Term #307/311

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 07-5442 PSG (PLAx)	Date	April 4, 2017
Title	Harris *et al.* v. Amgen Inc. *et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING Plaintiffs' Motions for Final Approval of the Settlement and for Attorneys' Fees, Expenses, and Case Contribution Awards**

Before the Court are Plaintiffs Steve Harris, Dennis Ramos, Jorge Torres, and Albert Cappa's[1] ("Plaintiffs") motions for final approval of class action settlement, and attorneys' fees, expenses, and case contribution awards. Dkts. # 307, 311. The Court held a final fairness hearing in this matter on April 4, 2017. Having considered the arguments in all of the submissions, the Court GRANTS Plaintiffs' motions.

I. Background

In this class action lawsuit, Plaintiffs allege that Amgen, a Fortune 200 global biotechnology company, and Amgen administrators violated sections 404 and 405 of the federal Employee Retirement Income Security Act ("ERISA"). Specifically, Plaintiffs allege that Defendants breached their fiduciary duties to Plaintiffs and a class of participants and beneficiaries by allowing the Amgen Retirement and Savings Plan, and the Retirement and Savings Plan for Amgen Manufacturing, Limited (collectively, the "Plans") to acquire and hold investments in Amgen, Inc. common stock when it was imprudent to invest in Amgen. Plaintiffs allege that Defendants failed to disclose significant safety concerns about two of Amgen's flagship products: Aranesp® (darbepoetin alfa) and Epogen® (epoetin alfa).

[1] The Complaint names an additional Plaintiff, Donald Hanks, as a class representative. Through his attorney, Hanks indicated to Plaintiffs' counsel that that he does not support the Settlement Agreement and is not seeking a case contribution award. *See Rifkin Decl. ISO Mot. for Attys' Fees, Expenses, and Approval of Case Contribution Awards* 11 n.8.

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The parties litigated this case for nearly nine years with appeals to the Ninth Circuit and the U.S. Supreme Court. The appeals started in June 2010 after the Court dismissed Plaintiffs' First Amended Complaint ("FAC") with prejudice. *See* Dkt. # 195. Later that month, Plaintiffs timely appealed to the Ninth Circuit. Dkt. # 196. The Ninth Circuit ultimately ruled in favor of Plaintiffs on Counts II and III of the FAC, but in January 2014, Defendants petitioned for certiorari and the U.S. Supreme Court granted cert. In *Harris I*, the Supreme Court vacated the Ninth Circuit's judgment and remanded to the Ninth Circuit for further consideration in light of the Supreme Court's ruling in *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The Ninth Circuit issued a new order, again in Plaintiffs' favor, Defendants again appealed, and the Supreme Court granted certiorari. This time, the Supreme Court reversed the Ninth Circuit's decision and remanded to this Court with instructions to determine "whether the stockholders may amend [the Complaint] in order to adequately plead a claim for breach of the duty of prudence." *See Amgen v. Harris*, 136 S. Ct. 758, 760 (2016).

On remand, the parties initiated settlement negotiations. After the plaintiffs in the related securities class action, *In re Amgen Inc. Securities Litigation*, CV 07-2536 PSG (PLAx), decided to proceed alone in settlement negotiations, counsel in this case continued to engage in extensive back and forth negotiations that continued for several months, and included in-depth conversations about both the monetary and non-monetary aspects of the settlement. Ultimately, without knowing whether this Court would grant Plaintiffs another opportunity to amend the Complaint, the parties filed a Notice of Settlement. *See* Dkt. # 293.

The Settlement Award consists of a cash payment of $2.75 million, excluding attorneys' fees, litigation expenses, case contribution awards, and payment to the Settlement Administrator, and certain structural reforms to the Plans, which Plaintiffs value between $2.74 million and $4.16 million. *See Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation* ("*Final App. Motion*") 1:11–17; *Ramaswamy Decl.*, ¶ 10. The structural reforms include provisions that prevent Amgen from imposing any restrictions, for at least five years, on the sale of company stock by Plan participants; require Amgen to clearly identify the individuals or entities who exercise fiduciary responsibilities of the Plan; require Amgen to provide, for at least three years, participant education regarding retirement investing; require Amgen to provide a "diversification notice" when company stock holdings exceed 20 percent of all Plan holdings; and provide, for at least three years, annual training to members of the fiduciary committee. *Ramaswamy Decl.*, ¶ 3. In their motion for final approval, Plaintiffs' counsel requests an attorneys' fees award of $1,250,000, reimbursement of case-related expenses in the amount of $109,743.68, and case contribution awards of $5,000 for each of the four moving Plaintiffs. *See Motion for an Award of Attorneys' Fees and Expenses, and Approval of Case Contribution*

Awards ("*Fees Mot.*") 1:1–7. The Settlement Administrator, JND Class Action Administration ("JND"), requires an additional $46,655 to provide notice and distribute payments to non-current participants of the Plans. *See Keogh Decl.*, ¶ 15; *Rifkin Supp. Decl.* ¶ 7.

If the Court approves all fees and expenses, the Settlement Administrator estimates that the net proceeds to Class Members would be approximately $1,325,000. *Keough Decl.* ¶ 13. Given the cost of settlement administration, Counsel recommends that the Court void any payment under $10 to non-current Plan participants. *Rifkin Supp. Decl.*, ¶ 7. The Settlement Administrator estimates that approximately 574 participants would have received less than $10. *Id.* 2 n.1. If the Court were to accept this recommendation, JND estimates that 1,766 members would receive between $10 and $50; 1,562 class members would receive between $50 and $100; 2,634 class members would receive between $100 and $500; 277 class members would receive between $500 and $1,000; and 181 class members would receive more than $1,000. *Id.* ¶ 7.

The Court granted preliminary approval of the Settlement Agreement and its terms, as well as the proposed Notice of Class Action Settlement ("Class Notice"), on November 29, 2016. Dkt. # 299. In its Order granting preliminary approval, the Court certified, for settlement purposes only, a Rule 23(b)(1) class of:

> All persons who were participants in or beneficiaries of the Plans at any time from May 4, 2004 to March 9, 2007, and whose accounts included investments in Company Stock at any time during the Class Period. Persons named as Individual Defendants in the Action and their Immediate Family Members are not members of the Settlement Class.

See id. at 2, 6. The Settlement Administrator then mailed the Class Notice via first-class regular mail to 13,344 class members identified through Defendants' records. *See Keough Decl.*, ¶ 6. Using skip tracing, the Settlement Administrator managed to deliver service to 98.66 percent of the class; only 179 Class Notices remain undeliverable. *See id.* ¶ 7. JND also published the Class Notice in a print version of USA Today and created a settlement website, www.amgenerisalitigation.com, and a toll-free information hotline to allow class members to learn more about the case. *Id.* ¶¶ 8–10.[2]

Plaintiffs now seek final approval of the Settlement Agreement and the plan of allocation, as well as attorneys' fees, costs, and case contribution awards. Dkts. # 307, 311.

[2] As of the March 21, 2017 deadline for class members to file objections, the Settlement Administrator had received no objections to the Settlement Agreement.

II. Discussion

A. Final Approval

i. Legal Standard

A court may finally approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). In determining whether a settlement is fair, reasonable, and adequate, the district court must "balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *Id.* The district court is cognizant that the settlement "is the offspring of compromise; the question . . . is not whether the final product could be prettier smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* The Ninth Circuit had noted that "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litig.*, 516 F.3d 1095, 1011 (9th Cir. 2008).

ii. Discussion

a. Strength of Plaintiffs' Case

"An important consideration in judging the reasonableness of a settlement is the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement." *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (C.D. Cal. 2010) (internal quotation marks omitted). Here, Plaintiffs point to significant litigation risks, and because Plaintiffs had

not yet successfully argued a motion to dismiss when the parties settled, the Court agrees that this factor weighs heavily in favor of the certainty of the recovery produced by the Settlement.

Plaintiffs have identified significant risks with both liability and damages in this case. To succeed at trial, Plaintiffs would need to prove that (1) at least some of Defendants named in the case were fiduciaries of the plans, (2) Defendants knew or should have known about the undisclosed information, and (3) the non-disclosures caused inflation in the price of Amgen stock, which caused injury to Plaintiffs. Over the course of this litigation, the U.S. Supreme Court articulated a stringent standard for pleading ERISA fiduciary breach claims based on non-public information. *See Amgen, Inc. v. Harris*, 136 S. Ct. 758, 759 (2016) (citing *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2472–73 (2014)). Plaintiffs needed to "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.* Plaintiffs admit that pleading such a claim would be challenging, given the difficulty of showing that the disclosure of negative information would not have harmed the fund. *See Mot.* 9:20–26.

Damages would also be difficult to prove. Although there is no definitive way to compute damages in a breach of fiduciary duty case under ERISA, *see Kim v. Fujikawa*, 871 F.3d 1427, 1430 (9th Cir. 1989), at least one of the methods of calculating damages would be foreclosed to Plaintiffs. Plaintiffs admit that many shares in the Plans appeared to suffer no out-of-pocket loss and the market price for Amgen stock has now risen dramatically. *See Mot.* 11:21–28. To allege damages, the Court would need to adopt the "alternative investment" damages model, which is not a certainty given the developing law in this area. *Id.* 12:1–12.

In light of the litigation risks, the Court agrees that the proposed settlement award is a proper compromise between the risks of litigation and the guarantee for recovery. Amgen has already paid the settlement amount into an interest-bearing escrow account, and the Court has every reason to believe that the Settlement Administrator will distribute payment swiftly to Class Members. The alternative of continued protracted litigation over complex liability and damages issues is far less desirable. Although Plaintiffs may not have received as much as they would have from a jury verdict, the expediency and guarantee of the payment assures the Court that the settlement agreement is sound. The Court therefore agrees with Plaintiffs that this factor weighs in favor of approving the Settlement Agreement.

b. Risk, Expense, Complexity, and Duration of Further Litigation

The second factor in assessing the fairness of the proposed settlement is the complexity, expense, and likely duration of the lawsuit if the parties had not reached a settlement agreement. *Officers for Justice*, 688 F.2d at 625. Where the parties reach a settlement before the commencement of class certification, expert witness discovery, and trial preparation, this factor generally favors settlement. *See Young v. Polo Retail, LLC*, C 02-4546 VRW, 2007 WL 951821, at *3 (N.D. Cal. Mar. 28, 2007). This litigation has already been underway for more than nine years, and additional discovery, trial, and a possible appeal would only push recovery further down the road. Given these considerations, the Court agrees with Plaintiffs that this factor too weighs in favor of approving the settlement.

c. Risk of Maintaining Class Action Status Through Trial

Although the Court has certified a class, the certification was for settlement purposes only. Under Federal Rule of Civil Procedure 23(c)(1)(C), an "order that grants or denies class certification may be altered or amended before the final judgment." Fed. R. Civ. P. 23(c)(1)(C). Because Defendants may have vigorously contested class certification through trial, this factor favors final approval of the Settlement Agreement.

d. Amount Offered in Settlement

The fourth factor in assessing the fairness of the proposed settlement is the amount of the settlement. "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. The Ninth Circuit has explained that "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625 (citations omitted). Any analysis of a fair settlement amount must account for the risks of further litigation and trial, as well as expenses and delays associated with continued litigation.

The parties have agreed to settle all claims for $2.75 million and structural changes to the Plans. *See Mot.* 1:11–17. Deducting attorneys' fees and expenses, case contribution awards, and costs for the Settlement Administrator, the net total for the class is approximately $1.325 million. *See id.* In its Order granting preliminary approval to the Settlement Agreement, the Court requested confidential memoranda from both parties on the settlement negotiations process. Having reviewed those memoranda and assessed how each party valued its case, the Court is confident that the settlement amount is reasonable and falls within the range approved

by the Ninth Circuit. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval of class settlement which represented roughly one-sixth of the potential recovery). Because Plaintiffs have not yet successfully defended a motion to dismiss, and there is a real possibility, given the state of ERISA law, that the Court would not grant Plaintiffs an opportunity to amend the Complaint, the Court finds the settlement amount reasonable.

e. The Extent of Discovery and the Stage of the Proceedings

The next factor requires the Court to gauge whether Plaintiffs have sufficient information to make an informed decision about the merits of their case. *See Dunleavy*, 213 F.3d at 459. The more discovery that has been completed, the more likely it is that the parties have "a clear view of the strengths and weaknesses of their cases." *Young v. Polo Retail, LLC*, C 02-4546 VRW, 2007 WL 951821, at *4 (N.D. Cal. Mar. 28, 2007) (internal quotation marks and citations omitted). Although the parties have not yet engaged in discovery in this case, the Court is confident that Class Counsel has sufficient knowledge and understanding of the merits of Plaintiffs' claims to determine that the settlement is fair, reasonable, and adequate. Counsel has reviewed SEC filings, company press releases, analyst reports, reports in independent news media, and court filings, as well as thousands of pages of documents produced by Amgen in the related securities class action. *Rifkin Decl.* ¶¶ 35–37. Over nine years of litigation and multiple appeals to the Ninth Circuit and the Supreme Court, Class Counsel surely have enough information to assess the merits of the claims. This factor thus weighs in favor of granting final approval.

f. The Experience and Views of Class Counsel

The recommendations of Plaintiffs' counsel are given a presumption of reasonableness. *See, e.g.*, *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Class Counsel have extensive experience in class action litigation, *see Rifkin Decl.*, Ex. 1; *McKenna Decl.*, ¶ 3, and have litigated a number of noteworthy ERISA class actions. *See, e.g.*, *In re Bank of Am. Corp. Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litig.* (No. 11-4237 S.D.N.Y.); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). Class Counsel believe that the settlement is "fair and reasonable and in the best interests of the Class." *See Mot.* 16:15–21.

The Court sees no reason to rebut the presumption that Class Counsel's recommendation should be regarded as reasonable. This factor thus weighs in favor of final approval.

g. The Presence of a Government Participant

Because no government entities are participants in this case, this factor is neutral.

h. Class Members' Reaction to the Proposed Settlement

In evaluating the fairness, adequacy, and reasonableness of settlement, courts also consider the reaction of the class to the settlement. *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *see also Arnold v. Fitflop USA, LLC*, CV 11-0973 W (KSCx), 2014 WL 1670133, at *8 (S.D. Cal. Apr. 28, 2014) (concluding that the reaction to the settlement "presents the most compelling argument favoring settlement").

Class counsel retained JND to provide notice and administration services for this litigation. *See generally Keough Decl.* JND mailed 13,344 class action notices to class members by first-class mail on January 14, 2017. *See Keough Decl.*, ¶ 6. If the mailings returned undeliverable, JND used skip tracing to identify the most updated addresses for class members. *Id.* To date, JND reports than only 179 notices are undeliverable. *Id.* ¶ 7. Moreover, as of March 21, 2017, the deadline for filing objections, JND had received no objections to the final settlement agreement. The lack of objections is an indicator that class members find the settlement to be fair, reasonable, and adequate. *See, e.g.*, *Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."). This factor thus weighs in favor of approval of the settlement.

i. Fair and Honest Negotiations

Evidence that a settlement agreement is the result of genuine "arms-length, non-collusive, negotiated resolution" supports a conclusion that the settlement is fair. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, Class Counsel's confidential memoranda describe a settlement negotiation process free of collusion and fraud. The parties started negotiations after the case returned to the district court from the Supreme Court, and included

advice and counsel from retired Judge Dickram Tevrizian. Extensive back and forth negotiations continued for several months, and included conversations about the monetary and non-monetary aspects of the settlement agreement. Having presided over much of the litigation, the Court is confident that the parties engaged in arms-length negotiations and that this factor too favors settlement.

j. Conclusion

Having reviewed the relevant factors and found that none counsel against approval of final settlement, the Court GRANTS Plaintiffs' motion for final approval of the class action settlement.

B. Plan of Allocation

A plan of allocation under Rule 23 "is governed by the same standards of review applicable to the settlement as a whole; the plan must be fair, reasonable and adequate." *Vinh Nguyen v. Radient Pharma. Corp.*, SACV 11-406 DOC (MLGx), 2014 WL 1802293, at *5 (C.D. Cal. 2014). Like a settlement, a plan of allocation must be "fair, reasonable, and adequate." *Atlas v. Accredited Home Lenders Holding Co.*, No. CV 07-0488 CAB, 2009 WL 3698393, at *4 (S.D. Cal. Nov. 4, 2009) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284–85 (9th Cir. 1992)).

Here, the plan of allocation provides recovery to Class Members on a *pro rata* basis according to their recognized claims of damages. *See Mot.* 21:28–22:4; *see also Keough Decl.*, Ex. A, at pp. 15–17 (Class Action Notice). The amount allocated to each class member will depend on their calculated loss relative to the loss of other class members. *Id.* 11:5–14. JND estimates that 1,766 members will receive between $10 and $50; 1,562 class members will receive between $50 and $100; 2,634 class members will receive between $100 and $500; 277 class members will receive between $500 and $1,000; and 181 class members will receive more than $1,000. *Rifkin Supp. Decl.*, ¶ 7. Because the net proceeds from the settlement are less than the total recognized losses to the class, each class member will receive a proportionate recovery. *See Keough Decl.*, Ex. A, at p. 16. Calculations will be based on records maintained by the Plans. *See id.*

The Settlement Administrator will make the payments by crediting the accounts of current Plan participants and by mailing payments to class members who are no longer participants, either directly or to a custodian they designate as handling their qualified payments. *Id.* The

Class Notice included instructions to non-active class members as to how to designate a custodian. *See id.* If the amount allocated to a class member who is no longer an active participant in the Plans is less than $10, class counsel may allocate the amount *pro rata* to all other class members. *See id.* at 17; *see also Keough Decl.*, ¶ 14. Class members and anyone claiming through them will be deemed to "fully release" Defendants from all related claims. *See Keough Decl.*, Ex. A at p. 16.

If a non-active class member does not claim their amount of the settlement funds, any unclaimed amounts will be disbursed *cy pres* to AARP, Inc., a non-profit organization whose mission is to enhance the quality of life for all individuals as they age, principally through information, service, and advocacy. *See Mot.* 22:15–28. The Ninth Circuit requires all such *cy pres* distributions to (1) address the objectives of the underlying statutes; (2) target the plaintiff class; and (3) provide reasonable certainty that any member will be benefitted. *Naschin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). The Court finds that the *cy pres* distribution to the AARP, Inc. meets these standards as it addresses the objectives of ERISA and class members may indirectly benefit from its efforts.

The Court finds that the plan of allocation is rationally grounded in a formula that will compensate class members adequately. The Court thus approves the plan of allocation.

C. Motions for Attorneys' Fees, Costs, and Case Contribution Awards

Plaintiffs request that the Court authorize the Settlement Administrator to disburse from the settlement amount: (1) $1,250,000 in attorneys' fees, which constitutes 45 percent of the cash settlement amount, and between 18 and 23 percent of the total settlement amount if considering the value of non-monetary changes to the Plans; (2) reimbursement for litigation expenses in the amount of $109,743.68; and (3) a $5,000 case contribution award for each of the four Moving Plaintiffs.

i. Legal Standard

Awards of attorneys' fees in class action cases are governed by Federal Rule of Civil Procedure 23(h), which provides that after a class has been certified, the Court may award reasonable attorneys' fees and nontaxable costs. The Court "must carefully assess" the reasonableness of the fee award. *See Staton*, 327 F.3d at 963; *see also Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499073, at *3–5 (C.D. Cal. Oct.

5, 2010) (explaining that in a class action case, the court must scrutinize a request for fees when the defendant has agreed to not oppose a certain fee request as part of a settlement).

Where litigation leads to the creation of a common fund, courts can determine the reasonableness of a request for attorneys' fees using either the common fund method or the lodestar method. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check after choosing a primary method). The Court will analyze Class Counsel's fee request under both theories.

ii. Discussion

In its order granting preliminary approval of the class action settlement, the Court raised concerns about the lack of justification for what appeared to be a relatively large request for attorneys' fees and class representative service awards. *See Preliminary Approval Order* 11–13. The Court has now had the opportunity to review Class Counsel's time sheets, rates, and hours expended. Although the Court finds that some of Class Counsel's rates exceed the standard of reasonableness in the Central District of California, the Court nonetheless concludes that counsel is entitled to recover the entire amount requested, given their diligence in pursuing this matter through multiple appeals on behalf of the class. The Court first assesses fees under the common fund method and then, as a cross-check, turns to assess fees under the lodestar method.

a. Percentage of the Common Fund

Under the percentage-of-recovery method, courts typically calculate 25 percent of the fund as a "benchmark" for a reasonable fee award. *See In re Bluetooth*, 654 F.3d at 942. The percentage can range, however, and courts have awarded more than 25 percent of the fund as attorneys' fees when the court has found a higher award to be reasonable. *See Singer v. Becton Dickinson & Co.*, No. CV 08-0821 IEG (BLMx), 2010 WL 2196104, at *8 (S.D. Cal. 2010) (finding an award of 33.3 percent of the common fund reasonable because class counsel took the case on a contingent basis and litigated for two years, courts routinely award between 20 to 50 percent of the total settlement amount, and no class member objected to the award); *Gardner v. GC Services, LP*, No. CV 10-997 IEG (CABx), 2012 WL 1119534, at *7 (S.D. Cal 2012) (finding that a departure from the 25 percent benchmark was reasonable where the results achieved were favorable, the risks of litigation were substantial, and the case was complex). Morevoer, in common fund cases, the court may consider the value of injunctive or non-

monetary relief in setting attorneys' fees when the value of the injunctive or non-monetary relief can be measured. *See Staton v. Boeing Co.*, 327 F.3d 938, 973 (9th Cir. 2003).

Plaintiffs request that the Court approve an attorneys' fees award of $1,250,000, which amounts to 45 percent of the cash settlement amount, and between 18 and 23 percent of the total settlement amount if considering the value of non-monetary changes to the Plans. The amount is reasonable under the percentage method whether or not the Court factors in the non-monetary value of the adjustments to the Plans. If the non-monetary value is factored, the attorneys' fees request falls under the 25 percent benchmark and the amount is presumptively reasonable.

However, even if the Court does not consider the non-monetary value of the settlement, the Court still finds the percentage requested reasonable. Plaintiffs have shown that an upward departure from the 25 percent benchmark is justified under *Viscaino*, which requires the Court to consider "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Viscaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002). Reviewing each factor in turn, the Court finds the results achieved favorable to the class. Plaintiffs recovered some amount in damages, despite acknowledging a difficult road ahead in proving liability, and no class members objected to the settlement terms. Second, as detailed above, the risks of litigation, including the risk that the Court would not allow Plaintiffs to amend their Complaint, were real and substantial. *Fees Mot.* 8:11–28. Third, the duration of the case—now more than nine years—counsels in favor a large attorneys' fees award. Fourth, Class Counsel took the case on a contingent basis. *Id.* 10:11–19. Fifth, although Class Counsel does not provide the Court with an approved percentage in similar cases, the Court notes that "awards exceed[] the benchmark" in a great deal of common fund cases. *See, e.g.*, *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007); *In re Nucoa Real Margerine Litig.*, 2012 U.S. Dist. LEXIS 189901, at *108 (C.D. Cal. June 12, 2012) (awarding attorneys' fees of "45 percent of the total monetary amount to be paid by [defendant] to resolve the case").

Given the above considerations, the Court finds class counsel's attorneys' fees request reasonable under a common fund theory. To the extent that the Court considers only monetary payments to the class, the Court grants an upward departure from the 25 percent benchmark in light of the results achieved, the risk of litigation, the contingent nature of the fee, and the financial burden carried by Class Counsel.

b. Lodestar Cross-Check

To determine attorneys' fees under the lodestar method, a court must multiply the reasonable hours expended by a reasonable hourly rate. *In re Washington Public Power Supply System Securities Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994). The Court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Id.*

1. Reasonable Rate

The reasonable hourly rate is the rate prevailing in the community for similar work. *See Gonzalez v. City of Maywood*, 729 F.3d 1196, 1200 (9th Cir. 2013) ("[T]he court must compute the fee award using an hourly rate that is based on the prevailing market rates in the relevant community." (citation omitted)); *Viveros v. Donahue*, CV 10-08593 MMM (Ex), 2013 WL 1224848, at *2 (C.D. Cal. 2013) ("The court determines a reasonable hourly rate by looking to the prevailing market rate in the community for comparable services."). The relevant community is the community in which the court sits. *See Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). If an applicant fails to meet its burden, the court may exercise its discretion to determine reasonable hourly rates based on its experience and knowledge of prevailing rates in the community. *See, e.g.*, *Viveros*, 2013 WL 1224848, at *2; *Ashendorf & Assocs. v. SMI-Hyundai Corp.*, CV 11-02398 ODW (PLAx), 2011 WL 3021533, at *3 (C.D. Cal. 2011); *Bademyan v. Receivable Mgmt. Servs. Corp.*, CV 08-00519 MMM (RZx), 2009 WL 605789, at *5 (C.D. Cal. 2009).

Here, Plaintiffs are represented by counsel at two law firms: Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"), and Gainey McKenna & Egleston ("Gainey McKenna"). Wolf Haldenstein is a law firm with fewer than fifty attorneys and three offices in New York, San Diego, and Chicago. *See Rifkin Decl. ISO Wolf Haldenstein Fees and Expenses*, Ex. 1. Through the declaration of counsel, Wolf Haldenstein asserts that the attorneys and paralegals who worked on this case had hourly rates ranging from $255 to $950. *See id.* ¶ 6. Gainey McKenna is a four-person firm with offices in New York and New Jersey. Through the declaration of counsel, Gainey McKenna asserts that its attorneys and paralegals are entitled to an hourly rate between $225 and $775.

The Court turns to the Real Rate Report as a useful guidepost to assess the reasonableness of these hourly rates in the Central District. *See Eksouzian v. Albanese*, CV 13-728 PSG (AJWx), at *4–5 (C.D. Cal. Oct. 23, 2015); *Carbajal v. Wells Fargo Bank, N.A.*, CV 14-7851 PSG (PLAx), at *5 (C.D. Cal. July 29, 2015). As Judge Fisher explained in *Hicks v. Toys 'R' Us-Delaware, Inc.*, the Real Rate Report is persuasive because it:

> identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as the specific practice areas, . . . [and] it is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies—a much better reflection of true market rates than self-reported rates in all practice areas as part of a national survey of top firms.

No. CV 13-1302 DSF (JCGx), 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014). The 2016 Real Report provides a number of useful data points for assessing the reasonableness of Class Counsel's attorneys' fees requests. In Los Angeles, a partner with a focus on commercial litigation or finance and securities at a firm with fifty or fewer attorneys has an average hourly rate between $240 and $450. *See* 2016 Real Rate Report, at p. 175. Labor and employment partners at similarly sized firms earn slightly less per hour, while corporate regulatory and compliance partners earn slightly more. *Id.* 175–76. Similarly, in Los Angeles, associates with a focus on commercial litigation and finance and securities earn an average hourly rate between $182.84 and $265. *See id.* All paralegals in Los Angeles earn a mean real rate of $227, although, given trends in attorney fee rates for partners and associates in firms with fifty or fewer attorneys, the real rate for paralegals in counsel's firms is likely 30 percent lower than the median. *See id.* 196.

The Court finds that the attorneys in this case performed in the top quartile of similarly situated attorneys, and so are entitled to fees in the top range of that suggested by the Real Rate Report. The Court adjusts the attorneys' hourly rates as follows:

Wolf Haldenstein Hourly Rates			
Attorney Name	**Experience Level**	**Requested Hourly Rate**	**Accepted Hourly Rate**
Daniel Krasner	Partner, 21+ years	$950	$450
Frank Gregorek	Partner, 21+ years	$880	$450
Mark C. Rifkin	Partner, 21+ years	$865	$450
Michael Jaffe	Partner, 21+ years	$830	$450
Betsy Manifold	Partner, 21+ years	$780	$450
Patrick Moran	Associate	$490	$300
Maja Lukic	Associate	$395	$295
Tony Gjata	Information Technology Manager	$360	$260
James Cirigliano	Paralegal	$315	$160

Kimberly Carbino	Paralegal	$205	$160
Sher Ling Gan	Paralegal	$185	$160
Elizabeth Lee	Paralegal	$240	$160
Melinda G. D'Avanzo	Paralegal	$265	$160
Wendy Loritsch	Paralegal	$205	$160
Kathryn M. Cabrera	Paralegal	$255	$160

GAINEY MCKENNA HOURLY RATES			
Attorney Name	**Experience Level**	**Requested Hourly Rate**	**Accepted Hourly Rate**
Thomas J. McKenna	Partner, 21+ years	$775	$450
Gregory M. Egleston	Partner, 21+ years	$750	$450
Noemi Rivera	Paralegal	$275	$160
Elaine Rosa	Paralegal	$250	$160
Margaret Carroll	Paralegal	$225	$160
Deidre Hamill	Paralegal	$225	$160

2. Reasonable Hours

An attorneys' fees award should include compensation for all hours reasonably expended prosecuting the matter, but "hours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132, 1135 (9th Cir. 2012). "[T]he standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982).

Here, the records demonstrate that class counsel at Wolf Haldenstein spent 3,857.50 hours litigating this case, and class counsel at Gainey McKenna spent 1,075.25 hours. *Rifkin Decl.*, ¶ 6; *McKenna Decl.*, ¶ 6. This case originated in 2007 and has been litigated for more than nine years, with appeals to the Ninth Circuit and the U.S. Supreme Court. In those years, counsel drafted three separate pleadings; drafted opposition briefs to three motions to dismiss; briefed three appeals in the United States Court of Appeals, including briefs in connection with two motions for rehearing *en banc*; briefed opposition to two petitions for *certiorari* in the Supreme Court; coordinated and reviewed discovery; prepared the Stipulation of Settlement and related papers; developed and negotiated plans of allocation; and communicated with members of the class. *See Rifkin Decl.*, ¶ 4. Counsel excluded from their fees request any time spent in connection with their fees motion and any attorneys or professionals who worked fewer than ten

hours on the litigation. *Id.* 2 n.1. After reviewing the declarations submitted by both firms, the Court finds the 4,932.75 hours reasonable.

Based on the Court's adjustment of class counsel's hourly rates, the reasonable lodestar amount is $2,008,835. The Court adjusts the attorneys' fees request as follows:

Wolf Haldenstein Lodestar Calculation			
Attorney Name	**Accepted Hourly Rate**	**Accepted Hours Worked**	**Total**
D. Krasner	$450	21.5	$9,675
F. Gregorek	$450	30.9	$13,905
M. Rifkin	$450	342.1	$153,945
M. Jaffe	$450	1184.5	$533,025
B. Manifold	$450	1433.8	$645,210
P. Moran	$300	53	$15,900
M. Lukic	$295	38.5	$11,358
T. Gjata	$260	128.3	$33,358
J. Cirigliano	$160	14.2	$2,272
K. Carbino	$160	42.5	$6,800
S. Gan	$160	33.4	$5,344
E. Lee	$160	563.8	$90,208
M. D'Avanzo	$160	35.9	$5,744
W. Loritsch	$160	23.6	$3,776
K. Cabrera	$160	201.5	$32,240
Wolf Haldenstein, Total Lodestar			**$1,562,760**

Gainey McKenna Lodestar Calculation			
Attorney Name	**Accepted Hourly Rate**	**Accepted Hours Worked**	**Total**
T. McKenna	$450	568.6	$255,870
G. Egleston	$450	376.35	$169,358
N. Rivera	$160	88.4	$14,144
E. Rosa	$160	6.1	$976
M. Carroll	$160	6	$960
D. Hamill	$160	29.8	$4,768
Gainey McKenna, Total Lodestar			**$446,076**

3. Multiplier

The lodestar amount in this case is $2,008,835. Counsel request $1,250,000 in attorneys' fees. *Fees Mot.* 1:1–7. This request represents a negative multiplier of 0.62. Given the duration of the litigation and Class Counsel's diligence in pursuing the case, the Court finds the negative multiplier of 0.62 more than justified and the Court GRANTS Counsel an attorneys' fees award of $1,250,000.

Having assessed the reasonableness of the hourly rates, the hours worked, and the multiplier, the Court finds that the requested fee amount is reasonable under both the common fund and lodestar theories, and GRANTS Plaintiffs' motion for attorneys' fees.

c. Litigation Costs

In addition to attorneys' fees, Class Counsel requests reimbursement of expenses in the amount of $109,743.68. *Fees Mot.* 1:1–8. Wolf Haldenstein's costs total $100,742,05 and Gainey McKenna's costs total $9,001.63. *Rifkin Decl.*, ¶ 8; *McKenna Decl.*, ¶ 8. A significant expense for both firms was the cost of computer research and services. *Rifkin Decl.*, ¶ 8; *McKenna Decl.*, ¶ 8. Class counsel indicate that the expenses are reflected in the books and records of the firms, and they attest that the request is accurate under penalty of law. Given the length of the litigation and vigor of the appeals, the Court is satisfied that the costs are reasonable, and therefore the Court GRANTS Plaintiffs' motion for costs in the amount of $109,743.68.

D. Case Contribution Awards

Plaintiffs Steve Harris, Dennis Ramos, Jorge Torres, and Albert Cappa also request that the Court award each of them a case contribution award in the amount of $5,000. *See Fees Mot.* 12–13. "Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citations omitted); *see In re Toys R Us-Delaware, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014). When considering requests for case contribution awards, courts consider five factors:

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the

litigation; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vraken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

In its Order preliminarily approving of the class action settlement, the Court raised concerns about the case contribution awards, given Class Counsel's at times inconsistent representations about the amount of involvement that the named Plaintiffs had in this case. The Court noted that the Ninth Circuit has struck down excessively high awards that appear to over-compensate plaintiffs. *See Online DVD-Rental*, 779 F.3d at 947–48.

The Court asked Plaintiffs to provide a detailed declaration for each Plaintiff seeking a case contribution award, and to explain Plaintiff Donald Hanks's role in the litigation. Class Counsel has since indicated to the Court that Hanks is not seeking a case contribution award, and has provided the Court with declarations from each of the other named Plaintiffs.

Having reviewed the declarations and the facts set out in the motion, the Court is no longer concerned that the requested case contribution awards are unreasonable. The case contribution award comprises 0.005 percent of the total settlement amount, which is well within the range found reasonable in *Staton*. *See* 327 F.3d at 976–77 (striking down a service award of 6 percent); *see also Bostick v. Herbalife Int'l of Am., Inc.*, No. CV 13-2488 BRO (RZx), 2015 WL 3830208, at *6 (C.D. Cal. June 17, 2015) ($10,000 for one named plaintiff); *Boyd v. Bank of Am. Corp.*, No. SACV 13-561 DOC, 2014 WL 6473804, at *7 (C.D. Cal. Nov. 18, 2014) ($15,000 for named plaintiff); *Gino Morena Enters., LLC*, No. CV 13-1332 JM (NLSx), 2014 WL 5606442, at *3 (S.D. Cal. Nov. 4, 2014) ($10,000 each for two named plaintiffs).

Plaintiffs reviewed draft complaints, discussed the case in telephone calls and emails with Class Counsel, and reviewed personal files, public records, and news stories about Amgen and developments in this case. *See Harris Decl.*, ¶ 7; *Ramos Decl.*, ¶ 8; *Torres Decl.*, ¶ 6; *Cappa Decl.*, ¶ 6. All moving Plaintiffs attest to having reviewed the Settlement Agreement and approving of its terms. *Harris Decl.*, ¶ 9; *Ramos Decl.*, ¶ 10; *Torres Decl.*, ¶ 8; *Cappa Decl.*, ¶¶ 12–13. Because this litigation has now gone on for more than nine years and resulted in recovery for the class, the Court looks favorably on the case contribution request. Accordingly, the Court GRANTS Plaintiffs' motion for case contribution awards for the four moving Plaintiffs.

III. Conclusion

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-5442 PSG (PLAx)	Date	April 4, 2017
Title	Harris *et al.* v. Amgen Inc. *et al.*		

For the reasons stated above, Plaintiffs' motions for final approval of class settlement and the plan of allocation, and for approval of attorneys' fees, expenses, and case contribution awards are GRANTED. Accordingly, it is HEREBY ORDERED AS FOLLOWS:

1. The Court approves settlement of the action between Plaintiffs and Defendants, as set forth in the Settlement Agreement as fair, reasonable, and adequate. The Parties are directed to perform their settlement in accordance with the terms set forth in the Settlement Agreement;

2. Class counsel is awarded $1,250,000 in attorneys' fees and $109,743.68 in costs. Additionally, each moving Plaintiff is awarded $5,000. The Court finds that these amounts are warranted and reasonable for the reasons set forth in the moving papers before the Court and the reasons stated in this Order;

3. The Court approves payment to JND Class Action Administration in the amount of $46,655;

4. JND is authorized to disburse funds pursuant to the terms of the Settlement Agreement and this Order;

5. Without affecting the finality of this judgment in any way, this Court hereby retains exclusive jurisdiction over Defendants and the Settlement Class Members for all matters relating to this litigation, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Order.

IT IS SO ORDERED.