

¶ 2. Time and expense was spent on *inter alia* investigating the viability of a claim, identifying a class representative, filing a Complaint on behalf of the Washington State putative class, and keeping up with developments in the case, and documents generated. *Id.* As noted in the accompanying record of attorney time, there was extensive time spent in locating a class representative for the Washington Class. *Id.*, **Exhibit 1**. All of the time and expense incurred to the benefit of the Washington Class/Class Members. The undersigned has advanced \$19,709.12 in costs and expenses, and expended 48.3 hours at the rate of \$750 per hour for a total fees and costs of \$55,934.12. *Id.* ¶ 3 & **Exhibit 2**.

On October 16, 2017, the Washington Class, individually and on behalf of all similarly situated, filed a Class Action Complaint against Defendants in the United States District Court for the Eastern District of Washington. *See* ECF No. 3476, p. 1.

On October 24, 2017, the action was transferred to this Court pursuant to the Conditional Transfer Order (CTO – 83). *See* ECF No. 1, WAE/4:17-cv-05166.

On November 20, 2017, the Washington Class filed a Notice to Conform to Producer Plaintiffs’ Amended Class Action Master Complaint pursuant to the Court’s Order Relating to Consolidated Pleadings (ECF No. 287). *See* ECF No. 3476.

On April 10, 2018, the Court entered an Order Preliminarily Approving a settlement agreement titled Agrisure Viptera/Duracade Class Settlement Agreement (the “Settlement Agreement”) that was executed on February 26, 2018, authorizing the Class Members to petition the Court for an award of attorneys’ fees and expenses by the Fee and Expense Application Deadline of July 10, 2018. *See* ECF No. 3532, pp. 1, 10 and ¶17. The Settlement Agreement authorizes a filing of a petition for an award of attorneys’ fees and expenses by counsel for Class Members who “performed work for the benefit of Class Members.” *See* ECF No. 3507-2 at ¶7.2.1.

III. ARGUMENT

INDEPENDENT COUNSEL’S ENTITLEMENT TO COMPENSATION FOR TIME AND EXPENSES

An award of attorney fees and expenses in class actions is provided for by Rule 23(h) of the Federal Rules of Civil Procedure. The rule reads, “In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” The notes to the rule clarify that “it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.”

The Court, plaintiffs, and the justice system in general have an interest in broadening the range of attorney participation in MDL cases, lest the work be confined to a specialized bar of MDL attorneys which would result in exclusivity, unfairness, and discrimination, and inure to the disadvantage of litigants and their attorneys. *In re Vioxx Products Liability Litigation*, 802 F. Supp. 2d 740, 762 (2011). *In re Vioxx* aptly demonstrated the notion that recovery of attorney fees should not be controlled merely by attorneys appointed to a Plaintiffs’ Steering Committee. Rather, in *in re Vioxx*, over one hundred firms or attorneys sought to perform common benefit work. *Id.* In allocating the fees, the court concluded, “[t]his case demonstrates that when a court provides a broad umbrella for willing and able attorneys to perform work in a consolidated mass tort or MDL litigation, those attorneys can achieve impressive results for their clients.”

The Tenth Circuit has recognized that attorney's fees may appropriately be awarded from a common fund. *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994). In determining attorney's fees in common fund cases, the “hybrid” approach is used which combines the percentage of the fund method with the twelve factors originally developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). The *Johnson* factors are: “the time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the ‘undesirability’ of the case, the nature and length of the professional relationship with the client, and awards in similar cases.... [T]he weight given to different factors may vary in common fund, as opposed to statutory fee shifting cases.” *Gottlieb*, 43 F.3d at 482 n.4 (internal citation omitted). The trial judge may exercise its judgment in assigning different relative weights to the factors, and may determine one factor is not applicable or give greater weight to one factor over another, where the bases for doing so are clearly reflected in the record. *Brown v. Phillips Petro. Co.*, 838 F.2d 451, 456 (10th Cir. 1988).

The United States Supreme Court “has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); see also, *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939)(when an attorneys’ efforts benefit a common fund, the court is empowered to award fees from the fund). In order to prevent unjust enrichment, courts exercise inherent equitable powers to assess attorneys’ fees

against the entire fund, thereby spreading the cost of those fees among everyone who benefited. *Sprague*, 307 U.S. at 161.

Consistent with the foregoing authority, the undersigned is clearly entitled to his fees and costs.

III. CONCLUSION

For the foregoing reasons, the undersigned respectfully requests an award of \$19,709.12 in costs and expenses and \$36,225.00 in attorneys' fees for 48.3 hours at the rate of \$750 per hour, for a total of \$55,934.12.

Respectfully Submitted this the 10th day of July, 2018.

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s/ James S. Rogers

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this court.

LAW OFFICES OF JAMES S. ROGERS

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