Nos. 2022-1018, 2022-1019

United States Court of Appeals for the Federal Circuit

HEALTH REPUBLIC INSURANCE COMPANY,
Plaintiff-Appellee

KAISER FOUNDATION HEALTH PLAN INC.,
and additional parties stated on continuation page,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeal from the United States Court of Federal Claims, No. 1:16-cv-00259-KCD
Judge Kathryn C. Davis

COMMON GROUND HEALTHCARE COOPERATIVE,
on behalf of itself and all others similarly situated,
Plaintiff-Appellee

KAISER FOUNDATION HEALTH PLAN INC.,
and additional parties stated on continuation page,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeal from the United States Court of Federal Claims, No. 1:17-cv-00877-KCD
Judge Kathryn C. Davis

APPELLANTS' REPLY BRIEF

SHEPPARD MULLIN RICHTER & HAMPTON LLP

Moe Keshavarzi
mkeshavarzi@sheppardmullin.com
333 South Hope Street
43rd Floor
Los Angeles, CA 90071-1422
Telephone: (213) 620-1780

John Burns
jburns@sheppardmullin.com
Matthew G. Halgren
mhalgren@sheppardmullin.com
501 West Broadway
19th Floor
San Diego, CA 92101-3598
Telephone: (619) 338-6500

Counsel for Appellants

COVER SHEET CONTINUATION PAGES

Because it is impossible to list all Appellants on the cover sheet, Appellants provide these continuation pages. The full list of Appellants in Case No. 2022-1018 is as follows:

KAISER FOUNDATION HEALTH PLAN INC., KAISER FOUNDATION HEALTH PLAN OF GEORGIA, KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., KAISER FOUNDATION HEALTH PLAN INC. OF COLO., KAISER FOUNDATION HEALTHPLAN OF THE NW, GROUP HEALTH COOPERATIVE, HARKEN HEALTH INSURANCE COMPANY, HEALTH PLAN OF NEVADA, INC., OXFORD HEALTH PLANS (NJ), INC., ROCKY MOUNTAIN HEALTH MAINTENANCE ORGANIZATION, INCORPORATED, UNITEDHEALTHCARE BENEFITS PLAN OF CALIFORNIA, UNITEDHEALTHCARE COMMUNITY PLAN, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITEDHEALTHCARE LIFE INSURANCE COMPANY, UNITEDHEALTHCARE OF ALABAMA, INC., UNITEDHEALTHCARE OF COLORADO, INC., UNITEDHEALTHCARE OF FLORIDA, INC., UNITEDHEALTHCARE OF GEORGIA, INC., UNITEDHEALTHCARE OF KENTUCKY, LTD., UNITEDHEALTHCARE OF LOUISIANA, INC., UNITEDHEALTHCARE OF MISSISSIPPI, INC., UNITEDHEALTHCARE OF NEW ENGLAND, INC., UNITEDHEALTHCARE OF NEW YORK, INC., UNITEDHEALTHCARE OF NORTH CAROLINA, INC., UNITEDHEALTHCARE OF OKLAHOMA, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., UNITEDHEALTHCARE OF THE MID-ATLANTIC, INC., UNITEDHEALTHCARE OF THE MIDLANDS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., UNITEDHEALTHCARE OF UTAH, INC., UNITEDHEALTHCARE OF WASHINGTON, INC., UNITEDHEALTHCARE OF OHIO, INC., ROCKY MOUNTAIN HEALTHCARE OPTIONS, INC., ALL SAVERS INSURANCE COMPANY, UNITEDHEALTHCARE INSURANCE COMPANY INC.

The full list of Appellants in Case No. 2022-1019 is as follows:

KAISER FOUNDATION HEALTH PLAN INC., KAISER FOUNDATION HEALTH PLAN OF GEORGIA, KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., KAISER FOUNDATION HEALTH

PLAN INC. OF COLO., KAISER FOUNDATION HEALTHPLAN OF THE NW, GROUP HEALTH COOPERATIVE, HARKEN HEALTH INSURANCE COMPANY, HEALTH PLAN OF NEVADA, INC., OXFORD HEALTH PLANS (NJ), INC., ROCKY MOUNTAIN HEALTH MAINTENANCE ORGANIZATION, INCORPORATED, UNITEDHEALTHCARE BENEFITS PLAN OF CALIFORNIA, UNITEDHEALTHCARE COMMUNITY PLAN, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITEDHEALTHCARE LIFE INSURANCE COMPANY, UNITEDHEALTHCARE OF ALABAMA, INC., UNITEDHEALTHCARE OF COLORADO, INC., UNITEDHEALTHCARE OF FLORIDA, INC., UNITEDHEALTHCARE OF GEORGIA, INC., UNITEDHEALTHCARE OF KENTUCKY, LTD., UNITEDHEALTHCARE OF LOUISIANA, INC., UNITEDHEALTHCARE OF MISSISSIPPI, INC., UNITEDHEALTHCARE OF NEW ENGLAND, INC., UNITEDHEALTHCARE OF NEW YORK, INC., UNITEDHEALTHCARE OF NORTH CAROLINA, INC., UNITEDHEALTHCARE OF OKLAHOMA, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., UNITEDHEALTHCARE OF THE MID-ATLANTIC, INC., UNITEDHEALTHCARE OF THE MIDLANDS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., UNITEDHEALTHCARE OF UTAH, INC., UNITEDHEALTHCARE OF WASHINGTON, INC., UNITEDHEALTHCARE OF OHIO, INC., ROCKY MOUNTAIN HEALTHCARE OPTIONS, INC., ALL SAVERS INSURANCE COMPANY, UNITEDHEALTHCARE INSURANCE COMPANY INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Nothing in Class Counsel's brief changes the fact that the Claims Court abdicated its responsibility to conduct a lodestar cross-check on its award of attorney fees, as mandated by the law, the class notice, and principles of fairness and reasonableness. Nor does it change the fact that the Claims Court failed to take the high level of class participation into account, contravening the class notice's assurances. What is more, the Claims Court expressly stated that it was not interested in protecting the class members, despite its duty to act as the class members' fiduciary when awarding fees from the common fund—an abuse of discretion Class Counsel does not even try to defend.

All these failures resulted in a windfall for Class Counsel: 10,000 hours of work paid at an hourly rate of more than $18,000, amounting to the staggering sum of $184 million. This payday far exceeds the low single digit multipliers that constitute the acceptable range, and it far exceeds what is necessary to attract capable counsel to take on class actions. The inapposite authorities Class Counsel relies on in its brief do not refute the careful analyses by courts and scholars that have concluded such attorney fee awards are not reasonable. The award should be vacated and the case remanded with guidance that the Claims Court follow the terms of the class notice and apply a lodestar cross-check to the award, compensating Class Counsel a fair and reasonable amount.

II. ARGUMENT

A. The Claims Court Should Have Applied a Reasonable Multiplier under a Lodestar Cross-Check, but It Did Not Do So

The Claims Court did not, as Class Counsel insists, conduct a lodestar cross-check. Appx24-25. If it had conducted a cross-check, the only reasonable conclusion would have been that its award was too high in light of the multiplier of more than 18. The award constituted an abuse of discretion.

1. The Claims Court Did Not Perform a Cross-Check

Class Counsel is wrong when it repeatedly insists that the Claims Court conducted a lodestar cross-check. CC Br. 27 ("[T]he Court of Claims plainly performed a lodestar cross-check."); *see also* CC Br. 2, 14, 15. The Claims Court stated that "*even if* the Court applied the lodestar cross-check, a multiplier of 18–19 would, at least, not be outside the realm of reasonableness." Appx25 (emphasis added). In this hypothetical conditional clause, "if the Court applied the lodestar cross-check" is the condition. This sentence structure "assumes that the condition has not been, is not, or is unlikely to be fulfilled." *The Chicago Manual of Style*, 5.228 (17th Ed. 2017). The same is true of the Claims Court's statement that "*even if* the Court *were* applying the lodestar method as a cross-check, it could simply determine the reasonableness of the fee based on its familiarity with the case." Appx24 (emphasis added). If the Claims Court had actually conducted a lodestar cross-check, it would have analyzed the reasonableness of the hours worked and

the hourly rate rather than dismissing the process as "a relatively arbitrary exercise." Appx24; *cf. Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 19-20 (2019). Accordingly, the Claims Court did not conduct the lodestar cross-check Objecting Class Members reasonably expected based on the unequivocal language of the class notice.

2. The Class Notice Stated There Would Be a Lodestar Cross-Check

Class Counsel specifically informed prospective class members that there would be a lodestar cross-check to induce them to join the class. The notice reassured prospective class members that the attorney fees "will be determined by the Court *subject to . . . what is called a 'lodestar cross-check'* (i.e., a *limitation* on class counsel fees based on the number of hours actually worked on the case)." Appx1389 (emphasis added). Now with its fee award in hand, Class Counsel has changed course, asserting that "the Court of Claims had no obligation to consider the lodestar at all." CC Br. 16.

Class Counsel argues that one of the two cases cited in the class notice should have made it clear that the lodestar cross-check would not be dispositive. CC Br. 26-27. That case, *Geneva Rock Products, Inc. v. United States*, 119 Fed. Cl. 581, 595 (2015), held that "an award 5.39 times the lodestar is reasonable under RCFC 23(h), given the complexity of the litigation, the diligent and skillful work by class counsel, and the pendency of the case for over six years." It did not,

however, suggest—much less hold—that a skillfully litigated case would justify a multiplier of 18. Moreover, the other cited case, *Loving v. Secretary of Health & Human Services*, 2016 WL 4098722, at *6 (Fed. Cl. July 7, 2016), did not use the percentage-of-the-fund method at all and relied exclusively on the lodestar method. Thus, there is no merit to Class Counsel's argument that Objecting Class Members should have inferred from the class notice that Class Counsel could be awarded the instant award without regard to the lodestar. Class Counsel told prospective class members that there would be a "limitation" on its fees based on the number of hours actually worked on the case, and Objecting Class Members were entitled to rely on that representation. The Claims Court abused its discretion by failing to give effect to the terms of the class notice.

3. Considerable Authority Demonstrates that a Lodestar Cross-Check Complements the Percentage-of-the Fund Method

As Objecting Class Members argued in their opening brief, a number of appellate cases from around the country support the use of a lodestar cross-check. OCM Br. 35-39. Class Counsel attempts to diminish the importance of cross-checks in the relevant caselaw, but its cited authorities are either inapposite or actually support Objecting Class Members.

Class Counsel argues that in *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), "the Supreme Court held that the percentage approach is proper and lodestar is not," and that the same principles apply to this case. CC Br. 22-23. But *Gisbrecht*,

which addresses attorney fees in Social Security cases, in fact supports Objecting Class Members' position. The Social Security Act provides a statutory limit of 25 percent on the portion of the recovery that a court may award to a claimant's attorney. *Gisbrecht*, 535 U.S. at 795 ("As part of its judgment, a court may allow 'a reasonable fee . . . not in excess of 25 percent of the . . . past-due benefits' awarded to the claimant." (quoting 42 U.S.C. § 406(b)(1)(A))). The claimants in *Gisbrecht* had expressly agreed to give their attorney a full 25 percent of their recoveries.[1] *Id.* at 797. The district court disregarded these express agreements, and instead, based its fee award entirely on a lodestar calculation (subject to the 25 percent statutory cap). *Id.* The Supreme Court explained that it was unlikely Congress would have intended for courts to rely exclusively on the lodestar method when it passed the relevant statutory provision in 1965 because courts did not even develop the lodestar method "until some years later." *Id.* at 806.

The *Gisbrecht* Court held that district courts should instead proceed by "looking first to the contingent-fee agreement, then testing it for reasonableness." *Id.* at 808. Notably, however, the court endorsed a lodestar cross-check as part of the process for testing an award for reasonableness: "*If the benefits are large in comparison to the amount of time counsel spent on the case, a downward*

[1] By contrast, the class notice at issue in the instant case specified a *cap* on the percentage of the fund Class Counsel would seek; it did not provide that Class Counsel would necessarily receive 5 percent of the fund.

adjustment is similarly in order." *Id.* at 808 (emphasis added). That is exactly what Objecting Class Members argue for in this appeal: an award based on a percentage of the fund, but adjusted downward when the lodestar cross-check reveals a large recovery in comparison with the amount of time counsel spent on the case.

Class Counsel cites *In re Cendant Corp. Litigation*, 264 F.3d 201, 285-86 (3d Cir. 2001), for the proposition that "[i]f the District Court does consider the lodestar, it might think of it as a floor and the fee under the retainer agreement as a ceiling." CC Br. 25. That was a case under the Private Securities Litigation Reform Act (PSLRA), in which the court explained that, while "searching judicial review of fee requests" is usually necessary in class actions, the PSLRA "shifts the underpinnings of our class action attorneys fees jurisprudence in the securities area," such that there is "a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel." *Id.* at 282. In contrast, the instant case is not a PSLRA case, and thus the "searching judicial review" (including a lodestar cross-check) is necessary.

Class Counsel cites another PSLRA case, *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 307 (3d Cir. 2005), for the proposition that a "multiplier need not fall within any pre-defined range, provided that the District Court's

analysis justifies the award." CC Br. 25. In that case, the court was pointing out that the multiplier can (and should) vary based on the circumstances of the case. As the court explained, "[t]he multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid*, 396 F.3d at 305-06. Thus, high-quality work in a high-risk case can merit a higher multiplier than low-quality work in a low-risk case. That does not mean that any case would justify a multiplier like the exceptionally high multiplier awarded here.

In a footnote, Class Counsel cites several district court cases and one state court case for the proposition that the lodestar cross-check is just "a check, not an inflexible command." CC Br. 26 n.3. To be sure, there is flexibility in the cross-check in that it does not require that any particular multiplier be achieved: the point is to verify that the multiplier is within a reasonable range. The cases Plaintiffs cite deal with multipliers between 0.5 and 6. None of them stands for the proposition that a multiplier of 18 is reasonable or permissible.

There is no merit to Class Counsel's argument that imposing a cap on a lodestar multiplier would amount to a "back-door application of the lodestar method" in lieu of the percentage of the fund method. CC Br. 28; *see also* CC Br. 15 ("Objectors' demand that the Court of Claims put dispositive weight on the lodestar multiplier is just an ill-disguised demand to apply the lodestar *method*.").

First, the lodestar method and lodestar cross-check are different in that the lodestar *method* involves picking a *specific* (relatively low) multiplier and applying it to the lodestar figure, while the lodestar *cross-check* simply asks whether the multiplier generated by the percentage-of-the fund method is within a *reasonable range* (the upper limit of which is higher than what would typically be assigned when starting with the lodestar method). Second, regardless of whether there is an "inflexible cap," CC Br. 28, without some guidance from the appellate court about what the reasonable range for a multiplier is, the lodestar cross-check cannot ensure fairness and uniformity.

Class Counsel is also wrong in arguing that if a lodestar cross-check imposes a ceiling on fee awards, "then the lodestar—rather than the percentage of the fund—becomes the primary lens through which to determine reasonableness." CC Br. 29. In the large majority of cases, the lodestar cross-check reveals that the selected percentage of the fund yields a multiplier within a reasonable range, and so there is nothing more to be done: the selected percentage of the fund can be awarded without further considering the lodestar. Moreover, a recent Court of Federal Claims decision, *Mercier v. United States*, 156 Fed. Cl. 580 (2021), illustrates why Class Counsel is incorrect even when the multiplier falls outside the reasonable range. In *Mercier*, the court rejected a 30 percent award that would have resulted in a lodestar multiplier of 4.4 because such a large multiplier would

constitute "a windfall to counsel, is not necessary to attract competent counsel to similar cases, and would necessarily be at the expense of the class members." *Id.* at 592. The court instead selected a 20 percent award and determined that it would result in a multiplier of 2.95, which was "a very generous but reasonable recovery" that "reflect[ed] the outstanding work of class counsel in this case, the length of the case, and the risk to counsel of recovering nothing despite investing substantial time, effort, and money." *Id.* Even though the lodestar served as a guardrail requiring the rejection of a too-high award, the final award was still calculated based on a percentage of the fund.

4. Viewed in the Aggregate, the Weight of Authority Supports Multipliers in the Low Single Digits

While every spectrum has its outliers, courts that have engaged in comprehensive analyses of the available authorities have concluded that lodestar cross-checks should generally yield multipliers in the low single digits. For example, contrary to Class Counsel's interpretation of *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722 (3d Cir. 2001), CC Br. 30, that case supports requiring multipliers to be in the low single digit range. The court explained that a multiplier of 7 or 10 "is substantially higher than any of the multipliers in the cases charted above, which range from 1.35 to 2.99, and is also significantly higher than the 'large' 5.1 multiplier" the court had questioned in a different case. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 742. The court "strongly suggest[ed]"

that, on remand, "a lodestar multiplier of 3 (the highest multiplier of the cases reviewed above) is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion." *Id.* This ceiling did not merely apply to "that specific case," as Class Counsel asserts, CC Br. 30, but was based on the upper limit of the range the court identified from charting "fee awards given in federal courts since 1985 in class actions in which the settlement fund exceeded $100 million and in which the percentage of recovery method was used." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 737.

Class Counsel also misinterprets *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 393 F.3d 96 (2d Cir. 2005). Class Counsel maintains that *Wal-Mart Stores*, which approved a multiplier of 3.5, does not contain "any suggestion that a higher lodestar would be impermissible." CC Br. 31. Not so. *Wal-Mart Stores* included parentheticals noting approval for ranges of "1.35 to 2.99" and "between 3 and 4.5." *Wal-Mart Stores*, 396 F.3d at 123. Citing ranges with upper limits suggests that a multiplier vastly exceeding those limits would be out of line. And despite Class Counsel's efforts to undermine *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), CC Br. 31, the Ninth Circuit in that case did not merely defer to the district court, but approved the 3.65 multiplier because it was "within the range of multipliers applied in common fund cases," noting that most of the cases it surveyed were in a range "from 1.0–4.0." *Vizcaino*, 290 F.3d at 1051 & n.6.

Class Counsel argues that caselaw supports the Claims Court's speculation that if it were to perform a lodestar cross-check, it would conclude that a multiplier of 18 would "not be outside the realm of reasonableness." Appx25; CC Br. 14, 51-53. "Not outside the realm of reasonableness" does not equate to "reasonable," which is what Rule 23(h) requires. In any event, as discussed in Objecting Class Members' opening brief, none of the three cases the Claims Court cited supports its conclusion, and all are inapposite to this case. OCM Br. 44-45. Class Counsel cites additional cases, mostly from district courts, approving multipliers between 6.13 and 10.26. CC Br. 53 n.9. But even if the Claims Court had relied on these cases (it did not), the multipliers approved in these cases are well below the multiplier of 18 that was awarded here. Class Counsel cites no common fund case in which a federal appellate court has ever approved such a high multiplier, and this Court should reject Class Counsel's invitation to become the first.

A more fundamental flaw in the Claims Court's and Class Counsel's reliance on specific multipliers (approved in mostly lower court cases) is that they are using cherry-picked examples to answer a question better suited to comprehensive statistical analysis. In other words, the fact that a small number of judges around the country have made outlier awards does not mean that Class Counsel should receive an outlier award in this case. Rather, it makes more sense to consider multipliers in common fund cases holistically and determine what is

generally acceptable. After careful study of the issue, Newberg on Class Actions explains that "[e]mpirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range; this fact counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean." 5 Newberg on Class Actions § 15:87 (5th ed. 2021). Even if extraordinary cases might justify a multiplier *somewhat* higher than that presumptive ceiling, Class Counsel has not identified any academic study (and Objecting Class Members are aware of none) indicating that a multiplier of 18 would be within the acceptable range.

A lodestar cross-check is a critical component in analyzing a fee award. There may be some disagreement at the margins regarding the appropriate range for multipliers in common fund cases, but there can be no doubt that a multiplier of 18 is excessive under any reasonable standard. The Claims Court abused its discretion by failing to rein in this extraordinary fee.

5. Principles of Fairness and Reasonableness Constrain a Court's Equitable Power to Award Attorney Fees from a Common Fund

Class Counsel has no response to Objecting Class Members' substantial authority explaining why lodestar cross-checks *should* be required. OCM Br. 32-35. When deciding an issue of first impression for this circuit, this Court is permitted to develop the law in the way it should be. This Court should take this opportunity to require lodestar cross-checks in percentage-of-the-fund cases.

"The common fund doctrine is rooted in the traditional practice of courts of equity and derives from the equitable power of the courts under the doctrines of quantum meruit and unjust enrichment.'" *Haggart v. Woodley*, 809 F.3d 1336, 1352 (Fed. Cir. 2016). "At its heart, equity is about fairness." *Id.* at 1359. A lodestar cross-check promotes fairness because it ensures "that the percentage award is not a windfall." 5 Newberg on Class Actions § 15:86. "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-70 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

Class Counsel maintains, without any analytical support, that a lodestar cross-check "incentivizes inefficiency and overbilling" and is time-consuming and arbitrary. CC Br. 16; *see also* CC Br. 24. But those who have comprehensively studied this issue have concluded that the "costs of the lodestar cross-check are likely exaggerated," "the value that the cross-check adds [is] underappreciated," and the cross-check is an "ethical imperative." 5 Newberg on Class Actions § 15:86; Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of A Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics 1453, 1469-70 (2005). While courts

conducting a cross-check "need not scrutinize each individual billed hour," courts still must consider whether the overall time expended was reasonable, and so attorneys will be disincentivized to waste time that might make their fee requests appear unreasonable. *See* 5 Newberg on Class Actions § 15:86; *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005) ("Ultimately controlling is the requirement that the award of attorneys' fees be reasonable.").

Because this Court has not yet addressed whether a lodestar cross-check should or must be employed when using the percentage-of-the-fund method, an undesirable and unfair situation has arisen: the application of the cross-check often hinges on an individual Claims Court's general views on whether such cross-checks are beneficial. OCM Br. 29-31. Class Counsel offers no response to this important issue.

In recent years, a number of Claims Courts have conducted lodestar cross-checks in percentage-of-the-fund cases. *See Mercier v. United States*, 156 Fed. Cl. 580, 592 (2021); *Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 20 (2019); *Geneva Rock Prods., Inc. v. United States*, 119 Fed. Cl. 581, 594-95 (2015); *Raulerson v. United States*, 108 Fed. Cl. 675, 679 (2013); *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005). Others have not. *See Thomas v. United States*, 121 Fed. Cl. 524, 531 n.2 (2015); *Sutton v. United States*, 120 Fed. Cl. 526, 532 n.1 (2015); *Lambert v. United States*, 124 Fed. Cl. 675, 683 n.10 (2015).

The Claims Court in this case falls into the second camp. The Claims Court generally impugned use of the lodestar—untethered to the circumstances of this particular case—stating that "the lodestar method has been identified as a poor fit for common fund cases" because it "'is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation,' and it creates incentives for inefficiency." Appx11. It went on to reject "Objectors' suggested use of the lodestar (either directly or as a cross-check), which relies on arbitrary premises and results in a grossly disproportionate fee award to Class Counsel in comparison to the complete recovery obtained by the classes." Appx11-12. The Claims Court then cited a district court for the proposition that "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." Appx12 (quoting *Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010)). The Claims Court thus expressed an aversion to lodestar cross-checks independent of the specifics of this case.

Given this split in authority, this case presents an opportunity for the Court to provide much-needed guidance for applying the lodestar cross-check in megafund cases in a uniform manner. The Court should counsel lower courts toward employing a lodestar cross-check, and it should remand to allow the Claims Court in this case to reevaluate its award in accordance with that guidance. *See*

SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1383 (Fed. Cir. 2007) (vacating district court's decision and remanding for district court to exercise its discretion in light of this Court's new guidance). A law firm's receipt of a windfall at the expense of the class it represents should not turn on the individual predilections of a randomly-assigned judge.

6. The Inputs to the Lodestar Cross-Check Should Be Supported by Adequate Evidence Even if Detailed Billing Records Are Unnecessary

Class Counsel claims that Objecting Class Members insist on "in-depth scrutiny of billing records." CC Br. 32. That is not true. In their opening brief, Objecting Class Members specifically stated that, for purposes of a cross-check, courts "need not scrutinize each individual billed hour, but may instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." OCM Br. 46 (quoting 5 Newberg on Class Actions § 15:86). Objecting Class Members also noted that "class counsel need not necessarily submit the same level of evidence in support of a cross-check as it would if the lodestar were being used to set the fee award in the first instance." OCM Br. 46. Thus, Class Counsel's argument on this subject is largely a straw man.

The problem with Class Counsel's evidence was not that it failed to include detailed billing records, but rather, that it hardly constituted evidence at all.

Appx1806-1807; OCM Br. 46-47. Class Counsel offered some descriptions of the tasks it completed, but it did not provide even a rough breakdown for how it managed to expend 10,000 hours on this case or how many hours were expended by each attorney. Appx1806-1807. Class Counsel cites a number of district court cases for the proposition that "declarations of precisely" the sort it provided are routinely considered sufficient. CC Br. 34 n.5. The cited orders, however, do not clarify the level of detail the declarations provided in those cases. In any event, circuit court authority indicates that a court must "gather sufficient information so that the lodestar is a meaningful crosscheck of the percentage-of-the-fund method." *In re Nat'l Collegiate Athletic Ass'n*, 768 F. App'x 651, 654 (9th Cir. 2019); *see also id.* ("Here, after reviewing class counsel's initial declarations that summarized the lodestar calculation, the district court ordered counsel to provide more detailed information including a summary of the hours spent on various categories of activities, such as motions, depositions, document review, and court appearances."). Therefore, class counsel should provide, at a minimum, "a summary of the hours expended by all counsel at various stages." *In re Rite Aid*, 396 F.3d at 307 n.16. Class Counsel's declaration did not meet this low standard, and the Claims Court abused its discretion by accepting Class Counsel's evidence as adequate. On remand, the Claims Court should require Class Counsel to submit

sufficient evidence so that the lodestar cross-check can be "meaningful." *In re Nat'l Collegiate Athletic Ass'n*, 768 F. App'x at 654.

B. The Claims Court Failed to Act as a Fiduciary for the Class, and Class Counsel Does Not Contend Otherwise

Class Counsel has no response to Objecting Class Members' argument that the Claims Court had an independent duty to protect the interests of the class and identify the fairest amount for the attorney fee award. In their opening brief, Objecting Class Members argued that the Claims Court seemed to misunderstand its role when, instead of putting the interests of the class first, it accepted Class Counsel's fee request as presumptively reasonable and declared that it saw "little reason for the Court to step in to protect the interests of sophisticated entities who made a considered decision to join these cases." OCM Br. 48-49 (quoting Appx21). Class Counsel quotes the Claims Court's dismissive statement about its duty to class members, CC Br. 46, but does not deny that the Claims Court failed to act as a fiduciary for the class.

Circuit courts have underscored the importance of a district court's fiduciary duty to class members when awarding attorney fees. *See, e.g.*, *Vizcaino*, 290 F.3d at 1052; *In re Rite Aid*, 396 F.3d at 307; *Mba v. World Airways, Inc.*, 369 F. App'x 194, 198 (2d Cir. 2010). "Because the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the

role of fiduciary for the class plaintiffs. *As a fiduciary for the class, the district court must act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is*." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (emphasis added) (citations and quotes omitted). In contrast, the Claims Court expressly stated that it was *not* going "to step in to protect the interests of" class members. Appx21. This constituted an abuse of discretion. *See Sharp Farms v. Speaks*, 917 F.3d 276, 293 (4th Cir. 2019) (holding in the context of a settlement approval that the "district court . . . did not act as a fiduciary of the class and thus abused its discretion"). Class Counsel does not even attempt to contend otherwise.

C. The Claims Court Abused Its Discretion by Failing to Account for High Participation, as Required by the Class Notice

The class notice represented that "[t]he fee may be substantially less than 5% depending upon the level of class participation represented by the final membership of the [class]." Appx1389. In Class Counsel's own words, the class members in this case comprise "one-third of the total value of all risk corridors claims," and are "by orders of magnitude the largest contingent . . . represented by any law firm in risk corridors litigation." Appx1804. Despite the large size of the class, Class Counsel still sought—and the Claims Court still awarded—the maximum 5 percent award. This award did not adhere to the class notice.

Class Counsel finds the word "may" significant in the class notice's statement that "the fee *may* be substantially less than 5% depending on the level of class participation." CC Br. 47 (emphasis added by class counsel). The word "may" can indicate possibility or probability, and the absence of certainty. *See May*, Merriam-Webster Dictionary (2022). Based on its reading, Class Counsel evidently believes that "may" conveys uncertainty as to how the level of class participation would impact the fee. But when read in context, the uncertainty relates to what the *level of class participation would be*, not whether the fee percentage would depend on the level of class participation. Given that class participation turned out to be high, the fee should have been "substantially less than 5%."

Class Counsel argues that it "made clear to numerous [unspecified] class members that it planned to seek a 5% fee," that "class members chose to accept that arrangement," and that "it is reasonable to hold them to that choice." CC Br. 47. Class Counsel does not, however, cite *any* evidence that it told *Objecting Class Members* it would seek the full 5% fee regardless of the size of the class. Consequently, Objecting Class Members were entitled to rely on the class notice's assurance that the class size would be taken into account in calculating attorney fees.

Class Counsel confusingly asserts that "Objectors present no argument as to how a class notice could legitimately infringe upon the Court of Claims' authority and discretion to determine reasonableness." CC Br. 36-37. Courts interpret and apply class notices all the time. A court might intercede to protect class members when a fee provision is too generous to counsel, but Objecting Class Members are not aware of any case holding that a court can award class counsel *more* fees from a common fund that are allowed under a class notice.

The Claims Court should have entered an award that took account of the large class participation as required by the class notice. The Claims Court's failure to do so was an abuse of discretion.

D. The Claims Court's Analysis of the Percentage-of-the-Fund Factors Is Not Determinative and Was Marred by Abuses of Discretion

1. The Seven-Factor Analysis Is Insufficient to Determine the Award in This Case

Class Counsel devotes a considerable portion of its brief to marching through the seven factors the Claims Court considered when deciding on the percentage-of-the-fund to award. CC Br. 37-54. Class Counsel criticizes Objecting Class Members for not addressing more of the factors. CC Br. 37-38. To be sure, Objecting Class Members disagree with some of the Claims Court's conclusions as to some of the factors. *E.g.*, Appx1986-1987. However, Objecting

Class Members recognize that some of these conclusions are not so erroneous as to constitute abuses of discretion, and so they do not contest them on appeal.

Class Counsel may well have been entitled to a 5 percent award if it had been required to expend more hours or if there had been lower class participation. Neither of these considerations, however, was captured by the Claims Court's seven-factor analysis. Those seven factors (which have never been prescribed by this Court, *Mercier*, 156 Fed. Cl. at 591) may be helpful to a point, but they do not tell the full story in this case because they fail to consider the terms of the class notice and the lodestar.

The overarching problem with the Claims Court's seven-factor analysis is that it does not lead to any particular result. That is, multiple courts could evaluate the same factors in the same way and still come up with completely different percentages-of-the-fund to award. The Supreme Court has observed this precise difficulty in the fee-shifting context: "[s]etting attorney's fees by reference to a series of sometimes subjective factors place[s] unlimited discretion in trial judges and produce[s] disparate results." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010). By contrast, "the lodestar calculation is 'objective,' and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* at 552. Using the factors to come up

with a percentage-of-the-fund might be fine for a start, but until the lodestar cross-check is applied, the results have the potential to be unpredictable and unfair.

2. The Claims Court's Assessment of the Factors Included Abuses of Discretion

Notwithstanding the foregoing, the Claims Court abused its discretion at several points in its seven-factor analysis, particularly with regard to the factor concerning the hypothetical fee that would have been negotiated in a similar case. *See* OCM Br. 50-53 (discussing abuses). Class Counsel's arguments to the contrary are unavailing.

Class Counsel argues that a fee award should "mimic a hypothetical ex ante bargain." CC Br. 45. Even if that is advisable, in this case, the ex ante bargain as reflected in the class notice required a lodestar cross-check and adjustment based on class participation. Appx1389. Class Counsel stated in a declaration, "certain other QHP issuers informed me and my partners that they chose to file an individual suit with different counsel because they preferred a different (hourly) fee structure as opposed to the uncertainty of a contingency fee award." Appx1803. Objecting Class Members preferred a contingent fee model *with a lodestar cross-check* as promised by the class notice. This does not, however, mean that they would not have preferred an hourly model if they knew the lodestar was going to be ignored.

Class Counsel also claims that it "would have cost nothing" for additional class members to object and that their failure to object is evidence of their satisfaction with the fee award. CC Br. 50-51. Not so. If additional members had objected, those members would have had to contribute to the attorney fees charged by Objecting Class Members' counsel. By not objecting, the other class members have the potential to reap rewards from the efforts of Objecting Class Members without paying anything at all.

Class Counsel also refers repeatedly to its "100% recovery" as a reason for its sky-high fee award. CC Br. 11, 13, 18, 43. What Class Counsel fails to appreciate, however, is that this was not a typical tort case in which the amount of damages was up for debate. A full recovery was assured once the Supreme Court resolved the legal issue in favor of the health plans in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020)—a case not brought by Class Counsel that was decided by a margin of eight justices to one. Obtaining that full recovery was an automatic result of winning the case and does not require some separate recognition.

Finally, Class Counsel misses the mark when it argues that the "discretion" of a court awarding fees "is 'considerable' because of 'the district court's superior understanding of the litigation . . . .'" CC Br. 19. Here, after the briefing on the attorney fee motion was complete, the cases were transferred to a different judge to

decide the motion. Appx2251, Appx3775. Accordingly, the Claims Court did not have a "superior understanding" of this litigation at the time it decided Class Counsel's fees motion.

3. The Claims Court Could Have Reached a Variety of Results without Abusing Its Discretion

Class Counsel maintains that Objecting Class Members' position would result in Class Counsel's receiving less for representing the class than it would have earned if it had represented certain individual class members and received 25 percent of those members' recoveries. CC Br. 48; *see also* CC Br. 1; CC Br. 18 ("Objectors fail to mention the percentage that they seek: a fraction of 1%."); CC Br. 49; CC Br. 50 (arguing that Objecting Class Members' proposed award *in the Claims Court* would amount to 0.22 percent of the fund). But regardless of the specific award amount advocated below, on appeal, Objecting Class Members are not arguing for any particular award or requesting (as Class Counsel insists) that this Court makes its own determination of what fee is reasonable. *See* CC Br. 20. Rather, Objecting Class Members argue that the case should be remanded so that the Claims Court can conduct a lodestar cross-check with the benefit of this Court's guidance on that subject.[2]

[2] Objecting Class Members acknowledge that the ultimate award will almost certainly be significantly higher than what they originally advocated in the Claims Court, and such an award could very well be within the Claims Court's discretion.

III. CONCLUSION

Accordingly, this Court should vacate the Claims Court's attorney fee award and remand for further proceedings so that the Claims Court may conduct a proper analysis and lodestar cross-check of the award.

Dated: May 26, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/Moe Keshavarzi_*
MOE KESHAVARZI
JOHN BURNS
MATTHEW G. HALGREN
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). This brief contains 6,209 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: May 26, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/Moe Keshavarzi_*
MOE KESHAVARZI
JOHN BURNS
MATTHEW G. HALGREN
Attorneys for Appellants