

# Attachment B

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

**FILED**

OCT - 4 2002

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS  
EAST ST. LOUIS OFFICE

CLAUDINE WILFONG, ET AL., )

Plaintiffs, )

and )

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )

Plaintiff-Intervenor, )

v. )

Cause No. 00-680-DRH

RENT-A-CENTER, INC. )

Defendant. )

**ORDER ON ATTORNEYS' FEES AND COSTS**

This Court, having heard evidence on attorneys' fees and expenses, having reviewed affidavits and testimony submitted herein, time and expense records, and other pleadings in support of the application of Class Counsel, Jerome Schlichter of Schlichter, Bogard & Denton, and Mary Ann Sedey and John Ray of Sedey & Ray, HEREBY FINDS AS FOLLOWS:

Class actions brought under statutes containing fee-shifting provisions, such as Title VII, may properly be converted into common fund cases at the time of settlement. Skelton v. General Motors Corp., 860 F.2d 256 (7<sup>th</sup> Cir. 1988), cert. denied, 493 U.S. 810 (1989). The common fund doctrine serves as a catalyst for settlement because it enables the defendant to place a ceiling on its liability and avoid separately litigating attorneys' fee and costs. Id at 256. This

doctrine has been held to specifically apply to Title VII class actions in the Seventh Circuit.

Alexander v. Chicago Park District, 927 F.2d 1014 (7<sup>th</sup> Cir. 1991), cert. denied 112 Sup. Ct. 1262 (1992). Attorneys who help to create a fund or benefit for all class members may receive fees and expenses directly from the common fund. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

It is also permissible to use the lodestar approach with a multiplier. The lodestar approach to the award of attorneys' fees initially involves multiplying the number of hours reasonably spent on the case by a reasonable hourly billing rate. Once this is calculated, application of a multiplier can be considered to account for contingency, complexity, risks, and result. City of Detroit v. Grinnell Corp., 495 F.2d 448, 470-73 (2<sup>nd</sup> Cir. 1974).

The decision whether to use the lodestar or the percentage approach in common fund cases is completely within the discretion of the district court. Harman v. Lyphomed, Inc., 945 F.2d 969, 975 (7<sup>th</sup> Cir. 1991), Florin v. Nationsbank of Georgia, 34 F.3d 560, 566 (7<sup>th</sup> Cir. 1994). However, the risk incurred by undertaking the litigation is a very important factor in awarding fees. As stated in In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7<sup>th</sup> Cir. 1992), "class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." In Florin 34 F.3d 560 (7<sup>th</sup> cir. 1994), the Court used a lodestar method with a multiplier, noting that a multiplier is "mandated, if the court finds that counsel 'had no sure source of compensation for their services' " [emphasis added], and the "need for such an adjustment [for inherent risk] is particularly acute in class action suits." At 565. The Seventh Circuit has also "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the

market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.”

If a lodestar approach is used, in the Seventh Circuit and throughout the federal system, the seminal case, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5<sup>th</sup> Cir. 1974) provides the factors relevant in determining the award, particularly with regard to upward adjustments for exceptional result and serious risk. The Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented by the case; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. After calculating the lodestar, a court may adjust it upwardly or downwardly if the “Johnson factors, not included in the reasonable fee analysis, warrant the adjustment.” Watkins v. Fordice, 7 F.3d 453, 457 (5<sup>th</sup> Cir. 1993). The Johnson factors as applied to this case, *infra*, undeniably warrant an adjustment to the lodestar.

1. Time and Labor Required

This Court finds that Class Counsel, through September 30, 2002, have spent 19,902.8 attorney hours and 6,174.3 paralegal and law clerk hours on this case, for a total of over 26,000 hours. In the Spring through Fall of 2001, Class Counsel utilized expert witnesses, advancing their costs in the sum of more than a quarter million dollars, took and defended many depositions, fought the Defendant’s continued resistance to discovery and conducted a nationwide effort

which resulted in obtaining over 300 affidavits of discrimination from women and men in 47 states. As to this effort, Donna Harper, the EEOC Supervisory Trial Attorney working most closely with Class Counsel, noted:

“Plaintiffs’ counsel have devoted virtually every working hour, including weekends and holidays, to this case for several months. They have committed their staffs to do likewise, and have fully funded all necessary case development. Counsel have hired additional staff as required to locate and interview hundreds of witnesses and class members.”

This intense period was just reaching its climax when Defendant entered into and announced a tentative settlement in a case in the Western District of Missouri – Bunch-Leyings v. Rent-a-Center. This case involved two individual plaintiffs whose case had been stayed. Without taking their depositions, Defendant agreed to allow them to come back into Court and then stipulated to their being named representatives for a settlement only class of all women employees and applicants with Defendant nationwide - essentially the same class as that herein. If successful, the “reverse auction” settlement would have enabled Defendant to eliminate the case herein for about \$15 million, a fraction of the amount Class Counsel herein obtained. A nationwide notice omitting any mention of the pendency of the case herein was approved and sent, and the settlement was preliminarily approved.

Faced with destruction of this case, Class Counsel immediately undertook an all out massive effort aimed at communicating with the entire class about the inadequacy of the Bunch-Leyings proposed settlement in the Western District of Missouri. In this period, Class Counsel expended the staggering number of over 15,000 hours of attorney and paralegal time between October 31, 2001 and February 28, 2002. In the month of January 2002 alone, over 5,000 attorney hours were spent on this case.

Class Counsel's efforts to defeat this settlement required hiring over 28 lawyers in a short time to communicate with the class regarding their rights and to explain that they had the option to opt out of the Bunch-Levings settlement, a highly material fact not disclosed by the nationwide notice sent out in that case. This Court finds that a so-called "reverse auction" such as attempted in the Bunch-Levings case, had never before been attempted in an employment discrimination class action. Class Counsel's herculean effort and commitment of resources to defeat it was unprecedented and involved risk never before undertaken in a national employment discrimination class action. This enormous risk and resource commitment was undertaken in the face of a settled case which would have essentially destroyed this case if successful.

Class Counsel's efforts to defeat the reverse auction settlement ultimately proved successful as they obtained the extraordinary number of over 1,000 opt outs from that settlement. This led to the abandonment of the settlement by Defendant and the eventual replacement of it with the settlement herein - a result for more than triple the monetary amount - 47 million dollars and more than six times the value - \$115 million dollars - and which involves extremely powerful affirmative benefits to the Class. The time spent by Class Counsel was not only reasonable but made the difference between the settlement herein and one which would have been worth a mere fraction of its value.

This Court finds that the rates set forth in the Affidavit of Jerome Dobson are reasonable market rates for the St. Louis Metropolitan area for a case of complex litigation. They are as follows:

- A. Mr. Schlichter and Ms. Sedey - over 25 years experience, \$400 per hour;
- B. Attorneys out of law school 12 years, \$300 per hour; 8-10 years, \$275 per hour; 5-7 years, \$260 per hour; less than 4 years, \$140 per hour; paralegals, \$90 per hour.

This produces a lodestar using local rates of \$5,330,412.50. National rates are substantially higher. For example, Mr. Goldstein's rate is \$500 per hour.

It is also noteworthy that Class Counsel have committed to completing the settlement herein, defending it on appeal if necessary, and to four years of monitoring. This will require substantial additional time, and such time has not been included in the lodestar calculation of Class Counsel.

**2. Novelty and Difficulty of the Case**

In addition to the inherent difficulty in proving systemic sex discrimination through statistical evidence and massive witness testimony, this case presented numerous complex and uncertain legal and factual issues. As noted by Barry Goldstein, previously recognized by Senior Judge James Foreman of this Court as the foremost employment discrimination lawyer in the United States, management and certification of a nationwide employment discrimination class action are difficult challenges, even absent the additional complicating factors in this case. In his evaluation of this case, Mr. Goldstein found that "it is extraordinarily difficult to oppose successfully a proposed class action settlement and, as Class Counsel did in this litigation, negotiate an alternative settlement that increases the monetary relief by several times and vastly improves the injunctive relief provided to the class."

Class Counsel also confronted a variety of other difficult, novel legal questions, particularly in the areas of the need and procedure for joint notices to the class due to the Bunch-Levings settlement omitting any mention of this case or a class member's right to be a part of it, and of the appellate issues surrounding the two cases which existed in different Districts and Circuit Courts of Appeal. The novelty and difficulty of the legal and factual issues presented by

this case weigh heavily in favor of an addition to the lodestar.

3. The Requisite Skill

As found by this Court, this case involved complex legal and factual questions. Only competent counsel experienced in employment discrimination, class actions, and complex litigation could even approach handling a case of this nature. It has taken thoroughly experienced and highly skilled counsel with great fortitude to accomplish the settlement presented to this Court. Barry Goldstein, himself the most skilled employment discrimination lawyer in the United States, has confirmed the specialized level of skill required to successfully serve as class counsel in such a challenging case. This factor weighs heavily in favor of an addition to the lodestar.

4. Preclusion of Other Employment

Lead Class Counsel personally spent over 6,000 hours on this case and their combined offices spent over 26,000 professional hours to achieve this settlement. Class Counsel was undeniably precluded from other employment. Indeed, Class Counsel set up the equivalent of an additional law office under intense time pressure to communicate with the class and defeat the Bunch-Levings settlement. Their offices have been burdened greatly by the massive amounts of class communication, addition of staff, sheer volume of documents and pleadings, and extensive periods of full time work on the case. In the words of Donna Harper, the supervisory trial attorney for the St. Louis District Office of the EEOC, "Plaintiffs' counsel have devoted virtually every working hour, including weekends and holidays, to this case for several months. They have committed their staffs to do likewise, and have fully funded all necessary case development." Such complete devotion of resources and wholehearted, concentrated

commitment of time under the threat of a class action settlement through a reverse auction is unprecedented in an employment discrimination case. Obviously, the intensity and time precluded other employment.

5. Customary Fee

While the Court accepts the rates for local attorneys, there is simply no local market for litigation of this magnitude. No other local attorneys or firm would undertake a similar risk of nonrecovery and few firms would nationally. As noted by Mr. Goldstein, national rates apply and these produce a substantially higher lodestar.

6. Fixed or Contingent Nature of Fee

Class Counsel has received no advancement of fees or expenses from any class member for the duration of the entire case. From the outset, award of any fees and reimbursement of expenses has been entirely contingent upon achieving a favorable result for the class. Significantly they were not funded by any private organizations or public interest groups, and they did not obtain a fee contract with the class at large. For this factor, a multiplier of the lodestar is *mandated*.

7. Time Limitations Imposed by Client or Circumstance

Time was an absolutely critical element in this case. In this race to res judicata, Class Counsel had to marshal tremendous resources in an extraordinarily narrow time frame because of the attempted Missouri settlement. Even in spite of these time limitations, it is the opinion of Barry Goldstein that Class Counsel has managed to accomplish more for this class in two years than any private counsel has ever accomplished for a comparable large national employment discrimination class within a two year period. He stated:

"It is noteworthy to compare this recovery with the less than \$15,000,000 fund created in the proposed Bunch settlement. Within nine months of the proposed Bunch settlement, Class Counsel were able to obtain class certification in Wilfong, defeat the Bunch settlement, and negotiate a vastly superior settlement."

This Court adopts as its finding Mr. Goldstein's opinion that Class Counsel have accomplished more than anyone ever before in a comparable case within a two year period.

8. Amount Involved, Results Obtained

A common fund in the amount of \$47,000,000 is but one aspect of the exceptional result obtained through Class Counsel's efforts. The settlement obtained by Class Counsel also will result in 10% of the Defendant's available job openings in the next fifteen month being made available to Class members who qualify. The value of this, according to Dr. David Peterson, a nationally recognized statistician, is over 68 million dollars, creating a total settlement value of over 115 million dollars. Defendant must also set up an entire Human Resources Department, staffed with five people under a newly created Vice President position; must prepare a video for all employees from the CEO sending a strong message of no tolerance of discrimination and that performance evaluations will take this into account; must hire a consultant approved by Class Counsel and the EEOC to ensure that discrimination does not occur; must do new training sensitive to gender matters; must report for four years to the Court, Class Counsel and the EEOC; must broadly post vacancies in a way never done before; must eliminate its 75-pound weight lifting requirement; and must consider qualified women for its board. In effect Defendant will be creating a new corporate culture.

The nonmonetary relief described above will undeniably benefit all current and future employees, regardless of gender, by creating uniform and fair treatment of all employees in accordance with standard equal employment opportunity practices. Class Counsel have

successfully performed the role of a "private attorney general" contemplated under the common fund doctrine, a role viewed with great favor in this Court. As stated by Senior Judge James Foreman of the Court, "In essence, it is an example of advocacy at its highest and noblest purpose, and Class Counsel accomplished a great public good."<sup>1</sup> This accurately describes the achievement of Class Counsel in this case.

This result compels a fee award far in excess of the lodestar amount.

9. Experience, Reputation, Ability of Attorneys

Class Counsel are of the highest experience, reputation, and ability. Former Chief Judge James Foreman, speaking of Mr. Schlichter, stated: "Class Counsel [Jerome J. Schlichter] has appeared in this Court and has been known to this Court for approximately 20 years. This Court finds that Mr. Schlichter's experience, reputation, and ability are of the highest caliber."<sup>2</sup> Mr. Schlichter is known well to this District Court Judge and this Court agrees with Judge Foreman's view of Mr. Schlichter's experience, reputation and ability.

Ms. Sedey and Mr. Ray are preeminent employment discrimination attorneys in the Metropolitan St. Louis area. They also have demonstrated the highest caliber of experience, reputation and ability.

Class Counsel demonstrated their commitment to the women in this case throughout by zealously advocating for their best interests. This is borne out by the EEOC, which filed a Memorandum in Support of Plaintiff's Motion for Class Certification, attesting to its belief that

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<sup>1</sup>See Mister v. Illinois Central Gulf Railroad, 832 F.2d 1427 (7<sup>th</sup> Cir. 1987), Order No. 2 Attorneys Fees and Costs, August 5, 1993, in which Senior Judge Foreman used this language to describe Mr. Schlichter's efforts as Class Counsel therein.

<sup>2</sup>Id.

Class Counsel "will continue vigorously to prosecute this case in the best interest of the class and in the best tradition of zealous legal advocacy, tempered by their recognition of their responsibility to protect the interests of the class." In an accompanying declaration, Supervisory Trial Attorney for the EEOC's St. Louis District Office, Donna Harper, stated that in over twenty years of practice, she had never observed a "class case that has been more thoroughly prepared and developed by private counsel." Further, she added that,

"Counsel for plaintiffs are not only experienced and capable, but have demonstrated a high degree of personal integrity and ethical conduct in the pursuit of these claims. Counsel...actively have sought and heeded the Commission's views regarding both the public interest and the merits of advancing certain positions since the Commission intervened. Counsel have remained committed to the best interests of the class throughout, neither putting their own interests nor the interests of their clients ahead of the interests of the class."

This factor again operates in favor of adding to the lodestar and to the percentage of the common fund.

10. Undesirability of Case

When Class counsel undertook representation of the class herein, it was a daunting task. It is never easy to demonstrate nationwide, companywide sex discrimination; the need for solid statistical and witness evidence can be insurmountable. Even individual employment discrimination cases are difficult to prove and not readily accepted by experience counsel. This case is extraordinarily undesirable. This Court finds, based on the affidavit of Jerome Dobson, that no other attorneys in the St. Louis Metropolitan area would have undertaken this effort. Indeed, few attorneys or law firms nationwide would have.

11. Nature and length of Employment Relationship with Client

This type of case is unlikely to lead to other cases or retainers on behalf of individual

members of the class. Thus, Class Counsel will not benefit economically in the future for these efforts.

12. Awards in Similar Cases

This is the only national employment discrimination class action which, while facing the prospect of approval of an inferior settlement, defeated it and achieved a dramatically larger and more comprehensive one. Thus, no case is similar. Clearly, however, cases that have involved significant risk and use of resources strongly support an upward adjustment of the lodestar or a substantial percentage.

If ever there were a case warranting upward adjustment of the lodestar based on the Johnson factors, it is this case. Class Counsel invested enormous time and labor and expenses; they faced difficult, novel legal and factual questions; their litigation obstacles necessitated specialized legal skill; they relinquished other more lucrative employment in order to pursue this case; any award of fees or reimbursement of expenses in this case has been contingent from the outset and has come with great risk; the circumstances surrounding the litigation before two courts imposed significant time restraints on them; their experience, reputation and ability are of the highest caliber uniquely suited for this type of action; this case is undesirable to the legal community; they are unlikely to receive future employment from individual class members; and fee awards in less compelling cases than this strongly call for a significant multiple of the lodestar.

In the Consent Decree, Class Counsel voluntarily placed an upper limit on the amount of fees they would request and accept, thereby preventing this Court from awarding attorneys' fees that reflect the full value of Class Counsel's efforts through application of national market rates, a high-end multiplier, or an additional award for future services. This Court finds that a multiplier

of the lodestar significantly higher than the requested multiple of approximately 2 would be appropriate.

All of the Johnson factors weighing heavily in favor of upwardly adjusting the lodestar also weigh heavily in favor of awarding a significantly higher percentage of the common fund to Class Counsel than the requested percentage. The benchmark used in this Circuit for attorneys fees in a common fund case is 33 1/3%, a figure which can be adjusted upward.

If ever there were a case warranting a large percentage of the common fund as attorneys' fees based on the Johnson factors, it is this case. As a result, Class Counsel's request for fees representing slightly more than 22% of the common fund are certainly is significantly less than what this case would justify.

Class Counsel is thus requesting a very modest percentage despite exceptional risk and result. If the conservative value of just part of the nonmonetary relief is considered together with the common fund, then Class Counsel's request represents only about 9% of the monetary value the settlement represents. In addition, Class Counsel will not receive any fees for future services. The Court therefore approves the requested fee of \$10,500,000.00.

Attorneys who help to create a fund or benefit for all class members may also receive costs in addition to fees directly from the common fund. Costs herein have been contemporaneously recorded, and were reasonably incurred through Class Counsel's exceptional representation of the Class. The figure of \$767,777.58, including estimated expenses to be incurred, is reasonable.

Wherefore, it is the Order of the Court that Class Counsel's Petition for attorneys fees of \$10,500,000 and \$767,777.58 in expenses is hereby granted; for a total of \$11,267,777.58. The Settlement Administrator is directed to pay this amount to Class Counsel from the Settlement Fund.

October 4, 2002  
DATE

David R. Herndon  
David R. Herndon  
United States District Judge