220-2, PageID.3628 at ¶ 9.1.)

The fees sought here comply with the Settlement Agreement. That the attorney fees were negotiated at arm's length underscores that the fees are reasonable and should be approved. See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (holding that agreed-to fees are ideal, because "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

Courts have recognized that, absent evidence of collusion, a negotiated fee should receive substantial weight and deference, particularly where overseen . *See, e.g., Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) ("In the absence of any evidence of collusion or detriment to the class, the Court should give substantial weight to a negotiated fee amount[.]"); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 861 (E.D. Mo. 2005) ("[W]here…the parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference."); *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) (holding with regard to attorney fees that "[t]he presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval, but such an agreement is not binding on

the court."); *In re Schering-Plough/Merck Merger Litig*., 2010 WL 1257722, at *18 (D.N.J. March 26, 2010) ("[T]his fee is the product of mediation conducted before a disinterested and revered member of the legal community, therefore, the Court is hard pressed to conclude that the fee is not warranted."). Contrary to the assertions of Objectors' and Opt-outs' counsel, there is no evidence of collusion here, as best demonstrated by the involvement of the Sixth Circuit Mediation Office in facilitating the settlement of this case. *see D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion . . . ."). Indeed, "there appears to be no better evidence of a truly adversarial bargaining process than the presence of a neutral third party mediator." *In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) (citation omitted); *see also McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009) (involvement of Seventh Circuit mediator undermined claim of collusion).

C. The Requested Percentage is Appropriate

Class Counsel seeks a fee of 20% of the amount paid to each eligible claimant. Even Objectors concede that the requested 20% fee is "well below market." (ECF No. 345-3, PageID.6331.) In selecting an appropriate percentage award, the Supreme Court recognizes that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). *See also Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."). In fact, in this case, the law firm representing most of the class members who chose to opt out of the settlement charged fees ranging from 33.3% to 50% to pursue opt out claims.

Sixth Circuit courts typically award attorney fees of between 20 and 50% of a settlement. *See In re Rio Hair Naturalizer Prod. Liab. Litig*., 1996 WL 780512, at *16 (E.D. Mich. Dec. 20,

1996) ("[F]ee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund."); *In re Cincinnati Gas & Elec. Co. Sec. Litig*., 643 F. Supp. 148, 150 (S.D. Ohio. 1986); *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993); *In re Dun & Bradstreet Credit Serv. Customer Litig*., 130 F.R.D. 366, 372 (S.D. Ohio 1990). Likewise, the Court of Federal Claims recognized that one-third is a typical recovery. *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005). Class Counsel's request for an award of attorney fees of 20% of claims paid is at the low end of the range of percentage awards made by courts in this District and Circuit. *See, e.g.*, *Bessey v. Packerland Plainwell*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (concluding that 33% fee request was reasonable).

D. Consideration of the Relevant Factors Justifies an Award of a 20 Percent Fee in this Case

Courts in this Circuit apply six factors when determining the reasonableness of a requested fee award: (1) the value of the benefit rendered to the class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc*., 102 F.3d 777, 780 (6th Cir. 1996); *Smillie v. Park Chem. Co*., 710 F.2d 271, 275 (6th Cir. 1983).

The ultimate task for the Court is to ensure that counsel is fairly compensated for the work performed and the result achieved. *Rawlings*, 9 F.3d at 516. As discussed in detail below, consideration of the above factors confirms that a 20% fee is justified as reasonable and appropriate under the circumstances of this case.

1. The Value of the Benefit Achieved

Class Counsel have secured a settlement that provides a substantial and certain payment of up to 80% of the surplus value associated with subject properties to each Class Member filing a valid claim. The response of the Class to the settlement has been overwhelmingly positive, resulting in a claims rate which will clearly exceed 40%. Courts have consistently recognized that the result achieved is an important factor to be considered in determining a fee award. *Hensley*, 461 U.S. at 436 ("[T]he most critical factor is the degree of success obtained."); *Behrens v. Wometco Enters., Inc*., 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of the work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990). This favorable settlement was created by the entrepreneurial work Class Counsel did in identifying the claims and legal principles at issue and the efforts of Class Counsel in litigating this case for nearly a decade, including the contentious motion practice and settlement negotiations detailed in the Final Approval Brief. Also, in the face of a campaign of interference led by counsel promoting Opt-Outs and Objectors, Class Counsel spearheaded the remarkably successful Notice program, leading to a claims rate virtually unheard of in claims-made class actions.

2. The Value of the Services on an Hourly Basis

To assess the value of services on an hourly basis and to ensure that the requested fee does not represent a windfall, Courts in this Circuit typically perform a lodestar cross check (reviewing the number of hours reasonably expended on a case multiplied by a reasonable hourly rate). *In re Cardinal Health, Inc. Sec. Litig*., 528 F. Supp. 2d 752, 764 (S.D. Ohio 2007). However, use of the lodestar crosscheck is not mandatory, particularly where it is evident that the fee sought is not excessive. *Linneman v. Vita Max Corp*., 970 F.3d 621, 628 (6th Cir. 2020); *see also, Dick v. Sprint*

Comm's Co. L.P., 297 F.R.D. 283, 300 (W.D. Ky. 2014) ("[A] lodestar analysis is unnecessary if the fee does not appear excessive as a percentage of the recovery."); *Bowling*, 102 F.3d at 779 ("It is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual case before them."). While Class Counsel believe that a 20% fee based upon claims made is objectively reasonable, the following lodestar cross check analysis provides further support for the reasonableness of the fee.

Class Counsel has expended considerable effort in prosecuting this litigation over the course of nearly a decade in this Court and in the Court of Appeals for the Sixth Circuit. Class Counsel have invested more than 12,000 hours in advancing this case, partners alone spent more than 7,500 hours litigating these claims. *See* Ex. 1 – Declaration of David H. Fink; Ex. 2 – Declaration of Owen D. Ramey; Ex. 3 – Declaration of James Shek. To determine the lodestar, "the number of hours reasonably worked on a client's case" are multiplied by "a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). For purposes of determining the lodestar for work performed by Class Counsel in this case, the following hourly rates were used:

Partners with at least ten years experience:	$750/hour
Associates:	$395/hour
Legal Assistants:	$175/hour
Law Clerks:	$125/hour
Students/Clerical Assistants:	$ 75/hour

See Ex. 1 – Declaration of David H. Fink; Ex. 2 – Declaration of Owen D. Ramey; Ex. 3 – Declaration of James Shek. These rates are significantly lower than rates often used by Class

Counsel in seeking fee awards.[4] Using these rates, the lodestar for Class Counsel's work through September 26, 2023, is $6,855,321.25. *See* Ex. 1 – Declaration of David H. Fink; Ex. 2 – Declaration of Owen D. Ramey; Ex. 3 – Declaration of James Shek.

The nature of the Settlement in this case creates one complication for completion of the lodestar crosscheck. The lodestar crosscheck requires calculation of the "lodestar multiplier." *In re AT & T Corp*., 455 F.3d 160, 164 (3d Cir. 2006). The multiplier is determined by dividing the dollar amount of the requested fee award, determined from the percentage-of-recovery method, by the lodestar. *Id*. But, while the method proposed here for calculating the fee is clear, the precise dollar amount of the fee cannot yet be determined.

Here, the fee depends upon allowable claims made. Because the final validation and payment of claims will not occur until after Final Approval, the amount that will be paid to Class Members (and, thus, the actual fee amount) cannot presently be precisely ascertained. Still, it is possible to determine a realistic range for the claims made. The Claims Administrator (Kroll) has identified claims for parcels with total Surplus Proceeds of "approximately $40,094,375.36," and has indicated that, after adjusting for claims made relating to parcels for which Kroll also received exclusion requests, total Surplus Proceeds would be "approximately $36,344,745.90." Because the claims review process is ongoing, however, that number could overstate or understate the ultimate total. For purposes of the present motion, Class Counsel believes that it is extremely unlikely that total Surplus Proceeds claimed will be less than $25 million or more than $41 million. Taking 80% of each of those totals and then applying 20% to those net amounts generates a fee estimate of $4,000,000 at the low end and $6,560,000 at the high end.

[4] While Class Counsel has capped all rates at $750/hour for purposes of this Motion, David Fink's current standard hourly rate for class action matters is $1,100/hour. *See* Ex. 1 – Declaration of David H. Fink.

Using these projected high and low values for the potential recovery produces a lodestar multiplier of between .58 and .96. Stated another way, the fee is likely to be between 58% and 96% of lodestar. While this is not precise, the lodestar cross check is not designed for precision. *See, e.g., Milliron v. T-Mobile USA, Inc*., 423 F. App'x 131, 136 (3d Cir. 2011) (Noting that, when the percentage-of-recovery method is used, the lodestar cross check "is not the primary analysis…and does not entail mathematical precision or bean-counting."). What is clear is that this "negative multiplier" (i.e. the fee is expected to be less than 100% of lodestar) supports the reasonableness of the requested fee award, even in the almost inconceivable circumstance that claims exceed $40 million.

Courts in this Circuit have awarded multipliers ranging from 1.3 up to 5.9. *See, e.g., Lonardo v. Travelers Indem. Co*., 706 F. Supp. 2d 766, 796 (N.D. Ohio 2010) (approving multiplier of 1.3); *New York State Teachers Retirement Sys. v. Gen. Motors Corp*., 315 F.R.D. 226, 244 (E.D. Mich. 2016) (approving multiplier of 1.9); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503-04 (E.D. Mich. 2000) (approving 2.49 multiplier); *Lowther v. AK Steel Corp*., Case No. 1:11-cv-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (finding multiplier of 3.06 "very acceptable under the facts and circumstances of this case[.]"); *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 767-68 (S.D. Ohio Dec. 31, 2007) (approving multiplier of "approximately 5.9" in complex securities class action). *Barnes v. City of Cincinnati*, 401 F.3d 729, 746 n. 4 (6th Cir. 2005) (approving 1.75 lodestar multiplier).

The reasonableness of the requested fee is further enforced by the agreement of Class Counsel to forgo any reimbursement of expenses by the class. It is common for litigation expenses to be paid out of a common fund or reimbursed by Defendants. Here, Class Counsel has agreed to waive recovery of those expenses, so that the net recovery of class members is not reduced.

3. Contingent Nature of the Fee

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994). Class Counsel have pursued this litigation for nearly a decade, expending thousands of hours of professional time without compensation and taking a significant risk of recovering nothing for their efforts. The substantial risk in this case factors heavily in support of the requested fee award. Class Counsel are aware of many hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following trial, the excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel. Even plaintiffs who succeed at trial may find their judgment overturned on appeal.

4. Society's stake in rewarding attorneys to incentivize others.

It is in the public interest to reward attorneys who produce a common benefit for class members in order to maintain an incentive for others to pursue such cases. *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508, 534 (E.D. Mich. 2003) ("Society's stake in rewarding attorneys who produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee[.]"). As the Supreme Court has recognized, without access to the class action mechanism, small claimants often individually lack the economic resources to vigorously litigate

their rights. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *In re Cardizem*, 218 F.R.D. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this benefits society."); *In re Rio Hair*, 1996 WL 780512, at *17 ("[A]ttorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process.").

Plaintiffs' counsel in complex class action litigation are invariably retained on a contingent basis, largely due to the significant commitment of time and expense required. The typical class representative is unlikely to be able or willing to fund long and protracted litigation, particularly with the knowledge that others similarly situated will be able to "free-ride" on those efforts at no cost or risk to themselves. The significant expense of class litigation, along with the high degree of uncertainty of ultimate success means that contingent fees are virtually always required for such cases. Adequate compensation to encourage attorneys to assume the risk of litigation is in the public interest. Indeed, without adequate compensation for plaintiffs' counsel, persons with meritorious claims would be unlikely to pursue them. Thus, an important factor is "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." *Ramey v. Cincinnati Enquirer, Inc*., 508 F.3d 1188, 1196 (6th Cir. 1974); see also, *White v. Abrams*, 495 F.2d 724, 730-31 (9th Cir. 1974); *Bleznal v. C.G.S. Scientific Corp*., 387 F. Supp. 1184, 1189 (E.D. Pa. 1974). Without the willingness of Class Counsel to assume that risk, members of the Class may not have recovered anything, let alone the substantial recovery obtained here.

5. The Complexity of the Litigation

This factor clearly supports the reasonableness of the fee sought. Class Counsel pioneered the legal claims at issue in this litigation and negotiated a settlement that provides substantial relief

to Class Members. Getting to this point was neither certain nor easy. Class Counsel did the entrepreneurial work of developing the novel legal claims asserted[5], correctly anticipated the development of the law through cases like *Knick*, *Rafaeli*, *Hall* and *Tyler*, successfully reopened the case after it was initially dismissed by the Sixth Circuit and successfully negotiated the Settlement Agreement. This case has a complex substantive and procedural history.

Plaintiffs originally filed their Complaint in 2014, seeking to recover surplus proceeds following a tax-foreclosure sale. (ECF No. 1.) At the time Plaintiffs filed their Complaint, no Michigan court had found that a property interest exists in "surplus proceeds" from tax-foreclosure auctions conducted in accordance with Michigan's General Property Tax Act ("GPTA"). And, throughout the course of this dispute, Plaintiffs have faced numerous other complex obstacles, but they continued to pursue their claims vigorously.

Between 2014 and 2020, this case was dismissed for failure to state a claim upon which relief could be granted (ECF No. 38); appealed by Plaintiffs, at which point the Sixth Circuit, relying on the *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985) ripeness framework, instructed this Court to dismiss for lack of subject-matter jurisdiction based on Plaintiffs' failure to seek relief in state court first, *see Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 822 (6th Cir. 2017);[6] dismissed for lack of jurisdiction (ECF No. 45); and then, upon Plaintiffs' motion to reopen, reopened but stayed pending the decisions in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019) and *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020).

[5] Indeed, this case launched a "deluge" of copycat lawsuits. *Garcia v. Title Check, LLC*, No. 21-1449, 2022 U.S. App. LEXIS 981, at *1 (6th Cir. Jan. 12, 2022).

[6] The Sixth Circuit in *Wayside*, 847 F.3d 812, also opined that Plaintiffs' claims were barred by the Tax Injunction Act and the doctrine of comity, *id.* at 823, but a later panel concluded that these findings were *dicta* and incorrect. *Freed v. Thomas*, 976 F.3d 729, 738-41 (6th Cir. 2020).

Plaintiffs filed their motion to reopen after the Michigan Court of Appeals had rejected a similar takings claim, finding that no property interest existed in surplus proceeds under Michigan law. Plaintiffs argued that the Sixth Circuit's prior finding that Michigan courts provided an adequate remedy was undermined when "the Michigan Court of Appeals issued a decision showing that Michigan courts provide no such remedy for the type of takings at issue in this case." (Mot. to Re-Open at 2, 7, ECF No. 49-1.) This Court agreed and reopened the case. It stayed the matter, however, recognizing that the Michigan Court of Appeals' *Rafaeli* decision was by then pending before the Michigan Supreme Court, and that the validity of the *Williamson County* framework was in question before the United States Supreme Court in *Knick*. (Order Re-Opening Case at 6, ECF No. 64.)

The case then found new life following the decisions in *Knick* and *Rafaeli*. Following these decisions, this Court lifted the stay in this case. (ECF No. 93.) Defendants then moved to dismiss the case for various reasons, including because, according to Defendants, they were shielded by both sovereign and qualified immunity. (ECF No. 94.) With Defendants' motion to dismiss still pending, Plaintiffs sought leave to file a Second Amended Complaint that would add a new Plaintiff, dismiss the Van Buren County Treasurer, add other counties previously included in a putative defendant class as named defendants, and add new claims. (ECF No. 108.) Eight days later, in response to *Rafaeli*, the Governor signed legislation enacting Mich. Comp. Laws § 211.78t, which created the "exclusive mechanism for a claimant to claim and receive" surplus proceeds. Mich. Comp. Laws § 211.78t(9). And the next day, Plaintiffs filed a motion for class certification (ECF No. 114).

Following that flurry of activity, in February 2021, this Court denied Plaintiffs leave to file a Second Amended Complaint and granted in part (and denied in part) Defendants' motion to

dismiss. (ECF No. 140.) The Court dismissed the claims against the Van Buren County treasurer in her official capacity, as well as the claims against counties in the Eastern District of Michigan, but denied Defendants' motion to dismiss on sovereign immunity grounds. (*Id.*) Defendants appealed the latter holding (ECF No. 160), and the Court stayed the case again pending the appeal (ECF No. 162). Then, with the assistance of the Sixth Circuit Mediation Office, Class Counsel participated in dozens of mediation sessions over more than a year and a half and negotiated the Settlement Agreement. (ECF No. 222, PageID.3719). There was nothing simple about that settlement process. It is hard to imagine a case with more complexity, more risk and more hard work for Class Counsel.

6. The professional skill and standing of counsel.

The skill and experience of counsel on both sides of the "*v*" is another factor that courts consider in determining a reasonable fee award. *See, e.g., In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at * 7 (N.D. Ohio Feb. 26, 2015); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19 (E.D. Mich. Dec. 13, 2011). The Court appointed Fink Bressack, Lewis, Reed & Allen PC and James Shek as Class Counsel, recognizing that these attorneys have the requisite skill and experience in the relevant substantive law and the procedural area of class action litigation to effectively prosecute these claims. (ECF No. 234.) James Shek, Owen Ramey and Ron Ryan identified and advanced the novel legal issues creating the critical underpinnings of this litigation (and so many later-filed cases), and Fink Bressack provided substantial class action experience to guide this case through repeated collateral attacks. Together, these attorneys professionally, patiently and tenaciously represented the Plaintiffs, advancing the litigation and ultimately negotiating the Settlement.

When assessing this factor, courts also look to the qualifications of the attorneys opposing the class. Here, the quality of defense counsel is exemplary. The attorneys representing all of the Defendants and the firms in which those attorneys practice all have excellent, well-deserved, reputations in the Michigan legal community. They all brought deep experience and extensive resources to the defense of these claims.

In the final analysis, as more than one court has observed, "[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained." *Behrens,* 118 F.R.D. at 547-48. And, here, the significant relief obtained for the Class through the Settlement provides the principal basis for awarding the attorneys' fees sought by Class Counsel.

II. Allocation of Fees Awarded.

The Court is authorized to permit Class Counsel to allocate among the Class Counsel firms the awarded attorney fees in accordance with each firm's contribution to the prosecution of this case. *See In re Polyurethane Foam Antitrust Litig*., 168 F. Supp. 3d 985, 1006 (N.D. Ohio 2016) (noting that "[c]ourts routinely permit counsel to divide common benefits fees among themselves."). As part of any Order approving the award of attorney fees, Plaintiffs ask the Court to authorize Class Counsel to allocate the awarded attorney fees in accordance with contributions to the prosecution of the case.

CONCLUSION

For all of the foregoing reasons, Class Counsel respectfully ask that the Court approve Class Counsel's application for attorney fees in the amount of 20% of the amount to be paid by Court order to each Class Member, to be paid to Class Counsel as funds are disbursed to eligible claimants.

Dated: September 27, 2023

Respectfully submitted,

/s/ David H. Fink
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.2(b)(i), Counsel for Plaintiffs certifies that this brief contains 6,304 words, as indicated by Microsoft Word 2021, inclusive of any headings, footnotes, citations, and quotations, and exclusive of the caption, cover sheets, table of contents, signature block, any certificate, and any accompanying documents. Plaintiffs are filing a Motion for Leave to File Oversized Brief concurrently with this filing.

Dated: September 27, 2023

/s/ David H. Fink
David H. Fink

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

v.

COUNTY OF VAN BUREN, et al.,

Defendants.
_____/

No. 1:14-CV-1274

Hon. Paul L. Maloney

DECLARATION OF DAVID H. FINK IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES

I, David H. Fink, declare:

1. I am the managing partner in the law firm of Fink Bressack. I submit this declaration in support of Plaintiffs' Motion for an Award of Attorneys' Fees in connection with the services rendered in this matter (the "Action"). I have personal knowledge of the information set forth in this declaration.

2. My firm is one of the Class Counsel for the Plaintiffs in the Action.

3. The schedule attached as Exhibit A sets forth my firm's total hours and lodestar for the period from Inception through September 26, 2023. The total number of hours spent by my firm during this period of time was 4,665, with a corresponding lodestar of $2,518,452.50. This schedule was prepared from contemporaneous, daily time records prepared and maintained by my firm. In connection with representing the Plaintiffs in the Action, my firm did the following: factual research and investigations; legal research and analysis; preparation of pleadings, trial court and

appellate briefs; litigation strategy; analysis and case management; court appearances; settlement, including mediation; and outreach to class members after preliminary approval.

4. The lodestar amount reflected in Exhibit A is for work performed by attorneys and professional staff at my firm for the benefit of the Class. The hourly rates for the attorneys and professional staff in my firm reflected in Exhibit A are significantly lower than rates often used by Fink Bressack in seeking fee awards. For example, my current standard hourly rate for class action matters, which has been submitted in other cases, is $1,100/hour.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of September, 2023.

David H. Fink

EXHIBIT A

FINK BRESSACK
TIME SUMMARY
Inception - 09/26/2023
Wayside Church v County of Van Buren

NAME	CATEGORY	TOTAL HOURS	RATE	TOTAL AMOUNT
David H. Fink	Partner	1010.25	$750.00	$757,687.50
Darryl G. Bressack	Partner	151.25	$750.00	$113,437.50
Nathan J. Fink	Partner	970.00	$750.00	$727,500.00
Philip D. Miller	Partner	394.50	$750.00	$295,875.00
David A. Bergh	Associate	372.25	$395.00	$147,038.75
Glenn R. Gayer	Associate	662.75	$395.00	$261,786.25
John L. Mack	Associate	115.50	$395.00	$45,622.50
Lindsey D. Long	Associate	1.25	$395.00	$493.75
Morgan D. Schut	Associate	259.00	$395.00	$102,305.00
Kimberly S. Hunt	Legal Assistant/ Paralegal	24.00	$175.00	$4,200.00
Tonisha Thomas	Legal Assistant/ Paralegal	29.00	$175.00	$5,075.00
Kyle Tucker	Legal Assistant/ Paralegal	29.75	$175.00	$5,206.25
Eli I. Ravid	Law Clerk	27.25	$125.00	$3,406.25
Patrick J. Masterson	Law Clerk	11.00	$125.00	$1,375.00
Tyler J. Langley	Law Clerk	38.00	$125.00	$4,750.00
Dominic J. Catallo	College Student	221.50	$75.00	$16,612.50
Kevin T. Ellis	College Student	174.25	$75.00	$13,068.75
Margaret J. Hartigan	College Student	139.50	$75.00	$10,462.50
Madeline J. Jaks	Clerical Assistant	12.50	$75.00	$937.50
Katherine Ulrych	Clerical Assistant	21.50	$75.00	$1,612.50
Totals:		4665.00		$2,518,452.50

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

v.

COUNTY OF VAN BUREN, et al.,

Defendants.
_____/

No. 1:14-CV-1274

Hon. Paul L. Maloney

DECLARATION OF OWEN D. RAMEY IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES

I, Owen D. Ramey, declare:

1. I am a partner in the law firm of Lewis Reed & Allen. I submit this declaration in support of Plaintiffs' Motion for an Award of Attorneys' Fees in connection with the services rendered in this matter (the "Action"). I have personal knowledge of the information set forth in this declaration.

2. My firm is one of the Class Counsel for the Plaintiffs in the Action.

3. The schedule attached as Exhibit A sets forth my firm's total hours and lodestar for the period from Inception through September 26, 2023. The total number of hours spent by my firm during this period of time was 3,730, with a corresponding lodestar of $2,797,500. This schedule was prepared from contemporaneous, daily time records prepared and maintained by my firm. In connection with representing the Plaintiffs in the Action, my firm did the following: factual research and investigations; legal research and analysis; preparation of pleadings, trial court and

appellate briefs; litigation strategy; analysis and case management; court appearances; settlement, including mediation; and outreach to class members after preliminary approval.

4. The lodestar amount reflected in Exhibit A is for work performed by attorneys at my firm for the benefit of the Class.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of September, 2023.

Owen Ramey

Owen D. Ramey

EXHIBIT A

LEWIS REED AND ALLEN

TIME SUMMARY

Inception - 09/26/2023

Wayside Church v County of Van Buren

NAME	CATEGORY	TOTAL HOURS	RATE	TOTAL AMOUNT
Owen D. Ramey	Partner	2398.00	$750.00	$1,798,500.00
Ronald W. Ryan	Partner	1332.00	$750.00	$999,000.00
Totals:		3730.00		$2,797,500.00

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

v.

COUNTY OF VAN BUREN, et al.,

Defendants.
/

No. 1:14-CV-1274

Hon. Paul L. Maloney

DECLARATION OF JAMES SHEK IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES

I, James Shek, declare:

1. I submit this declaration in support of Plaintiffs' Motion for an Award of Attorneys' Fees in connection with the services rendered in this matter (the "Action"). I have personal knowledge of the information set forth in this declaration.

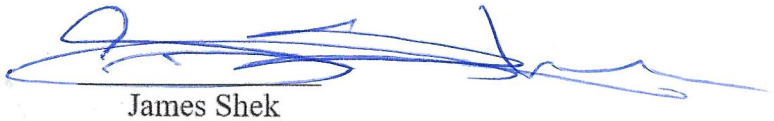
2. I am one of the Class Counsel for the Plaintiffs in the Action.

3. The schedule attached as Exhibit A sets forth my firm's total hours and lodestar for the period from Inception through September 26, 2023. The total number of hours spent by my firm during this period of time was 3,700.25, with a corresponding lodestar of $1,539,368.75. This schedule was prepared from contemporaneous, daily time records prepared and maintained by my firm. In connection with representing the Plaintiffs in the Action, my firm did the following: factual research and investigations; legal research and analysis; preparation of pleadings, trial court and appellate briefs; litigation strategy; analysis and case management; court appearances; settlement, including mediation; and outreach to class members after preliminary approval.

4. The lodestar amount reflected in Exhibit A is for work performed by attorneys and professional staff at my firm for the benefit of the Class.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of September, 2023.



James Shek

EXHIBIT A

JAMES SHEK ATTORNEY AT LAW

TIME SUMMARY

Inception - 09/26/2023

Wayside Church v County of Van Buren

NAME	CATEGORY	TOTAL HOURS	RATE	TOTAL AMOUNT
James Shek	Partner	1551.00	$750.00	$1,163,250.00
Susan C. Dickerson	Legal Assistant/ Paralegal	424.75	$175.00	$74,331.25
Marisa A. McNeely	Legal Assistant/ Paralegal	1724.50	$175.00	$301,787.50
Totals:		3700.25		$1,539,368.75