

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
CLERK, U.S. DISTRICT COURT
October 1, 2018
CENTRAL DISTRICT OF CALIFORNIA
BY: VPC DEPUTY

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LINDA RUBENSTEIN, on behalf of
herself and all others similarly
situated,

Plaintiffs,

v.

THE NEIMAN MARCUS GROUP
LLC, a Delaware Limited Liability
Company, and DOES1-50, inclusive,

Defendants.

Case No.: 2:14-CV-07155-SJO-JPR

~~PROPOSED~~ ORDER AWARDING
ATTORNEY'S FEES, COSTS, AND
SERVICE AWARD

Assigned to the Hon. S. James Otero

Date: October 1, 2018

Time: 10:00a.m.

Ctrm: 10C

1 A final approval hearing was held before this Court on October 1, 2018, to
2 consider, among other things, the amount of attorney’s fees, costs, and the service
3 award to be awarded to Plaintiff’s counsel, Kirtland & Packard LLP and the named
4 plaintiff and class representative Linda Rubenstein (the “Class Representative”).
5 Having considered the evidence and argument submitted by the parties, and any
6 objections to the settlement submitted,

7 **GOOD CAUSE APPEARING, IT IS HEREBY ORDERED,**
8 **ADJUDGED AND DECREED THAT:**

9 The Court, by separate Order and Final Judgment, approves the Settlement as
10 fair and reasonable for the reasons stated therein. As to the request for attorney’s
11 fees, costs, and service award, the Court has completed a thorough analysis of the
12 basis for the request. The Court finds that an award of thirty percent of the
13 Common Fund, in the amount of \$870,000 in fees to Class Counsel, Kirtland &
14 Packard LLP (“K&P”), is appropriate, along with reimbursement of costs in the
15 amount of \$32,574.41, and Service Award to the Class Representative consisting of
16 a \$5,000 payment.

17 Where counsel for a class seek fees from a common fund, courts within the
18 Ninth Circuit have discretion to use one of two methods to determine whether the
19 request is reasonable: percentage-of-the-fund or lodestar/multiplier. *See In re*
20 *Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010); *Vizcaino*, 290 F.3d at
21 1048–49); *Hanlon v. Chrysler Group*, 150 F.3d 1011, 1029 (9th Cir. 1998).
22 K&P’s request for fees is reasonable under the applicable percentage-of-the-fund
23 analysis, a conclusion confirmed here by the Ninth Circuit’s lodestar-multiplier
24 cross-check.

25 The common fund doctrine rests on the understanding that attorneys should
26 normally be paid by their clients. *See Boeing Co. v. Van Gemert*, 444 U.S. 472,
27 478 (1980) (the United States Supreme Court “has recognized consistently that a
28

1 litigant or a lawyer who recovers a common fund . . . is entitled to a reasonable
2 attorney’s fee from the fund as a whole”); *Paul, Johnson*, 886 F.2d at 271 (“[I]t is
3 well settled that the lawyer who creates a common fund is allowed an extra reward,
4 beyond that which he has arranged with his client, so that he might share the wealth
5 of those upon whom he has conferred a benefit.”).

6 Unsurprisingly, given this equitable principle, courts prefer a percentage-of-
7 the-fund model over a lodestar-multiplier approach in cases where it is possible to
8 ascertain the value of the settlement through the existence of a common fund and/or
9 quantifiable practice changes. *See In re Bluetooth Headset Products Liability*
10 *Litigation*, 654 F.3d 935, 942 (“Because the benefit to the class is easily quantified
11 in common-fund settlements, we have allowed courts to award attorneys a
12 percentage of the common fund in lieu of the often more time-consuming task of
13 calculating the lodestar.”); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d
14 1036, 1046 (“[U]se of the percentage method in common fund cases appears to be
15 dominant.”).

16 Further confirming courts’ preference for awarding attorneys’ fees in class
17 cases on a percentage-of-the-fund-basis, an empirical study based on eighteen years
18 of published opinions on settlements in 689 common fund class actions and
19 shareholder derivative settlements in both state and federal courts found that: (1)
20 83% of cases employed the percentage-of-the-recovery method, and (2) the number
21 of courts employing the lodestar method has declined over time, from 13.6 percent
22 from 1993-2002 to 9.6% from 2003 to 2008. *See Theodore Eisenberg & Geoffrey*
23 *P. Millery, Attorneys’ Fees and Expenses in Class Action Settlements: 1993-2008*, 7
24 *Journal of Empirical Legal Studies* 248, 267-69 (2010).

25 By contrast, courts rely on the lodestar method under circumstances not
26 applicable here, *i.e.*, when “there is no way to gauge the net value of the settlement
27 or of any percentage thereof.” *Hanlon*, 150 F.3d at 1029; *In re Bluetooth*, 654 F.3d
28

1 at 941 (lodestar appropriate “where the relief sought and obtained is often *primarily*
2 injunctive in nature and thus not easily monetized”). (Emphasis added) This
3 limited use of the lodestar method relates in part to its potential deterrent effect:
4 “[I]t is widely recognized that the lodestar method creates incentives for counsel to
5 expend more hours than may be necessary on litigating a case so as to recover a
6 reasonable fee, since the lodestar method does not reward early settlement.”
7 *Vizcaino*, 290 F.3d at 1050 n.5; *see also In re Activision Securities Litigation*, 723
8 F. Supp. 1373, 1378 (observing that application of the lodestar method may
9 encourage “abuses such as unjustified work” and therefore “does not achieve the
10 stated purposes of proportionality, predictability and protection of the class”)

11 Taking into account the significant risks associated with the litigation, the
12 complexity of the litigation process, which included, among other things,
13 successfully appealing this case from dismissal, and the result obtained for class
14 members, Plaintiff’s Counsel’s request is entirely consistent with the Ninth
15 Circuit’s typical range for such cases. *See, e.g., Vizcaino v. Microsoft Corp.*, 290
16 F.3d 1043, 1048-1050 (9th Cir. 2002). Plaintiff’s Counsel’s request is also
17 supported by a lodestar-multiplier cross-check. Plaintiff’s Counsel seek a lodestar
18 enhanced by a multiplier of 1.2, which is on the low end of the range the Ninth
19 Circuit established for such multipliers, and which is well supported by the skill
20 level and complexity of legal work required in this litigation, along with the
21 substantial result achieved for the Class. *Vizcaino*, 290 F.3d at 1051 & n. 6.

22 Plaintiff’s Counsel has secured a \$2,900,000 common fund settlement and no
23 reversionary interest to Neiman exists as to any amount of the Gross Settlement
24 Fund. Thus, the *entire* Net Settlement Fund, which cannot be less than \$1,625,000
25 minus Plaintiff’s Counsel’s costs only, shall be allocated to pay claims of
26 Settlement Class Members who submit valid and timely claim forms. By
27 negotiating for a non-reversionary fund, K&P insured that the entire recovery
28

1 benefits the class, rather than having any amount go back to defendants or to cy
2 pres. Thus, class members will get a substantial financial benefit, which itself
3 justifies the requested fee award, even *before* the significant injunctive relief is
4 considered.

5 “Reasonable costs and expenses incurred by an attorney who creates or
6 preserves a common fund are reimbursed proportionately by those class members
7 who benefit from the settlement.” *In re Media Vision Tech. Sec. Litig.*, 913 F.
8 Supp. 1362, 1366 (N.D. Cal. 1995) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S.
9 375, 391-392 (1970)). K&P has incurred out-of-pocket costs to date totaling
10 \$32,574.41, including costs for mediation fees, an expert witness, and travel for
11 out-of-state depositions. K&P seeks reimbursement of these costs, which were
12 necessary to secure the litigation’s resolution, and should be recouped. *See In re*
13 *Media Vision*, 913 F. Supp. at 1367-72.


14 Plaintiff’s Counsel asks the Court to award a Settlement Class Representative
15 Payment to named plaintiff Linda Rubenstein, consisting of a \$5,000 payment.
16 Modest enhancement payments compensating named plaintiffs for work done on
17 behalf of the class attempt to account for financial or reputational risks associated
18 with the litigation, and promote the public policy of encouraging individual
19 plaintiffs to undertake the responsibility of representative lawsuits. *See Rodriguez*
20 *v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009); *Hartless v.*
21 *Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) (“Incentive awards are fairly
22 typical in class actions.”). Here, Ms. Rubenstein came forward and initiated contact
23 with counsel to instigate the litigation when no one else did, agreed to serve as the
24 named plaintiff, provided substantial assistance with the factual underpinnings of
25 the case due to receipts and clothing price tags she maintained, reviewed and
26 commented on substantive filings, provided input in the settlement negotiation
27 progress, and approved the Settlement Agreement’s terms after review and
28

1 consultation with counsel. Granting the \$5,000 Settlement Class Representative
2 Payment to Ms. Rubenstein is appropriate and consistent with awards approved by
3 federal courts in this District given the substantial amount of effort and work she
4 performed, and the significant benefit her work provided to the litigation's success.
5 *See, e.g., Ross v. US Bank Nat. Ass'n*, 2010 U.S. Dist. LEXIS 107857, at *6 (N.D.
6 Cal. Sept. 29, 2010) (approving \$20,000 service award); *In re Ferrero Litig.*, 2012
7 U.S. Dist. LEXIS 94900, at *11 (S.D. Cal. 2012) (awarding \$7,500 and \$10,000
8 service awards); *Cook v. Tiffany & Co.*, 2011 U.S. Dist. LEXIS 106230, at *10
9 (S.D. Cal. 2011) (awarding \$7,500 service awards); *Chavez v. WIS Holding Corp.*,
10 2010 U.S. Dist. LEXIS 56138, at *8 (S.D. Cal. 2010) (same).

11 Any and all objections to Class Counsel's request for attorneys' fees and
12 costs, and service award to the class representative have been considered and are
13 hereby found to be without merit and are overruled.

14 Having reviewed the submissions of Class Counsel, the Court finds that the
15 sums awarded above are reasonable compensation for Settlement Class Counsel's
16 Litigation Fees and Expenses Payment, and the Settlement Class Representative
17 Payment for the class representative. The Qualified Settlement Fund
18 Administrator ARX Management shall pay these sums to Class Counsel within ten
19 (10) business days of the Settlement Effective Date.

20 DATED: 10/01/18
21 _____

22 
23 THE HONORABLE S. JAMES OTERO
24 UNITED STATES DISTRICT JUDGE
25
26
27
28