IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, *et al.*,	)	
Plaintiffs,	)	Civil Action Nos. 05-CV-1251-MLB-KMH and 07-CV-1043-MLB-KMH
vs.	)	
The Boeing Company, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' CORRECTED MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiffs David A. Harkness, William G. Hartig, Jr., David Lewandowski, JeNe Lewandowski, Ronald Owens, Richard Pullen, Tomey Shabshab, Donna Zagonel, Michael Baker (collectively, "the Harkness Class Representatives"), the Society for Professional Engineering Employees in Aerospace, IFPTE Local 2001 ("SPEEA") and the International Association of Machinists and Aerospace Workers and its District 70 ("IAM") move for approval of a settlement providing for an award of attorneys' fees pursuant to Fed. R. Civ. P. 23(h), Fed. R. Civ. P. 54(d), and 29 U.S.C. §1132(g)(1). As discussed below, the Court should grant this motion and should approve the settlement for reasonable attorneys' fees and expenses of $4.2 million. Defendants have agreed to pay this amount pending approval by the Court.

I. STATEMENT OF FACTS

The background of this lawsuit and the proposed settlement of the Harkness claims are described in the Memorandum in Support of Unopposed Motion for Order Preliminarily

Approving Settlement on Behalf of the Harkness Class (Dkt. #633) and the accompanying Settlement Agreement (Dkt. #632-1).

Rule 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by ... the parties' agreement." The Rule further provides that "[a] claim for an award must be made by motion under Rule 54(d)(2)," notice of which must be "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). In turn, Rule 54(d)(2) requires a claim for fees to be made by motion, and specifies its content, including "the grounds entitling the movant to the award" and "the amount sought." Fed. R. Civ. P. 54(d)(2)(B). Fee applications are typically filed within 14 days after judgment (Fed. R. Civ. P. 54(d)(2)(B)(i)), but because of the notice requirement of Fed. R. Civ. P. 23(h), they are filed in advance of the objection deadline in class action lawsuits.

To comply with Rule 23, the following was included, subject to the Court's approval, in the proposed notice to be sent to all class members:

> As further explained in the proposed Plan of Allocation and Distribution Order, if the Court approves the Settlement Agreement:
>
> 1. Class Counsel will be paid $4,200,000 for Class Counsel's Fees and Expenses out of the Common Fund Settlement Proceeds as attorneys' fees and to reimburse Class Counsel for all expert and consulting fees and litigation expenses paid by Class Counsel to prosecute the Litigation.

(Dkt. #632-2, Notice at 5).

Class Counsel have also complied with Local Rule 54.2 by consulting with Boeing's counsel on this matter in the course of reaching the Settlement and by filing the Settlement Agreement. The Settlement Agreement here provides that Boeing will establish a fund of $90 million, of which they have agreed to pay $4.2 million for Class Counsel's fees and expenses.

II. ARGUMENT

A. Introduction

The settlement providing for Class Counsel's fee award is reasonable given (1) the highly valuable services provided by Class Counsel throughout this lengthy and contentious case, (2) the significant monetary relief acquired for the Class, (3) the fact that fees and expenses of $4.2 million are only 4.67% of the $90 million recovery, and (4) the fact that the award actually represents a negative multiplier (counsel will receive 94% of their lodestar at reasonable market rates and litigation expenses).

B. Attorneys' Fees Are Justified Under ERISA.

Attorneys' fees and costs are properly awarded in ERISA cases as long as the fee claimant has achieved "some degree of success on the merits." *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242, 245 (2010).

Courts after *Hardt* have held that a party can achieve "some degree of success on the merits" by virtue of a voluntary settlement agreement reached as a result of litigation. *See, e.g., Temme v. Bemis Company Inc.*, 762 F.3d 544, 550 (7th Cir. 2014) (settlement was considered a "success on the merits" where agreed-upon recovery of benefits would obviously have conferred on plaintiff prevailing party status if it had been won at trial); *Cross v. Quality Management Group*, LLC, 491 Fed.Appx. 53, 55-56 (11th Cir. 2012) (affirming district court holding that recovery by way of settlement agreement constituted "some degree of success on the merits"); *Perelman v. Perelman*, 2014 WL 1413948 at *5 (E.D. Pa. April 14, 2014) ("we would award fees where a plaintiff's litigation efforts resulted in a voluntary, non-trivial, more than procedural victory, apparent to the Court without the need to conduct a lengthy inquiry into whether that success was substantial or occurred on a central issue").

The Settlement Agreement here, which provides the Class with a $90 million recovery, was reached after nine years of intensive litigation and the denial of the bulk of Boeing's motion for summary judgment (Dkt. 581), and thus clearly constitutes a "success on the merits" for Plaintiffs within the meaning of *Hardt*.

C. A Fee Provision of Less Than 4.7% of the Recovery is Reasonable.

Plaintiffs' counsel do not claim fees beyond the $4.2 million agreed to in the settlement, which is less than reasonable market billing rates set forth below. The Court may consider, however, that Plaintiffs' counsel could have recovered well over $25 million under a common-fund theory.

In assessing the reasonableness of attorneys' fees in a settlement, courts in ERISA cases look to the common-fund doctrine as a comparison. Courts in this Circuit "have found that either method of fee calculation [hourly lodestar or common-fund] 'may be cross checked against the amount that counsel would normally have recovered on any other reasonable basis.'" *In re Crocs Sec. Litig.*, 2014 WL 4670886 at *4 n.3 (D. Colo. Sept. 18, 2014) (quoting *Ashley v. Regional Trans. District and Amalgamated Transit Union Pension Trust*, 2008 WL 384579 at *8 (D. Colo. Feb. 11, 2008)).

The common-fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). The Supreme Court recently reaffirmed the primacy of the common-fund doctrine in allocating attorneys fees incurred in winning relief for ERISA participants. *See U.S. Airways Inc. v. McCutchen*, 133 S.Ct. 1537, 15448-51 (2013). Even before *McCutchen*, courts in this Circuit have applied the common-fund doctrine in ERISA cases. *See, e.g., Gordon v. U.S. Steel Corp.,* 724 F.2d 106 (10th Cir. 1983);

Eaves v. Penn, 587 F.2d 453 (10th Cir.1978); *In re Sprint Corp. ERISA Litigation*, 443 F.Supp.2d 1249 (D. Kan. 2006); *Great-West Life & Annuity Insurance v. Clingenpeel*, 996 F.Supp. 1348 (W.D. Okla. 1998).

Under the percentage-of-common-fund method, courts set a reasonable fee based on a reasonable percentage of the common fund. *Brown v. Phillips Petroleum Co.*, 838 F.2d at 454 (10th Cir. 1998) Courts using the percentage-of-the-fund method also typically consider the factors in the alternative lodestar calculation. *Brown,* 838 F.2d at 454; *Rosenbaum v. MacAllister,* 64 F.3d 1439, 1445 (10th Cir.1995); *Cox v. Sprint Communications Company*, 2012 WL 5512381 at *2 (D. Kan. Nov. 14, 2012) ("In common fund cases like this one, the Tenth Circuit applies a hybrid approach, combining the percentage fee method with the specific factors traditionally used to calculate the lodestar").

This Circuit has recognized 25% of the fund as the "benchmark" award in common-fund cases. *Gottlieb v. Barry*, 43 F.3d 474, 488 (10th Cir. 1994). *See also Ramah Navajo Chapter v. Norton,* 250 F.Supp.2d 1303, 1316 (D.N.M. 2002) ("Under the percentage-of-the-fund method, an appropriate starting point is the 25% benchmark established by the case law, with adjustments to be made up or down based on the factors articulated in *Johnson*").

In the class action context, courts in this Circuit typically award fees in the vicinity of 25% of the recovery. *See In re Sprint Corp. ERISA Litigation*, 443 F.Supp.2d at 1271 ("[P]laintiffs' requested fees and expenses of $3.9 million represent less than 16% of the benefit conferred on the plaintiff class members. The court has no difficulty concluding that this is an eminently reasonable percentage under the percentage-of-the-fund method based on the customary fee for similar work and awards in similar cases"). *See also Cox*, 2012 WL 5512381 at *3 ("At 26 percent of the value of the fund as a whole, the fee-and-expense award would be

well within the range of reasonable percentage-fee awards in this Circuit"); *Childs v. Unified Life Insurance*, 2011 WL 6016486 at *15 (N.D. Okla. Dec. 2, 2011) ("fees in the range of one-third of the common fund are frequently awarded in class action cases"); *Lucken Family Ltd. Partnership v. Ultra Resources,* 2010 WL 5387559 at *5-6 (D. Colo. Dec. 22, 2010) ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class"); Newberg on Class Actions § 14:6 (4th ed.) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery").

Here, the requested fees and expenses are only 4.67% of the $90 million recovery – less than one-fifth of the 25% benchmark in common-fund cases. As we show below, the award also represents a negative multiplier of counsel's market rates and hours expended (counsel will receive 94% of lodestar and expenses).

D. The Fee Settlement Is Reasonable Under ERISA Alone.

The settlement is also reasonable under ERISA alone (29 U.S.C. §1132(g)), as the effective hourly rates are lower than reasonable market rates for complex litigation, so that Class Counsel receives less than lodestar.

There is little question that Plaintiffs are entitled to recover attorneys' fees under ERISA. In the Tenth Circuit, district courts may consider several factors when deciding to award attorneys' fees under ERISA's fee provision (29 U.S.C. §1132(g)(1)). *Gordon v. U.S. Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983) (identifying five factors). The court has explained that "no single factor is dispositive and a court need not consider every factor in every case," *Cardoza v. United of Omaha Life Insurance Co.*, 708 F.3d 1196, 1207 (10th Cir. 2013), and is "not obliged to consider these factors at all." *Garrett v. Principal Life Insurance Co.*, 557

Fed.Appx. 734, 737 (10th Cir. 2014). Nevertheless, the five factors are: (1) the degree of the opposing parties' culpability; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would have a deterrent factor; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of a plan or resolved a significant legal question; and (5) the relative merits of the parties' positions. *Cardoza,* 708 F.3d at 1207 (citing *Gordon*).

In this case Boeing has agreed, subject to this Court's approval, to pay the requested fee award, thereby acknowledging that the requested attorneys' fees are merited. This fact should guide the Court's decision on this unopposed motion, applying the *Gordon* factors.

1. Boeing's potential liability and the merits of the parties' positions.

The first and fifth *Gordon* factors may be considered together. *See, e.g, Welch v. UNUM Life Insurance Co.*, 2008 WL 3876319 at *4 (D. Kan. Aug. 18, 2008) ("The court agrees… that factor 1 (degree of the opposing parties' culpability or bad faith) and factor 5 (relative merits of the parties' positions), are related, and will therefore be discussed together"); *Louderback v. Litton Industries Inc.*, 2008 WL 144690 at *2 (D. Kan. Jan. 15, 2008).

Here, the Settlement Agreement represents a significant and valuable recovery for the Plaintiffs and the Harkness class. *See Seiffer v. Topsy International*, 70 F.R.D. 622, 629 (D. Kan. 1976) ("The certainty of fixed recovery by way of agreement is often preferable to the vagaries of what might be achieved by a trial"). The fact that Boeing has agreed to settle this case by paying class members $85.8 million (less estimated administrative expenses of $147,500), and to pay fees and expenses of $4.2 million, is evidence that Plaintiffs had brought colorable claims.

While this Court has not issued a final decision on the merits, to the extent these two factors are applicable, they weigh in favor of an award of attorneys' fees to plaintiffs. *See Krogh*

v. Chamberlain, 708 F.Supp. 1235, 1240 (D. Utah 1989) ("When the plaintiff receives what he or she sued for by way of voluntary settlement, the fee award should not be reduced just because the party did not prevail in a lawsuit"); *see also Temme*, 762 F.3d 544, 550; *Cross*, 491 Fed.Appx. at 55-56; *Perelman,* 2014 WL 1413948 at *5.

2. Boeing is able to satisfy the fee award.

According to its website, "Boeing is the world's largest aerospace company and the leading manufacturer of commercial jetliners and military aircraft combined" with total revenue in 2013 of $86.6 billion.[1] Boeing clearly has the ability to satisfy the award.

3. The deterrent effect of a fee award.

In awarding attorneys' fees to plaintiffs in ERISA cases, "[d]eterrence is achieved against employers ... because they will have added incentive to comply with ERISA ... if they know that they may have to pay plaintiffs' attorneys' fees, in addition to the costs of compliance and their own legal fees." *Herring v. Oak Park Bank*, 1997 WL 458417 at *2 (D. Kan. July 3, 1997). *See also Van-Hoove v. Mid-America Building Maintenance*, 841 F.Supp. 1523, 1537 (D. Kan. 1993) (holding that an award of attorneys' fees would have a deterrent effect by emphasizing the seriousness of ERISA obligations). In fact, such award is practically the only true deterrent in light of controlling authorities that hold that punitive and pain and suffering damages are not recoverable under ERISA. *See, e.g., Unitis v. JFC Acquisition Co.*, 643- F.Supp. 454, 463 (N.D.Ill. 1986) (in pension case, softening the blow of its refusal to allow punitive damages by noting the deterrent effect of an attorneys' fee award); *Allison v. UNUM Life Ins. Co. of Am.*, 381 F.3d 1015, 1025 (10th Cir. 2004) ("*Nowhere does the Employee Retirement Income Security Act allow consequential or punitive damages.*") (emphasis in original; citation omitted).

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[1] *See* http://www.boeing.com/boeing/companyoffices/aboutus/index.page?; http://www.boeing.com/assets/pdf/companyoffices/aboutus/overview/boeing_overview.pdf.

4. The lawsuit was brought to benefit a class of participants in Boeing's retirement plan.

As a result of Plaintiffs' counsels' successful efforts, the Harkness Class, numbering approximately 1,800 individuals, will receive damages and reimbursements (after the deduction of the requested attorneys' fees and costs and settlement administration costs) worth approximately $85.65 million. This satisfies the fourth *Gordon* factor, which examines whether Plaintiffs endeavored to help an entire group of plan participants instead of just select individuals. *See, e.g., Holdeman v. Devine*, 2006 WL 1049104 at *3 (D. Utah, April 19, 2006).

E. The Requested Fee Award Is Reasonable Under Lodestar Principles.

The amount of a fee award under the lodestar must be reasonable. *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993). The lodestar calculation is the product of the number of attorney hours "reasonably expended" and a "reasonable hourly rate." *Robinson v. City of Edmond,* 160 F.3d 1275, 1281 (10th Cir. 1998).

1. Plaintiffs' Counsels' lodestar is reasonable.

A reasonable hourly rate may be calculated according to "the prevailing market rate in the relevant community." *Guides, Ltd. v. Yarmouth Group Property Management,* 295 F.3d 1065, 1078 (10th Cir. 2002); *Jackson v. Austin,* 267 F.Supp.2d 1059, 1064 (D. Kan. 2003) (to determine a reasonable rate, the Court focuses on the rates of "lawyers of comparable skill and experience."). In determining a reasonable hourly rate, courts may "look to national markets, an area of specialization, or any other market they believe is appropriate to fairly compensate attorneys in individual cases." *McHugh v. Olympia Entertainment*, 37 Fed. Appx. 730, 740 (6th Cir. 2002).

The Tenth Circuit authorizes district courts to award attorneys' fees based on national rates in cases where the attorneys brought special experience to the case or where out-of-state

experience was otherwise deemed warranted. *See, e.g., Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 983 (10th Cir. 1990) (ordering national rates to counsel in complex antitrust litigation); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) (holding that special circumstances will justify award of rates higher than local prevailing rates). *See also Gottlieb v. Barry*, 43 F.3d 474, 485 n.8 (10th Cir. 1994) (holding that district court's decision to apply higher out-of-town rates was entitled to deference on appeal); *In re WICAT Securities Litigation*, 671 F. Supp. 726, 731-732 (D. Utah 1987) (following *Ramos* and ordering fees to be paid based on the requested rates, other courts' consideration of a national rate, and other factors).

In this matter, the relevant community is as the national market for attorneys representing employees in employment class actions. Perhaps the most telling evidence that the relevant community is the national market for employment class action attorneys is that, in addition to being represented by the largest firm in Kansas, the Boeing Defendants were principally represented by attorneys from the Washington, D.C. office of international law firm Gibson Dunn & Crutcher, including a former U.S. Solicitor of Labor.

Stephen R. Bruce, Esquire, who maintains offices in Washington, D.C. and has a national practice devoted to ERISA individual and class action litigation, attests that "[t]here are only a small number of firms in the United States with the knowledge and experience to successfully prosecute an ERISA class action," and that "the hourly rates charges by Plaintiffs' counsel and support staff in computing the value for the services they have rendered in this litigation on behalf of Plaintiffs and the class are in accord with the prevailing market rates for this type of litigation." *See* Declaration of Stephen Bruce ¶¶ 8-14 (filed herewith).

"It is well established that complex ERISA litigation involves a national standard and special expertise." *Tussey v. ABB Inc.*, 2012 WL 5386033 (E.D. Mo. Nov. 2, 2012) (considering

evidence of hourly rates of $800 for attorneys with more than 25 years of experience, $625 for attorneys with 15-24 years of experience, and $450 for attorneys with 5-15 years of experience, court approved a blended rate of $514 for all attorneys).[2] *See also Degrado v. Jefferson Pilot Fin'l Ins. Co.*, 2009 WL 1973501 at *10 (D. Colo. July 6, 2009) (noting that other courts have held that ERISA cases "involve a national standard" for determining attorneys' hourly fees); *Gallo v. Moen Inc.*, 2014 WL 4472630 at *3-4 (N.D. Ohio Sept. 11, 2014) (applying national rates in ERISA/LMRA class action and approving hourly rates up to $550); *Chesemore v. Alliance Holdings*, 2014 WL 4415919 at *6 (W.D. Wis. Sept. 5, 2014) (recognizing that "ERISA cases involve a national rate" and approving hourly rates of $395 for lower-level associates and $895 for highest-level partners as on par with rates charged by plaintiffs' firms handling ERISA class actions); *Beesley v. Int'l Paper Co.*, 2014 WL 375432 at *3 (S.D. Ill. Jan. 31, 2014) (finding the legal market for ERISA class action was "a national one" and approving rates between $394 to $892 as reasonable).[3]

Alternatively, the relevant rate may also be determined to be the widely acknowledged rates for legal services in Washington, D.C., home of the Murphy Anderson firm (lead counsel for Plaintiffs) and the Gibson Dunn firm (lead counsel for Boeing). The United States Attorney

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[2] Although the Eighth Circuit reversed the district court in part on the merits of the claims, it held that the district court did not abuse its discretion in using national rates or applying a $514 blended rate in calculating the fees to class counsel. *Tussey v. ABB Inc.*, 746 F.3d 327, 340-41 (8th Cir. 2014).

[3] *See also Lucas v. K-Mart*, 2006 WL 2729260 at *4 (D. Colo. July 27, 2006) (holding in ADA action that, "Because of the significant resources and skill required, as well the risks entailed, to litigate large-scale actions on behalf of a class, very few attorneys handle such cases. Thus the relevant community for purposes of determining a reasonable billing rate for Class Counsel likely consists of attorneys who litigate nationwide, complex class actions.").

for the District of Columbia regularly publishes the *Laffey* Matrix, which establishes prevailing community legal rates for lawyers and legal staff based on the lawyers' years of experience.[4]

Courts in D.C. routinely use the *Laffey* Matrix – without more – to determine the prevailing legal rates in Washington, D.C. *E.g., Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013) ("In determining whether a rate is reasonable, courts in this district frequently rely upon the *Laffey* matrix, a methodology for calculating the prevailing market rate for attorneys' fees in the Washington, D.C. community."); *Harvey v. Mohammed*, 951 F. Supp. 2d 47, 54 (D.D.C. 2013) ("To determine reasonable hourly rates, it is customary in this District to apply the *Laffey* Matrix . . . .")

Likewise, courts outside of the District of Columbia also frequently use the Laffey Matrix to determine the prevailing market rates in D.C. *See, e.g., Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 726 F.3d 403, 413 (3d Cir. 2013) (using *Laffey* Matrix to determine prevailing rates for D.C.-based lawyers); *Desena v. LePage*, 847 F.Supp.2d 207, 214 (D. Me. 2012) (same); *Recouvreur v. Carreon*, 940 F. Supp. 2d 1063, 1070 (N.D. Cal. 2013); *Hash v. United States*, 2012 WL 1252624 at *22 (D. Idaho Apr. 13, 2012); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 2008 WL 906031 at *11 (W.D. Mich. Mar. 31, 2008).

The *Laffey* Matrix may determine the rate when the relevant community is deemed to be national market for attorneys in employment class actions. *Gallo v. Moen Inc.*, 2014 WL 4472630 at *3-4 (N.D. Ohio Sept. 11, 2014).

Class Counsel's hourly rates are typical of those approved for payment by courts in other ERISA class action cases during the time this litigation has been pending and are also consistent with the *Laffey* Matrix, and represent reasonable hourly rates for this type of work. The agreed-

[4] The current Laffey Matrix can be found here: http://www.justice.gov/usao/dc/divisions/Laffey%20Matrix_2014-2015.pdf.

on settlement is based on hourly rates of $500 to $575 for attorneys with more than 24 to 35 years of experience; $460 to $495 for attorneys with 14-18 years of experience; $370 for attorneys with 8-10 years of experience; $240 to $255 for attorneys with 1-3 years of experience; and $140 for paralegals and law clerks. These hourly rates represent reasonable rates. Stephens Decl. ¶¶ 9-10 (and exhibits thereto); Payne Decl. ¶¶ 4-6 (and exhibits thereto); Hammond Decl. ¶ 15-16; Bruce Decl. ¶¶ 12-14. The requested rates are also well within the range of prevailing rates for similar services by lawyers of reasonably comparable skill, experience, and reputation. Bruce Decl. ¶ 13.

Class Counsel have gathered and reviewed their fees and expenses, reviewed their daily back-up information, and have confirmed that the work was completed and done for the stated purpose. Stephens Decl. ¶ 6; Payne Decl. ¶ 6; Hammond Decl. ¶ 12. This review shows the following:

- Class Counsel have devoted at least 10,831.4 attorney and professional hours to the prosecution of this case. Stephens Decl. ¶ 7; Payne Decl. ¶ 6; Hammond Decl. ¶ 12.

- On a straight-time basis (i.e., assuming that Class Counsel were charging standard hourly rates and had reasonable assurance of timely payment), the total time expended on this case has a market value of $4,264,631.60. Stephens Decl. ¶ 12; Payne Decl. ¶ 6; Hammond ¶ 15.

- Class Counsel conservatively estimate that up to an additional 600 hours of professional time may be required to complete diligent representation of the Class, in connection with final approval and implementation of the Settlement. Stephens Decl. ¶ 8; Payne Decl. ¶ 7; Hammond Decl. ¶ 14.

- In the case of attorneys from the Murphy Anderson and Feinstein Doyle Payne & Kravec, law firms, the hourly rates charged by Class Counsel, between $240 and $575, are the usual and customary hourly rates charged for services in other actions and are based on each person's position, experience level, and location. Stephens Decl. ¶¶ 9-10; Payne Decl. ¶ 6. In the case of Tom Hammond, whose practice mainly consists of contingent fee litigation, the requested hourly rate of $500 is less than the effective hourly rate he has earned throughout the course of his career, and reasonable based on his experience in labor matters, his litigation

experience in both jury and non-jury matters, and the rates charged by attorneys of comparable skill and experience. Hammond Decl. ¶¶ 15-16.

- As explained in the Motion and Memorandum in Support for Preliminary Approval and in the Stephens Declaration, and exhibits thereto, the stated hours were incurred by among other things, investigating the claims against Defendants, conducting discovery including reviewing, analyzing the documents and ESI produced by Defendants and third parties, preparing the Complaint, conducting legal research, briefing summary judgment motions, briefing Defendants' motions to dismiss, engaging in settlement negotiations, negotiating the Settlement Agreement, communicating with class members and Named Plaintiffs, and preparing the necessary agreements and pleadings related to the Settlement Agreement. *See, e.g.,* Stephens Decl. ¶ 5.

Thus, Class Counsel's reasonable hours at reasonable rates produce a lodestar of $4,264,631.60, not taking into account the additional work that will be necessary following preliminary approval.

2. Analysis of the *Johnson* factors supports the requested fee award.

In determining whether a requested fee award is reasonable, the Court may also analyze the familiar factors set forth in *Johnson v. Georgia Highway Express*, 48 F.2d 714, 717-19 (5th Cir. 1974): (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the requisite skill to properly perform the legal service, (4) the preclusion of other employment by the attorneys due to 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 circumstance, (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. *See, e.g., Cox*, 2012 WL 5512381 at *2 and n.1 (D. Kan. Nov. 14, 2012). An analysis of the *Johnson* factors allows the Court to determine whether the lodestar figure is subject to upward or downward adjustment. *Flohrs v. Eli Lilly and Co.*, 2013 WL 3947152 at *3 (D. Kan. July 31, 2013).

A review of the *Johnson* factors confirms that Class Counsel's lodestar is more than reasonable. As discussed in the preceding section and as set forth more fully in the accompanying declarations, Class Counsel expended a significant amount of time and labor in the prosecution of this case. *See, e.g.,* Stephens Decl. ¶ 5. This necessarily resulted in the preclusion of other work by the attorneys due to the length of time spent working on this matter. This case also presented significant difficulty, and success in this case was never assured. In responding to these challenges, Class Counsel, all of whom have experience in complex litigation, brought their skill to bear in the litigation of this case over the many years it took to reach the Settlement Agreement.

In addition, the high quality of opposing counsel is another factor that weighs in favor of granting the requested fee. In this matter Boeing was ably and professionally represented by attorneys from the Washington D.C. office of Gibson, Dunn & Crutcher[5] and locally by attorneys from Foulston Seifkin.[6] The high quality of opposing counsel is another factor that weighs in favor of granting the requested fee. *See Horton v. Leading Edge Marketing, Inc.*, 2008 WL 323222 *2 (D. Colo. Feb. 4, 2008) (high quality of opposing counsel weighed in favor of the fee application) (citing *Brown,* 838 F.2d at 455).

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[5] According to its website, "Gibson Dunn has one of the most sophisticated and wide-ranging employee benefits practices in the United States, representing some of the largest employers and multiemployer funds in both compliance and litigation matters." http://www.gibsondunn.com/practices/pages/LAE_detail.aspx. William J. Kilberg is a former Solicitor for the Department of Labor and has been called "the labor lawyer of choice for corporate America," and "one of the most esteemed employment lawyers in the land." http://www.gibsondunn.com/lawyers/wkilberg. Paul Blankenstein has been ranked as one of the top ERISA litigation attorneys in the nation. http://www.gibsondunn.com/lawyers/pblankenstein.

[6] Foulston Seifkin is the largest law firm in Kansas, representing Fortune 500 companies. http://www.foulston.com/. Attorneys Jim Armstrong and Boyd Byers are both nationally recognized for their litigation and employment-law skills. http://www.foulston.com/Attorneys/Details/James-Armstrong; http://www.foulston.com/Attorneys/Details/Boyd-Byers.

Most importantly, the Settlement Agreement provides for a total fund of $90 million, which (after the deduction of attorneys' fees and expenses and settlement administration costs) will provide Harkness Class members with damages and reimbursements worth on average about $47,500 on an individual basis. This tremendous recovery and the immediate benefit it provides in and of itself would fully justify Class Counsel's lodestar. *See Wirtz v. Kansas Farm Bureau Services*, 355 F.Supp.2d 1190, 1204 (D. Kan. 2005) ("The most critical [*Johnson*] factor is the degree of success obtained") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

The requested fee award is reasonable in of itself, and in comparison to similar cases. Class Counsel's $4.2 million requested fee award represents a ***negative*** multiplier—only 98% of plaintiffs' counsels' total lodestar, and 94% of the total when litigation expenses are included—and therefore should be conclusive evidence that the request is reasonable. *See Barr v. Qwest Communications*, 2013 WL 141565 at *5 (D. Colo. Jan. 11, 2013) (fee and expense award deemed reasonable in part by virtue of it representing a negative multiplier of .7 of the lodestar); *Cox*, 2012 WL 5512381 at *4 (same); *Lane v. Page*, 862 F.Supp.2d 1182, 1257-58 (D.N.M. 2012) (fact that requested fee represented a discount on class counsel's lodestar weighed in favor of finding fee request reasonable). Similar cases show that courts have approved much higher multiples of the lodestar. *See, e.g., In re Crocs Sec. Litig.*, 2014 WL 4670886 at *4 (D. Colo. Sept. 18, 2014) ("[E]ven if some of the claimed rates are high, the requested fee of $3 million is a 1.23 multiple of the lodestar and well below what courts in this District typically award in collective actions."); *In re Bank of Am. Wage and Hour Employment Litig.*, 2013 WL 6670602 at *3 (D. Kan. Dec. 18, 2003) (approving fees of $18.25 million representing multiplier of 1.1); *Ponca Tribe of Indians v. Continental Carbon*, 2009 WL 2836508 at *4 (W.D. Okla. July 30, 2009) (approving fees of $4.2 million and multiplier of 1.4); *Ashley v. Regional Trans. District*

and Amalgamated Transit Union Pension Trust, 2008 WL 384579 at *9 (D. Colo. Feb. 11, 2008) (approving fees representing 1.3 multiplier); *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1269 (D. Kan. 2006) (award of $3.6 million in fees "results in a lodestar multiplier of only 1.18, a multiplier which the court finds imminently reasonable").

Thus an analysis of the *Johnson* factors supports the reasonableness of counsels' lodestar calculation.

F. Litigation Expenses

Out-of-pocket expenses such as postage, copying, and attorney travel, may be recoverable, not as "costs," but as part of a "reasonable attorney's fee" under fee-shifting statutes such as ERISA. *See Jordan v. Mich. Conference of Teamsters Welfare Fund*, 2000 WL 33321350 at * 6 (E.D. Mich. Sept. 28, 2000) (awarding other out-of-pocket expenses in ERISA case). As shown in the accompanying declarations, Plaintiffs have incurred $210,598.69 in litigation expenses in prosecuting this case. *See* Stephens Decl. ¶ 13; Payne Decl. ¶ 9; Hammond Decl. ¶ 18. Plaintiffs' out-of-pocket expenses, when considered along with Class Counsel's lodestar and requested negative multiplier, further support the reasonableness of Class Counsel's fee request.

III. CONCLUSION

For the reasons stated above, Plaintiffs ask the Court to grant their unopposed motion for approval of a settlement awarding Plaintiffs' attorneys' fees in the amount of $4.2 million.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2015, that I electronically filed the foregoing Memorandum in Support of Motion for Attorneys' Fees and Expenses with the clerk of court via the ECF system, which will send a notice of electronic filing to the following:

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