STATE OF MINNESOTA | DISTRICT COURT

HENNEPIN COUNTY | FOURTH JUDICIAL DISTRICT
CASE TYPE: CIVIL OTHER

Edain Altamirano Flores; Esperanza Herrera; Lori Nicol; Olutundun Arike Ogundipe; Jason Beck; Patricia Goggin; Norma Juarez; and Bruno Gorostieta, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Spiros Zorbalas; Stephen Frenz; Equity Residential Holdings, LLC; National Housing Fund, LLC; The Apartment Shop, LLC; ERT, LLC; Quarters for Creativity, LTD.; Emerald Square Properties, Inc.; Hennepin Quarters, Inc.; Powderhorn Quarters, Inc.; Hiawatha Quarters, Inc.; 25 &3146 Properties, Inc.; Lahaha Holdings, Inc.; Arts Avenue Properties, Inc.; SS Quarters, Inc.; Berkeley Holdings, Inc.; 1801Properties, Inc.; SZ112, Inc.; S1322, Inc.; R110, Inc.; G121, Inc.; Alpha-Omega Companies, Inc.; JAS Apartments, Inc.; Jennifer Frenz; Mary Brandt; and 2020 Vision Investments, LLC,

Defendants.

Court File No. 27-CV-16-14225
Class Action
Judge Mary R. Vasaly
Chief Judge Ivy S. Bernhardson

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the Court on Plaintiffs' and Class Counsel's Motion for Attorneys' Fee Award, Cost Award, and Class Representative Service Award. All appearances were noted on the record.

After reviewing the memoranda, affidavits, arguments of counsel, Class Counsel's *in camera* submissions of detailed records regarding its time and expenses, and all the files herein,

the Court makes the following Findings of Fact and Conclusions of Law under Minn. R. Civ. P. 23.08(c):

FINDINGS OF FACT

1. This case was commenced on September 23, 2016, with a 37-page Complaint, which was based on trial and deposition testimony in another matter as well as Class Counsel's pre-suit investigation.

2. The Complaint asserted theories of landlord liability and damages under Minn. Stat. § 504B.161, the Minnesota consumer protection statutes, and the veil-piercing doctrine. The claims in the Complaint had not previously been pursued in a successful class action in this State, but they are based on well-developed and well-defined principles of law and statutes.

3. This action was vigorously litigated by all parties from the date of filing until the parties reached a settlement at mediation on June 8, 2018 (about 21 months). This litigation included two rounds of contested dispositive motions; a contested class certification motion; a contested request to add punitive damages; motions for injunctive relief; and multiple discovery-related motions. A chart of statistics related to the litigation follows:

Topic	Summary
Summary of Motions	• 44 Total Motions Filed
Court Filings	• 16 Total Key Court Orders • 275 Total Pages of Key Court Orders • 2,262 Total Number of Pages within Key Motion Papers (excluding exhibits) • 1,175 Total Number of Exhibits Filed with the Key Motions
Court Hearings/ Oral Arguments	• 18 Oral Arguments
Written Discovery	• 1,811 Total Number of Interrogatories Served • 2,565 Total Number of Requests for Production Served • 527 Total Number of Requests to Admit Served
Depositions	• 45 Depositions Taken

	• 354 Deposition Exhibits Marked • 161 Hours and 21 Minutes of Deposition Testimony (incl. breaks) • 5,493 Pages of Deposition Transcripts
Document Productions	• 74,838 Total Documents Produced • 211,641 Total Pages Produced

4. Along with their Motion, Class Counsel submitted the Affidavit of Michael F. Cockson, describing Class Counsel's efforts and investment in this litigation in detail. According to Class Counsel's submission, Class Counsel's investment of attorney time through September 30, 2018 was $6,967,921 stemming from 13,696.1 hours worked by attorneys and paralegals. This does not include time worked by litigation support specialists, research librarians, and other paraprofessionals, and it does not include any fees associated with the preparation of Counsel's request for fees. At the Court's request, and as required by Minn. Gen. R. Prac. 119, Class Counsel subsequently submitted detailed daily time records for the Court's *in camera* review. These time records included entries through December 26, 2018, and included the full amount of time worked by attorneys, paralegals, and other support staff described above. These detailed time records showed Class Counsel's total time investment through that date was $7,488,776 stemming from 14,772.9 hours worked. The Court finds that the information submitted by Class Counsel provides a reasonable and adequate description of the work actually performed.

5. The Affidavit of Michael F. Cockson also details the costs and expenses incurred by Class Counsel. These costs and expenses total $269,312.49, which were recorded and billed separately from Class Counsel's attorney fees. Class Counsel also identified that the costs of providing initial class certification notice to the class along with class settlement notice and settlement administration work are estimated to total $115,000. Class Counsel also subsequently

submitted invoices and other records of expenses for the Court's *in camera* review. The Court finds that these amounts are a reasonable and accurate description of the costs actually incurred and the remaining costs estimated to be incurred.

6. Class Counsel also submitted a description of the assistance provided by the Class Representatives. Class Counsel indicated that the representatives participated in interviews and assisted Class Counsel in developing the factual record of the case, and they conferred with Class Counsel at all stages of the litigation. Each class representative had his or her deposition taken by Defendants. Representing the class exposed many of the representatives to inquiry into their alienage and immigration status—an inquiry that the Court ordered Defendants to cease because it constituted an "undue burden" on such class representatives. (*See* Dkt. No. 301.) One of the class representatives led a putative class action designed to undo alleged fraudulent transfers of Defendants' assets. The class representatives met and/or spoke by phone with Class Counsel throughout the case. Each class representative responded to several sets of written discovery requests. Finally, the class representatives took an active role in settlement negotiations, including attending mediation in person, and considered the appropriateness of a proposed mediator's settlement number both in the presence of Class Counsel and outside of Class Counsel's presence, ultimately deciding to accept the mediator's proposed settlement number. The Court finds that this is a reasonable and accurate description of the assistance provided by the class representatives.

7. In addition to the litigation in this case, class counsel made extensive efforts in a collateral fraudulent transfer action (*Lori Nicol v. Equity Residential Holdings, et al.*, Court File No. 27-CV-17-13581) to secure collectability of the eventual judgment in this case. The *Nicol* matter was therefore related litigation, and it was simultaneously settled with this class action,

and it was the source of $6,715,170.51 that was paid into the common settlement fund in this matter.

8. Class Counsel's efforts led to a settlement to the benefit of the tenant class on the eve of jury trial. The Court has approved that settlement in a separate Order granting final approval. Under the Settlement Agreement as approved by the Court, Defendants are obligated to create a common fund of $18,500,000 million. After payment of attorneys' fees and litigation costs and expenses as approved in this Order, the money from the settlement fund will be distributed to class members according to the formula, methodology, and distribution procedures set forth in Exhibit B to the Settlement Agreement, and detailed in Plaintiffs' prior submissions to this Court.

9. On October 24, 2018, the Court issued its Order preliminarily approving the settlement and directing notice to the class. In the notice—which was also attached to the Settlement Agreement—the class was informed that Class Counsel would be seeking $6 million from the settlement fund as attorneys' fees, along with costs and expenses, and that the class representatives would each seek a service award of $10,000.

10. No class member has filed an objection to the requested award of attorneys' fees, costs and expenses, or class representative service payments. On December 28, 2018, after the deadline for objections had passed, Defendants filed objections solely to Class Counsel's requested attorney fee award. Because Defendants' objections were untimely, the Court need not consider them. In addition, for the reasons discussed below, Defendants do not raise any substantive objections to the reasonableness of Class Counsel's requested fee award, but only procedural objections to the sufficiency of Class Counsel's submissions. As noted above, at the Court's direction, Class Counsel submitted additional detailed records for the Court's *in camera*

review, and those records provide sufficient information for the Court to evaluate the fee and expense requests.

CONCLUSIONS OF LAW

Class Counsel Is Entitled to an Award of Fees from the Common Fund.

1. The United States Supreme Court and the Minnesota Supreme Court have both held that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-lite Co.*, 396 U.S. 375, 392 (1970); *Gilchrist v. Perl*, 387 N.W.2d 412, 418 (Minn. 1986) ("[W]here the class representative is successful in creating a fund for the class, the representative is entitled to recover attorney fees.").

2. Minnesota courts, including this Court, have repeatedly approved attorneys' fee awards from common funds based on a percentage of the fund. In the Eighth Circuit, use of the percentage method in common fund cases is "well established." *See e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement.").

3. The determination of the amount of a reasonable attorneys' fee awarded from a common fund is committed to the sound discretion of the Court. *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (citing *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017)); *Petrovic*, 200 F.3d at 1156; *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010); *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

4. Class Counsel has requested a fee of 32% from the common fund. For the reasons explained below, the Court finds that an award of 25% is fair and reasonable. To evaluate the reasonableness of a requested percentage of a common fund as an attorneys' fee award, Minnesota courts and the Eighth Circuit commonly apply a seven-factor test derived from factors set forth by the other circuits. *See Yarrington*, 697 F. Supp. 2d at 1061-62 (citing *Carlson v. C.H. Robinson Worldwide, Inc.*, Civ. No. 02-3780, 2006 WL 2671105, at *7 (D. Minn. Sept. 18, 2006). The seven factors commonly considered by Minnesota federal courts are:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Yarrington, 697 F. Supp. 2d at 1062 (citing *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 993 (D. Minn. 2005)).

5. The recovery for this class of predominantly low-income tenants has few, if any, precedents both in terms of size of recovery and in the claims pursued. As noted above, the total settlement fund is $18,500,000. Class members do not need to submit any type of claim form and will see near immediate monetary pay out from the settlement fund upon final approval of the settlement. Class counsel indicated that continued litigation to try to obtain a damages verdict larger than $18.5 million would have exposed the class to significant risks, including with respect to the claims on the merits, the length of time that may be necessary to achieve recovery, and the collectability of any final award. Balanced against these litigation and collection risks, the $18.5 million settlement fund provides a substantial and immediate benefit to the class. *See Yarrington*, 697 F. Supp. 2d at 1062 ("By itself, the cash settlement is beneficial to the Class, but weighed

against the inherent risks of trial, the Court finds that the $16,500,000 cash settlement provides a substantial and immediate benefit to the Class."). The Court concludes that Class Counsel and the class representatives reasonably balanced these risks and benefits in agreeing to the settlement.

6. In undertaking this litigation, Class Counsel bore all of the financial risk in the event the case was unsuccessful, representing Plaintiffs on a contingency-fee basis. "Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *In re Xcel*, 364 F. Supp. 2d at 994; *see also Yarrington*, 697 F. Supp. 2d at 1062.

7. While Class Counsel indicated to the Court that this class action has no precedent, the basis for the claims are in fact not complex civil matters, but were applications of standard landlord/tenant law, including breaches of the covenants of habitability under § 504B.161 and violation of Minnesota's consumer protection laws. Plaintiffs did pursue certain novel claims, including claims that fraudulently obtained rental licenses were void *ab initio*, claims that fraud in obtaining rental licenses were actionable under the Minnesota Consumer Fraud Act, and claims that landlord deception was actionable under the Minnesota Deceptive Trade Practices Act, but, for example, they are not sophisticated securities fraud claims.

8. Clearly the skill of the lawyers supports a 25% fee. The Court stated during class certification that "it is undisputed that Plaintiffs' attorneys are highly qualified, knowledgeable and experienced attorneys who are willing to invest the resources necessary to fully prosecute the case." (Dkt. No. 261 at 29.) Likewise, the Court stated that Defendants had retained "sophisticated litigators with substantial

resources." (*Id.* at 34.) Defendants' counsel vigorously defended their clients and achieved several rulings in their clients' favor during this litigation. (*See, e.g.*, Dkt. Nos. 41, 423, 584.)

9. The substantial class settlement in this case was possible only because of Class Counsel's substantial investment of time and labor over the two years of this litigation. Overall, Class Counsel have invested over 13,500 hours prosecuting this action, the *Nicol* action, and other directly related collateral efforts. Class Counsel's efforts included, among other things, (1) conducting an extensive factual investigation into the alleged fraud; (2) vetting the complex and novel legal theories supporting Plaintiffs' claims; (3) drafting the Complaint; (4) responding to Defendants' motion to stay the litigation; (5) responding to Defendants' motions to dismiss; (6) reviewing over 70,000 documents and 150,000 pages produced by Defendants; (7) moving to compel additional productions and discovery from Defendants; (8) moving for a protective order to limit certain discovery inquiries by Defendants; (9) taking 23 fact depositions from Defendants and Defendants' employees; (10) taking or attending eight depositions of third-party witnesses; (11) taking five depositions of Defendants' expert witnesses; (12) defending eight depositions of the Plaintiffs; (13) successfully moving for class certification; (14) successfully moving to add claims for punitive damages; (15) successfully opposing Defendants' eight motions for summary judgment; (16) litigating a fraudulent transfer action; (17) preparing for trial; and (18) attending and monitoring City license revocation proceedings; (19) filings and appearances in a foreclosure action against several Defendants; and (20) engaging in extensive settlement negotiations over two sessions with two different mediators.

10. The Court received no objections to the requested fees of 32% and thus the Court's reduced allowance of fees at 25% is not an issue. The notice provided to the class notified class members that Class Counsel would be seeking $6 million in fees from the settlement fund. The class representatives themselves entered into the settlement agreement that had as an exhibit the notice with the contemplated fee request, so the most directly involved members of the class have been aware of the fee request since the time of settlement.

11. The Court has examined empirical studies of attorneys' fees awarded in class actions given the paucity of court decisions in Minnesota relating to fee awards in consumer class actions, and with the goal of ensuring a fair result with an award of "reasonable" fees. The Court understands and appreciates the need for counsel to receive fair compensation, because if these fees are set too low, then qualified counsel will not bring them in the first place. Injured parties would receive no redress and potential wrongdoers will not be deterred for fear of possible class action liability. However, if fees are set too high, attorneys will receive an unjustified windfall, and some of the benefits that should have gone to class members will be diverted to class counsel. The Court notes that federal judges rely extensively on empirical studies when assessing fee requests. *See, e.g.*, *In re Heartland Payments Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080-81 (S.D. Tex. 2012) ("District courts increasingly consider empirical studies analyzing class-action-settlement fee awards to set the appropriate percentage benchmark or to test the reasonableness of a given benchmark . . . Using these studies alleviates the concern that the number selected is arbitrary.").

12. The Court has examined three leading empirical studies in this area: (a) Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-*

2008, 7 J. Empirical Legal Stud. 248 (2010) (689 common fund settlements studied); (b) Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) (study of 688 class action settlements in federal district court in 2006 and 2007); and (c) Theodore Eisenberg, Geoffrey Miller and Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 New York University Law Review 937 (2017) (458 cases). All of these studies analyze attorney fee awards from many perspectives. In examining these three studies the Court found that for class action settlements of the size in this case, and also with respect to class actions in the consumer category, which the Court considers is the appropriate category for this case, the average, mean and median percentages ranged from 20% to 26% of the common fund.

13. The Court did not employ the lodestar method which multiplies hours reasonably expended against a reasonable hourly rate. The Court believes the percentage method "directly aligns the interests of the Class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 431-32 (S.D.N.Y. 2001). The clear trend of all courts, as explained in the empirical studies referred to above, is to use the percentage approach. The lodestar method created a temptation for lawyers to run up the number of hours for which they were paid. *See In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167-68 (S.D.N.Y. 1989). For the same reason, the lodestar created an unanticipated disincentive to early settlements. *See Savoie v. Merchants Bank*, 166 F.3d 456, 461 (2d Cir. 1999) (citation omitted). But the primary source of dissatisfaction was that it resurrected the ghost of Ebenzer Scrooge, compelling district courts to

engage in a gimlet-eyed review of line-item audits.[1] *See Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 51 (2d Cir. 2000) ("district judges should not have to participate" in the "nitpicking of fee review"); *Union Carbide*, at 167-68.

Class Counsel Will Be Reimbursed For Its Costs and Expenses.

14. Class Counsel also requested reimbursement of litigation expenses that were incurred and necessary for the prosecution of this case. Class Counsel also requested that the Court award the settlement administrator its reasonable costs of providing initial class certification notice to the class along with class settlement notice and settlement administration work. As noted above, Class Counsel submitted the Affidavit of Michael F. Cockson detailing the costs and expenses incurred, and the estimated total costs for class notice and settlement administration, and subsequently submitted additional invoices and other expense detail for the Court's *in camera* review. The total costs and expenses requested by Class Counsel are $269,312.49, and the estimated total for class notice and settlement administration is $115,000.

15. These litigation expenses are properly awarded to Class Counsel and to the settlement administrator. *See Yarrington*, 697 F. Supp. 2d at 1067 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit from the settlement."); *see also In re Xcel*, 364 F. Supp. 2d at 1000 (finding that expenses of photocopying, postage, messenger services, document depository, telephone and facsimile charges, filing and witness fees, computer assisted

[1] The Court's *in camera* review of Class Counsel's billing records bears this out. For example, the Court found that at all court hearings in this case, Class Counsel had in attendance at least four or five, generally six, and up to nine lawyers there with billing (blended) rates ranging from approximately $300 per hour to about $900 per hour. It is one thing if a law firm chooses to have young associates attend a court hearing for training purposes, and does not bill the client. It is entirely different if the client is fully aware and agrees to such staffing and billing. In this case, the low-income tenants who will benefit from the settlement had no say.

legal research, expert fees and consultants, and meal, hotel, and transportation charges for out-of-town travel are proper in a class-action litigation); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) (awarding class counsel costs related to "experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses").

The Class Representatives Will Each Be Awarded a $10,000 Service Award.

16. Plaintiffs additionally moved for an award giving financial recognition to the extensive services provided by the class representatives to the class. Courts routinely grant service awards to named plaintiffs. *Khoday v. Symantec Corp.*, No. 11-cv-180, 2016 WL 1637039, at *12 (D. Minn. Apr. 5, 2016); *Yarrington*, 697 F. Supp. 2d at 1068 (noting that "unlike unnamed Class Members who will enjoy the benefits of the Settlement without taking on any significant role, the Named Plaintiffs [make] significant efforts on behalf of the Settlement Class and [participate] actively in the litigation"); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009). In determining whether a service award is appropriate, the Minnesota federal courts look to: (1) the "actions the [class representatives] took to protect the class's interests"; (2) the "degree to which the class has benefitted from those actions"; and (3) the "amount of time and effort the [class representatives] expended in pursuing litigation." *Zilhaver*, 646 F. Supp. 2d at 1085 (citing *Koenig v. U.S. Bank*, 291 F.3d 1035, 1038 (8th Cir. 2002)).

17. A $10,000 service award for each class representative is warranted. *See Khoday*, 2016 WL 1637039, at *12 (approving service award of $10,000). The class representatives devoted a significant amount of time to this litigation. Their significant, time-consuming, and

courageous efforts provided benefit to the class and protected the class's interests because the class representatives' efforts substantially supported development of the case, class certification, and eventual settlement. *See Khoday*, 2016 WL 1637039, at *12 (noting that the named plaintiffs "participated in interviews, assisted with discovery, were deposed, participated in conferences, and met with attorneys throughout the litigation process"); *Yarrington*, 697 F. Supp. 2d at 1068-69 (awarding a service award and noting that the named plaintiffs "participated in numerous lengthy interviews by Settlement Class Counsel; assisted in responding to multiple discovery requests; were deposed by [defendant], and answered questions regarding extremely sensitive and personal medical information" and "participat[ed] in decisions relating to the settlement of the case as part of the settlement process").

18. Moreover, the service award requested here is consistent with service awards in other class actions. *See Khoday*, 2016 WL 1637039, at *12 (approving service award of $10,000); *Zilhaver*, 646 F. Supp. 2d at 1085 (awarding lead plaintiffs' $15,000 each from a settlement fund of $17 million); *In re Xcel*, 364 F. Supp. 2d at 1000 (awarding $100,000 to be split between eight lead plaintiffs); *see also Yarrington*, 697 F. Supp. 2d at 1069 (awarding a $5,000 incentive award and noting that such an award was "at the modest end of the spectrum"); *In re Employee Benefit Plans Sec. Litig.*, No. 3-92-708, 1993 WL 330595, at *7 (D. Minn. June 2, 1993) (approving attorneys' fees of 33.3% and incentive awards of $5,000 to each of the three representative plaintiffs from a common fund settlement of $10.7 million).

ORDER

On the basis of the foregoing, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion for Attorneys' Fee Award, Cost Award, and Class Representative Service Award is **GRANTED**.

2. The Court hereby **ORDERS** that Faegre Baker Daniels LLP ("Class Counsel") be awarded a fee of 25%, or $4,625,000, from the settlement fund in accordance with Section VIII.D. and C. of the Settlement Agreement.

3. The Court hereby **ORDERS** that Class Counsel be awarded $269,312.49 in costs and expenses from the settlement fund in accordance with Section VIII.D. and C. of the Settlement Agreement.

4. The Court hereby **ORDERS** that the settlement administrator will be reimbursed its reasonable fees and costs incurred in administering the settlement fund in accordance with and subject to the procedures stated in Section VI.F. of the Settlement Agreement.

5. The Court hereby **ORDERS** that Edain Altamirano Flores, Esperanza Herrera, Lori Nicol, Olutundun Arike Ogundipe, Jason Beck, Patricia Goggin, Norma Juarez, and Bruno Gorostieta each be awarded $10,000 from the settlement fund as a service award in accordance with Section VIII of the Settlement Agreement.

THE COURT ALSO FINDS THAT THERE IS NO JUST REASON FOR DELAY, AND DIRECTS THAT FINAL JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.

Dated: February 11, 2019

BY THE COURT:

Ivy S. Bernhardson
Chief Judge of the District Court