

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUSTIN REGEHR, §
for himself and all others similarly situated, §
§
Plaintiff, §

V. § CIVIL ACTION NO. 1:15-cv-00501-SS

GREYSTAR MANAGEMENT §
SERVICES, L.P., GREP GENERAL §
PARTNER, LLC, GREYSTAR REAL §
ESTATE PARTNERS, LLC, individually §
and as successors in merger to Riverstone §
Residential Group, SVF CANTEBREA, LP §
D/B/A ALARA CANTEBREA CROSSING, §
AND SVF CANTEBREA CORPORATION §
D/B/A SVF CANTEBREA GP §
CORPORATION, §
Defendants. §

CLASS COUNSEL AND PLAINTIFF'S UNOPPOSED MOTION FOR AWARD OF
ATTORNEY FEES, EXPENSES, AND INCENTIVE AWARDS TO CLASS
REPRESENTATIVE, AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. BACKGROUND	2
III. EVIDENCE IN SUPPORT.....	4
IV. ARGUMENT AND AUTHORITIES.....	5
A. Overview of Current Standards	5
B. The Lodestar Method.....	6
C. Calculating the Lodestar	8
1. The Hours Spent	8
2. The Hourly Rates	10
D. The Applicable <i>Johnson</i> Factors.....	11
1. The Time and Labor Involved	11
2. Novelty and Difficulty of the Issues	12
3. The Skill Required to Properly Perform the Legal Service	12
4. Preclusion of Other Employment.....	14
5. A Customary Fee for Similar Work in the Community.....	14
6. Whether the Fee was Fixed or Contingent.....	15
7. The Time Limitations Imposed by the Client or the Circumstances	15
8. Amount Involved and the Results Obtained	16
9. The Experience, Reputation, and Ability of the Attorneys.....	16
10. The Undesirability of the Case	16

11.	The Nature and Length of the Professional Relationship with the Client	16
12.	Awards in Similar Cases	17
E.	Expenses	18
VI.	REQUESTED INCENTIVE AWARD FOR CLASS REPRESENTATIVE	18
VII.	CONCLUSION.....	19
	CERTIFICATE OF CONFERENCE.....	21
	CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Brown v. AMLI Mgmt. Co.</i> , No. 13-981-LY (W.D. Tex. Aug. 28, 2015)	17
<i>Brown v. Lincoln Apartment Mgmt. Ltd. P’ship</i> , No. D-1-GN-14-001923 (Travis Cnty. Dist. Ct. Apr. 27, 2015)	17
<i>DeHoyos v. Allstate Corp.</i> , 240 F.R.D. 269 (W.D. Tex. 2007)	5, 11, 14
<i>In re Enron Corp. Sec., Derivative & Erisa Litig.</i> , 596 F. Supp. 2d 732 (S.D. Tex. 2008)	10
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1995).....	16
<i>In re Heartland</i> , 851 F. Supp. 2d at 1072	7, 8, 10, 16
<i>In re High Sulfur Content Gasoline Prods. Liab. Litig.</i> , 517 F.3d 220 (5th Cir. 2008)	5, 6
<i>Johnson v. Ga. Highway Express, Inc.</i> , 488 F.2d 714 (5th Cir. 1974)	5, 6
<i>Meyers v. State of Tex.</i> , No. A-00-CA-430-SS, 2010 U.S. Dist. LEXIS 47809 (W.D. Tex. Feb. 16, 2010)	11, 14
<i>Migis v. Pearle Vision, Inc.</i> , 135 F.3d 1041 (5th Cir. 1998)	16
<i>Saizan v. Delta Concrete Prods. Co.</i> , 448 F.3d 795 (5th Cir. 2006)	10
<i>Sleezer v. Chase Bank USA, N.A.</i> , Civ. No. 07-0961-HLH.....	18
<i>Strong v. BellSouth Telecomms., Inc.</i> , 137 F.3d 844 (5th Cir. 1998)	5, 6
<i>Union Asset Mgmt. Holding A.G. v. Dell, Inc.</i> , 669 F.3d 632 (5th Cir. 2012)	6, 7

STATUTES AND RULES

TEX. WATER CODE § 13.5058, 9

FED. R. CIV. P. 235

OTHER AUTHORITIES

MANUAL FOR COMPLEX LITIGATION § 14.231 (4th ed. 2004)6, 7

Pursuant to FED. R. CIV. P. 23, Class Counsel and Plaintiff Justin Regehr (“Plaintiff”) respectfully submit this Motion for Award of Attorney Fees, Expenses, and Incentive Award to Class Representative, and Memorandum in Support (“Motion”), in connection with the class action settlement preliminarily approved by the Court on May 5, 2017 (ECF 91) and set for final approval hearing on September 1, 2017 at 2:00 p.m.¹ Solely for purposes of settlement, Defendants Greystar Management Services, L.P.; GREP General Partner, LLC; Greystar Real Estate Partners, LLC, individually and as successors in merger to Riverstone Residential Group (the “Greystar Defendants”); SVF Cantebrea, LP d/b/a Alara Cantebrea Crossing; and SVF Cantebrea Corporation d/b/a SVF Cantebrea GP Corporation (the “SVF Defendants”) (collectively, “Defendants”) do not oppose this motion.

I. INTRODUCTION

1. This lawsuit began in this Court on June 11, 2015. The parties are now prepared for it to end. Following extensive litigation, counsel for the parties attended a mediation with Houston mediator Trey Bergman on March 21, 2017. As a result of those efforts, the parties have reached a settlement. The Settlement Agreement will provide each Participating Class Member a check written from a Net Settlement Fund, the size of which shall be determined after the subtraction of certain enumerated expenses from the Settlement Amount of \$2,700,000. This consideration is being provided in exchange for the release given by the Class.

2. The proposed settlement was reached through arms-length bargaining with the assistance and considerable involvement of experienced counsel and a respected mediator. The

¹ This Motion contains a simple form of proposed order in compliance with Local Rule CV-7(g). However, Class Counsel anticipate the Court will grant the Motion as part of its order approving the final settlement following the scheduled hearing on September 1, 2017. We will include with our motion for final approval a detailed proposed order containing all findings we believe appropriate to conclude the case, including findings regarding the relief sought in this Motion.

Settlement will result in financial benefit to all class members, and is fair and reasonable under the circumstances, considering factors such as the novelty of the claim, the outstanding liability issues, and the potential damages.

3. Consistent with the terms of the Settlement, Defendants do not oppose the attorney fees, expenses, or incentive award requested. The Settlement Agreement calls for an award of up to \$891,000.00 for attorney fees and expenses to Class Counsel, and an incentive award of \$10,000.00 to Plaintiff. Class Counsel's lodestar is \$685,225.50, and their combined expenses are \$17,700.65. The total attorney fee award requested by Class Counsel (\$873,299.35) represents a 1.27 (rounded down) multiplier of their lodestar. Plaintiff's and Class Counsel's request for attorney fees, expenses, and incentive award will be disclosed on the settlement website referenced in the Notice sent to all class members and maintained by the Third Party Administrator. Plaintiff and Class Counsel request that they be compensated for their efforts in achieving an excellent result for the Class. Approval of these amounts still ensures that the Class will receive significant monetary payments.

II. BACKGROUND

4. On June 11, 2015, Plaintiff filed a complaint in this Court on behalf of himself and a putative class alleging, *inter alia*, that Defendants committed various violations of Chapter 13 of the Texas Water Code and the Public Utility Commission of Texas ("PUC")'s Rules. *See* ECF 1; ECF 88-2 (Monts Decl.) (incorporated herein as **Exhibit 2**).

5. On August 31, 2015, and September 8, 2015, Defendants moved to dismiss the complaint. *See* ECF 23, 27; **Exhibit 2** (Monts Decl.). This Court held a hearing on those motions on October 14, 2015. *See* ECF 40; **Exhibit 2** (Monts Decl.).

6. On February 8, 2016, this Court entered an order granting both motions to dismiss.

See ECF 50; **Exhibit 2** (Monts Decl.). That same day, the Court entered a separate Order of Dismissal, which dismissed all Plaintiff's claims without prejudice. See ECF 51; **Exhibit 2** (Monts Decl.).

7. On March 7, 2016, Plaintiff filed a Motion for New Trial or to Alter or Amend Judgment. See ECF 54; **Exhibit 2** (Monts Decl.). This Court held a hearing on that motion on April 7, 2016. See ECF 61; **Exhibit 2** (Monts Decl.).

8. On May 2, 2016, this Court entered an order granting in part and denying in part Plaintiff's Motion for New Trial; partially vacating its February 8, 2016 Order; and granting Plaintiff leave to file an amended complaint demonstrating that the Water Code claims are viable. See ECF 62; **Exhibit 2** (Monts Decl.).

9. On May 20, 2016, Plaintiff filed his First Amended Complaint. See ECF 63; **Exhibit 2** (Monts Decl.).

10. On June 3, 2016, Defendants filed a Motion to Dismiss the First Amended Complaint. See ECF 66; **Exhibit 2** (Monts Decl.).

11. On July 21, 2016, this Court entered an order denying Defendants' Motion to Dismiss First Amended Complaint. See ECF 72; **Exhibit 2** (Monts Decl.).

12. On February 7, 2017, Plaintiff filed his Second Amended Complaint with leave of court. See ECF 81, 82; **Exhibit 2** (Monts Decl.).

13. The Parties ultimately agreed to mediate the case. See **Exhibit 2** (Monts Decl.). As part of the mediation process, Defendants produced significant case-specific information for settlement purposes to allow Plaintiff to assess the potential damages in the case. *Id.*

14. The Parties then participated in a mediation before Trey Bergman, an accredited neutral in Houston, Texas, on March 21, 2017, which resulted in a signed Mediation Term Sheet

containing all essential terms of a settlement that further specified the parties would draft and sign a more comprehensive settlement agreement to submit to this Court for preliminary approval. *Id.* The parties executed the final Settlement Agreement on May 2, 2017. *Id.*

15. A Motion for Preliminary Approval was filed on May 2, 2017 (ECF 88). The Court granted the motion following an oral hearing. (ECF 91).

16. Additional substantive details regarding the case—including a summary of the terms of the settlement—were included as part of the Motion for Preliminary Approval, and will also be included in the Motion for Final Approval. This Motion focuses solely on the issues regarding attorney fees, expenses, and the incentive award to the Class Representative.

III. EVIDENCE IN SUPPORT

17. The proposed Class Action Settlement Agreement signed by the Parties (the “Settlement”) was attached to the Preliminary Approval Motion as **Ex. 1** (ECF 88-1), and the Declaration of Class Counsel Britton D. Monts (“Monts Decl.”) was attached to the Preliminary Approval Motion as **Ex. 2** (ECF 88-2). Both documents, including their attached exhibits, are fully incorporated by reference.

18. In addition, Class Counsel and Plaintiff rely on the following documentary evidence in support of their Motion:

- Ex. 3** Declaration of Britton D. Monts in support of motion for award of attorney fee and expenses, and incentive award to class representative
- Ex. 4** Declaration of R. Martin Weber, Jr. in support of motion for award of attorney fee and expenses, and incentive award to class representative
- Ex. 5** Declaration of Jason Snell in support of motion for award of attorney fee and expenses, and incentive award to class representative
- Ex. 6** Declaration of Russell Post in support of motion for award of attorney fee and expenses, and incentive award to class representative

- Ex. 7** Declaration of Justin Regehr in support of incentive award
- Ex. 8** Order Approving Settlement in *Brown v. Lincoln Apartment Mgmt. Ltd. P'ship*
- Ex. 9** Order Approving Settlement in *Brown v. AMLI Mgmt. Co.*

IV. ARGUMENT AND AUTHORITIES

When a class action is settled and certified, class counsel is entitled to recover reasonable fees and expenses. In this motion, Class Counsel request a just award of their fees that total 127% of their \$685,225.50 lodestar. The exhibits to this Motion, as well as the detailed records provided, establish their lodestar and their expenses.

A. Overview of Current Standards

19. Rule 23(h) authorizes a district court to “award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.”² Courts, including in the Fifth Circuit, “have encouraged litigants to resolve fee issues by agreement, if possible.”³ But, “a district court is not bound by the agreement of the parties as to the amount of the attorney fees.”⁴

20. “In a class action Settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorney fees are reasonable.”⁵ “In determining a fee for counsel, the court’s objective is to ensure an overall fee that is fair to counsel and equitable within the class.”⁶ “The district court’s close scrutiny of fee awards serves to ‘protect the nonparty members of the class from unjust or unfair Settlements

² Fed R. Civ. P. 23(h).

³ *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (citing cases, including *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)).

⁴ *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 23, advisory committee’s notes to the 2003 Amendments, subdivision (h) (“The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee.”).

⁵ *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008).

⁶ Fed. R. Civ. P. 23, advisory committee’s notices to the 2003 Amendments, subdivision (h).

affecting their rights as well as to minimize conflicts that may arise between the attorney and the class, between the named plaintiffs and the absentees, and between various subclasses.”⁷ Such scrutiny also “guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class.”⁸ “To fulfill its duty, the district court must not cursorily approve the attorney fees provision of a class Settlement or delegate that duty to the parties.”⁹ “Although exacting judicial review of fee applications may be burdensome, it is ‘necessary to discharge the [court’s] obligation to award fees that are reasonable and consistent with governing law.’”¹⁰

21. Class Counsel seek approval of \$873,299.35 in fees and \$17,700.65 in costs and expenses. Defendants do not oppose this request. Class Counsel arrived at this amount using their lodestar, cross-checked by the *Johnson* factors. The declarations and billing records submitted herewith establish Class Counsel spent more than 1,165 hours investigating, filing, litigating and settling this case. Under the pure lodestar approach, the fees would exceed \$685,000. The requested fee award of \$873,299.50 is 127% of that lodestar.

B. The Lodestar Method

22. In common-fund cases—in which class counsel is compensated from the general fund used to pay class members’ damages and claims—district courts generally award attorney fees using one of two methods:

- (1) The percentage method, in which the court awards fees as a reasonable percentage of the common fund; or
- (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or

⁷ *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F. 3d at 228 (quoting *Strong*, 137 F.3d at 849).

⁸ *Id.* (quoting *Strong*, 137 F.3d at 849).

⁹ *Id.* (quotation omitted).

¹⁰ *Id.* (quoting MANUAL FOR COMPLEX LITIGATION § 14.231 (4th ed. 2004) (“MANUAL”)).

downward multiplier.¹¹

23. Under the lodestar method as applied in the Fifth Circuit, any upward or downward adjustment is based on the court’s review of the factors set out in *Johnson*.¹² The twelve *Johnson* factors are:

(1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted the case; (5) the customary fee for similar work in the community; (6) whether the fee was fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.¹³

24. “The *Johnson* factors are intended to ensure ‘a reasonable fee.’”¹⁴ In *Dell*, the Fifth Circuit confirmed district courts have discretion to determine the proper fee award in common-fund cases by using either the percentage or lodestar methods, cross-checked with the *Johnson* factors.¹⁵ The district court must show that it “has utilized the *Johnson* framework as the basis of the analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation.”¹⁶

25. Having two funds—one for the claimants, one for the attorneys—is a well-recognized variant of a common fund arrangement. “A variant on the traditional common-fund case occurs frequently in mass tort litigation—in both class actions and large consolidations—where a separate fund to pay attorney fees is created as a part of the Settlement.”¹⁷ Such an

¹¹ *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012).

¹² *Johnson*, 488 F.2d at 717-19.

¹³ *Dell*, 669 F.3d at 642-43.

¹⁴ *Id.* (quoting *Johnson*).

¹⁵ *Id.* at 642-44.

¹⁶ *Dell*, 669 F.3d at 642 (quotation omitted).

¹⁷ *In re Heartland*, 851 F. Supp. 2d at 1072 (quoting MANUAL § 14.11).

arrangement is sometimes called a “constructive common fund.”¹⁸ “If an agreement is reached on the amount of a Settlement fund and a separate amount for attorney fees and expenses, . . . the sum of the two amounts ordinarily will be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded counsel.”¹⁹ Although “[m]any courts and commentators have concluded that the best approach is to use the percentage method in a common-fund or variant case with the lodestar as a cross-check,” the “lodestar method is most appropriate in cases with a statutory provision for fee-shifting.”²⁰ The statute in this case involves a statutory provision for fee-shifting and, thus, the lodestar method is an appropriate measure of attorney fees to be awarded.

26. TEX. WATER CODE § 13.505, the applicable statute in this matter, provides a private right of action for a tenant under which he may recover three times the amount of any overcharge, a civil penalty equal to one month’s rent, *reasonable attorney’s fees*, and court costs from an owner who violates the statute.²¹ Thus, this Court should apply the lodestar method to determine the amount of attorney fees and then adjust upward or downward based on applicable *Johnson* factors.

C. Calculating the Lodestar

1. The Hours Spent

27. Class Counsel successfully litigated and achieved a class Settlement. To do so, Class Counsel spent significant time investigating the claims asserted, conducting discovery, responding to dispositive motions, and preparing for a class certification hearing before the parties settled. It is significant here that there is little precedent. Class Counsel successfully prosecuted a relatively novel case with limited precedent against a very aggressive defense.

¹⁸ *Id.*

¹⁹ *Id.* (quoting MANUAL § 21.7).

²⁰ *Id.* at 1072-73 & n.25.

²¹ TEX. WATER CODE § 13.505.

28. Here, Class Counsel seek an a attorney fee award of \$873,299.35, which is 127% of their lodestar of \$685,225.50. That sum is calculated as follows:

Name	Position	Years Licensed	Rate	Hours	Lodestar
Britton D. Monts	Attorney	32	\$ 650.00	436.25	\$283,562.50
R. Martin Weber, Jr.	Attorney	22.5	\$ 600.00	332.5	\$199,500.00
Jason Snell	Attorney	17	\$ 500.00	187.1	\$93,550.00
Richard E. Norman	Attorney	23.5	\$ 650.00	17.6	\$11,440.00
Russell Post	Attorney	20.5	\$ 650.00	77.0	\$50,050.00
Karson Thompson	Attorney	5	\$ 405.00	105.0	\$42,525.00
William Peterson	Attorney	8	\$ 365.00	12.2	\$4,453.00
Owen McGovern	Attorney	2.5	\$ 405.00	.2	\$81.00
Laura Crain	Leg. Asst.	28	\$ 160.00	.4	\$64.00

Total Lodestar: \$685,225.50²²

Total Hours: 1,168.3²³

40. In this case, Class Counsel have incurred expenses in the cumulative amount of \$17,700.65.²⁴ The expenses are summarized as follows:

Firm	Amount
Crowley Norman LLP	\$8,660.15
The Monts Firm	\$6,146.98
Beck Redden LLP	\$2,315.17
Snell Firm	\$578.35

41. Defendants have agreed not to oppose the amount of the requested fee and, thus, agree the attorney fees requested are reasonable. Accordingly, there is no dispute between the parties that this request for fees is reasonable and appropriate.

42. Even without an agreement, as a general matter, Class Counsel's 1,168.3 hours are reasonable. Class Counsel offer declarations and detailed documentary proof clearly demonstrating exactly how the hours they spent in the aggregate were devoted to particular tasks or categories of tasks.²⁵ The declarations summarize the hours spent and Class Counsel's

²² See Exhibits 3, 4, 5, and 6.

²³ *Id.*

²⁴ *Id.*

²⁵ The attached time records also include good faith estimates of the time counsel will be required to expend

respective billing rates.

43. This case presented novel issues, and Defendants aggressively defended the case by raising many of those issues through dispositive motions. Class Counsel spent a substantial amount of time building the case to change Defendants' view of their potential exposure and get the parties to the bargaining table. It was team effort. Defendants hired a well-respected defense firm with scores of lawyers, paralegals, and other specialists at their disposal, as well as the expertise and resources of Defendants, a premier apartment owner/operator in the United States with significant assets.

44. Class Counsel's billing records, included in their attached declarations, confirm the time billed was reasonably necessary to address the challenging issues presented in the litigation. These time records document in detail the legal tasks performed by experienced and diligent lawyers who did their work knowing they would not be paid unless a successful outcome was achieved. That is to say, the records show Class Counsel used appropriate staffing and billing judgment. "Billing judgment requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant."²⁶ Due to the novelty of the claims prosecuted and the absence of developed jurisprudence on the Texas Water Code and PUC rules at issue, Class Counsel had to be particularly diligent and focused at every stage of the case.

2. The Hourly Rates

45. "An attorney's requested hourly rate is *prima facie* reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates, and the rate is not contested."²⁷ An "accepted method of compensating

after the date this fee application is filed until the proposed Settlement is approved after final hearing, and fully implemented.

²⁶ *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006).

²⁷ *In re Heartland*, 851 F. Supp. 2d at 1087 (citation omitted) (finding reasonable rates ranging from

for a long delay in paying for attorneys' services is to use their current billing rates in calculating the lodestar."²⁸

46. Class Counsel seek reimbursement of attorney fees at the current hourly rates customarily billed to fee-paying clients for complex litigation matters such as this.²⁹ Class Counsel's hourly rates are reasonable for the Austin and Houston areas for this type of complex litigation requiring highly skilled and experienced lawyers to litigate successfully.³⁰ Class Counsel have been approved at these rates in similar cases.

D. The Applicable *Johnson* Factors

1. The Time and Labor Involved

47. The time and labor reasonably required and actually spent for Class Counsel to litigate this case were substantial. Since work first began on Plaintiff's claims against Defendants in early 2015, the parties have engaged in protracted litigation, including discovery, depositions, and extensive motion practice. After a number of conversations with defense counsel, the parties agreed to mediate the case subject to Defendants producing a subset of the requested discovery to allow Plaintiff and Class Counsel to adequately assess the potential damages in the case. The Parties participated in a full day mediation. After intense negotiations that lasted late into the evening, the parties reached a settlement.

48. The first *Johnson* factor supports the requested award.

\$90/hour for paralegal work to \$825 per hour for co-lead class counsel).

²⁸ *In re Enron Corp. Sec., Derivative & Erisa Litig.*, 596 F. Supp. 2d 732, 763 (S.D. Tex. 2008).

²⁹ See **Exs. 2-6**.

³⁰ See, e.g., *Meyers v. State of Tex.*, No. A-00-CA-430-SS, 2010 U.S. Dist. LEXIS 47809, at *46 (W.D. Tex. Feb. 16, 2010) (finding hourly rates of \$450 for partners and senior counsel reasonable in Austin, Texas seven years ago); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 325 (W.D. Tex. 2007) (finding hourly rates of between \$500-\$550 reasonable in San Antonio for lead class counsel ten years ago).

2. Novelty and Difficulty of the Issues

49. A number of difficult legal and factual issues complicated the development and ultimate settlement of this case. In early 2016, this Court granted Defendants' original motion to dismiss in a move that could have ended this litigation entirely. Through their hard work, Class Counsel achieved a rare outcome in federal litigation: the granting (in part) of a motion for new trial partially vacating the prior order of dismissal and granting Plaintiff leave to amend his complaint. After amendment, Class Counsel successfully defeated a second motion to dismiss raising new legal challenges and additional factual challenges to the viability of the case. In short, Class Counsel navigated the many risks and challenges of this litigation deftly and against significant, quality opposition.

50. Given this history, Class Counsel achieved an excellent outcome through the Settlement. Under the Settlement, each participating Class member will receive a check returning a portion of the disputed fees the tenant was assessed and paid without having to submit a claim form. When viewed against another probable outcome in this case—outright dismissal—Class Counsel's results are particularly noteworthy.

51. The second *Johnson* factor supports the requested award.

3. The Skill Required to Properly Perform the Legal Service

52. This factor is related to the novelty and difficulty of the issue, as well as the experience and ability of Class Counsel. Given the lack of jurisprudence in this area of the law, representing Plaintiff and the Class required focus, intensity, creativity, and skill. Class Counsel have extensive experience in complex litigation generally and specific experience in cases like this one.³¹

³¹ See Exs. 3-6.

53. Mr. Monts has more than thirty-two years of experience litigating, trying, and settling complex civil cases, including class actions and other types of contingency fee cases.³² He has served as class counsel in dozens of cases across the country, ranging from utility-fee disputes to royalty disputes to employment discrimination matters. We believe he was the first lawyer ever to file a case under Chapter 13, Subchapter M of the Texas Water Code.

54. Mr. Weber has more than twenty-two years of experience in personal injury and commercial litigation, including class actions.³³ He has ably tried and settled class action cases across the country in a wide variety of practice areas. One of Mr. Weber's more notable class action cases involved his successful representation, as co-lead counsel, of a class of more than two million consumers under the Fair Credit Reporting Act.

55. Mr. Snell has more than seventeen years of experience representing plaintiffs and defendants in a broad range of matters throughout Texas and New York.³⁴ He has handled securities cases, construction disputes, and wrongful death actions, and has tried lawsuits in both state and federal courts.

56. Mr. Post has more than twenty years of experience primarily handling civil appeals in state and federal courts.³⁵ Mr. Post was specifically brought into the case for his deep expertise in Fifth Circuit and Texas Supreme Court appeals. That expertise positioned him well to help craft winning legal arguments that revived this case and enabled co-counsel to negotiate a successful settlement.

57. Together, Class Counsel have filed the only known cases on behalf of classes of Texas tenants under the Water and Property Codes, giving them unique skill and experience in this

³² See **Ex. 3**.

³³ See **Ex. 4**.

³⁴ See **Ex. 5**.

³⁵ See **Ex. 6**.

type of tenant litigation. They have used their unique skill and experience to represent the interests of the Class zealously in achieving the Settlement.

58. Class Counsel could, and did, fairly and adequately represent the class. The third *Johnson* factor supports the award.

4. Preclusion of Other Employment

59. By accepting this case, Class Counsel necessarily limited their ability to work on other cases. It was apparent from the outset that by taking this case the lawyers would be required to devote a significant amount of time to this matter. Those commitments naturally prevented the lawyers from working on other cases, including cases that would have been billed regularly on an hourly basis. The opportunity cost of pursuing a class action against a large company represented by competent and motivated counsel with substantial resources is manifest, inevitable, and substantial. Complex and novel work like this precludes shifting the work to less experienced attorneys, resulting in substantially less time for Class Counsel to work on other lucrative matters.

60. This *Johnson* factor also supports the fee request.

5. A Customary Fee for Similar Work in the Community

61. Class Counsel seek fees of \$873,299.35. As established by their declarations, their listed rates are customarily charged for similar complex civil litigation legal services in this locality.³⁶ Defendants do not oppose the requested fees. Class Counsel's hourly rates are reasonable for the market for this type of complex litigation requiring highly skilled and experienced lawyers to litigate successfully.³⁷ While many of the attorneys involved in this case regularly work on a contingency basis, Mr. Post and his firm regularly work on an hourly basis.

³⁶ See **Exs. 3-6**.

³⁷ See, e.g., *Meyers*, 2010 U.S. Dist. LEXIS 47809, at *46 (finding hourly rates of \$450 for partners and senior counsel reasonable in Austin, Texas seven years ago); *DeHoyos*, 240 F.R.D. at 325 (finding hourly rates of between \$500-\$550 reasonable in San Antonio for lead class counsel ten years ago).

Class Counsel's hourly rates as used in the lodestar calculation are in line with Mr. Post's regularly charged hourly rates for cases of similar complexity. This is not a situation in which Class Counsel have generated arbitrary billing rates to justify their fees. Working on an hourly basis, each of the lawyers could easily command the rates listed above for their services.

62. The fifth *Johnson* factor supports the award.

6. Whether the Fee was Fixed or Contingent

63. Class Counsel took this case on a contingency basis. As discussed above, this case raised relatively novel statutory claims where there was little or no jurisprudence at the time the case was filed. Class Counsel took a substantial risk in taking on the case, yet they faithfully and diligently represented the class with no certainty of payment before or after the legal services were rendered. And despite the risk and uncertainty, Class Counsel were able to achieve a settlement under which Class members will be repaid a portion of their actual damages.

64. The sixth *Johnson* factor supports the award.

7. The Time Limitations Imposed by the Client or the Circumstances

65. Time limitations, always a factor in class action cases, were imposed by circumstances and by the efforts of the parties and the attorneys involved to research this unique matter, draft and file the lawsuit, conduct extensive formal and informal discovery, then engage in extensive efforts to resolve this class action. Class Counsel also faced significant time pressure based on contemporaneous efforts by the Texas Legislature to amend many of the provisions of the Texas Water Code involved in this case. The inevitability of additional legal battles over those changes, which would have raised costs for all involved and potentially reduced the amount of money available for settlement, placed meaningful pressure on the parties to conclude their settlement negotiations promptly.

66. This *Johnson* factor also supports the award.

8. Amount Involved and the Results Obtained

67. The “most critical factor in determining the reasonableness of a fee award is the degree of success obtained.”³⁸ Under the Settlement, each class member will receive a substantial return of the disputed fee he or she actually paid. According to data provided by Defendants, tenants were assessed and paid disputed fees during the Class Period with fees varying in amount from unit to unit. The Settlement fund to the Class, assuming all requested amounts for fees and costs are paid in full, will likely exceed \$1,500,000.³⁹ Given the difficulty of prosecuting this litigation and the relief obtained, the eighth *Johnson* factor supports the requested award.

9. The Experience, Reputation, and Ability of the Attorneys

68. As discussed above, this *Johnson* factor supports the requested award.

10. The Undesirability of the Case

69. This factor relates to the novelty and difficulty of the issues. As noted above, this litigation is one of the first of its kind. That being the case, neither liability nor damages were relatively clear, making the case risky and therefore undesirable. Many if not most lawyers and law firms would not agree to take on such a case given the risk and uncertainty. This factor supports the requested award.

11. The Nature and Length of the Professional Relationship with the Client

70. The length of the professional relationship with Plaintiff Regehr is over two years. This factor also supports the requested award.

³⁸ *In re Heartland*, 851 F. Supp. 2d at 1085 (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1995); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)).

³⁹ See Monts Decl. (ECF 88-1) Ex. A; Settlement at 9, ¶ 13.

12. Awards in Similar Cases

71. Other tenant class actions involving similar statutory claims have been settled recently and granted preliminary approval and/or have received final approval. Similar motions for attorney fee awards have been or will be filed in those cases too, and in the case of Class Counsel the same or similar hourly rates will be used.⁴⁰ For example, in one similar matter discussed in Mr. Monts's declaration, the court approved a fee award of \$390,000.00 based on a lodestar of \$293,092.50 (calculated using the same or similar hourly rates) and a 1.33 multiplier.⁴¹ In another similar matter, Judge Yeakel approved a lodestar fee of \$425,000.00 based on similar hourly rates to this case.⁴²

72. This *Johnson* factor also supports the requested award.

* * *

73. In sum, the *Johnson* factors support the requested award of \$873,299.50, based on the application of a 1.27 multiplier to the base lodestar amount. That multiplier is modest in comparison to those approved in other class action cases.⁴³ Here, the multiplier reflects the risk of zero recovery—highlighted by the case's early brush with outright dismissal—and the unique circumstances attendant to prosecuting a novel class action using seldom-cited statutory provisions that were actively being rewritten by the Texas Legislature while the litigation was ongoing.⁴⁴ The results obtained for the Class here are exceptional given the circumstances and justify the modest

⁴⁰ See **Ex. 3** ¶ 43.

⁴¹ *Id.*; see also *Brown v. Lincoln Apartment Mgmt. Ltd. P'ship*, No. D-1-GN-14-001923 (Travis Cnty. Dist. Ct. Apr. 27, 2015) (Order Granting Final Approval of Class Action Settlement), attached as **Exhibit 8**.

⁴² See **Ex. 3** ¶ 43; *Brown v. AMLI Mgmt. Co.*, No. 13-981-LY (W.D. Tex. Aug. 28, 2015) (Order Granting Final Approval of Class Action Settlement), attached as **Exhibit 9**.

⁴³ *E.g.*, *City of San Antonio, Tex. v. Hotels.com, L.P.*, No. 5-06-CV-381-OLG, 2017 WL 1382553, at *13 (W.D. Tex. Apr. 17, 2017) (approving lodestar multiplier of 2.5); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (approving lodestar multiplier of 5.2).

⁴⁴ See **Ex. 3** ¶¶ 34-55.

multiplier.

E. Expenses

74. TEX. WATER CODE § 13.505 provides for the recovery of court costs. Under the Settlement, Class Counsel are permitted to recover their costs and expenses. As demonstrated in their attached declarations, Class Counsel's costs and expenses total \$17,700.65.⁴⁵ These costs and expenses are reasonable and should be awarded.

VI. REQUESTED INCENTIVE AWARD FOR CLASS REPRESENTATIVE

75. Class Counsel and Plaintiff request an incentive award of \$10,000.00 for the named Plaintiff Justin Regehr. An incentive award is requested because the Class Representative played a key role in the success of this case. From the time he first contacted Class Counsel about tenant fees in mid-2015, Mr. Regehr has been actively involved in the litigation, participating in calls, emails, and meetings about the case.⁴⁶ He searched and retrieved records from his files; answered questions; worked with Class Counsel to gather the facts; kept himself apprised about settlement discussions and negotiations; approved the proposed settlement; and kept himself up-to-date on the progress of the case and all significant events and decisions. Without his initiative and efforts over a two-year period, the other tenants in the Class would not be receiving settlement checks.

76. After the initial investigation and filing of the case, Plaintiff stayed involved in the litigation, requesting periodic updates and monitoring progress of the case. His proactive efforts and genuine concern for other tenants were essential to the results obtained, thereby warranting the requested incentive award. Plaintiff put the interests of the Class ahead of his own interests without any expectation or guarantee that he would receive an incentive award in the event of a successful outcome. This type of conduct is precisely what the incentive award doctrine is designed

⁴⁵ See **Ex. 3, 4, 5** and **6**.

⁴⁶ See **Ex. 7**.

to acknowledge and reward. For these reasons, Class Counsel asks the Court to award the Class Representative an incentive award of \$10,000.00 to be paid in full by Defendants. Defendants do not oppose the amount of the incentive award requested.

77. The incentive award in this type of case has precedent. In 2015, Judge Yeakel (of this Court) and Judge Sulak (of the Travis County District Court) approved incentive awards of \$10,000 to class representatives in similar tenant class action settlements handled by Class Counsel.⁴⁷ This year, both Judge Yeakel and Judge Pitman (of this Court) have approved incentive awards of \$10,000 and \$7,500, respectively, to class representatives in similar tenant class action settlements handled by Class Counsel. Also this year, judges of the Harris County District Courts approved incentive awards of \$10,000 to class representatives in similar tenant class action settlements handled by Class Counsel. Courts in Texas have approved larger incentive awards in other class actions, and the requested award is appropriate based on Plaintiff's contribution to the outcome in this case.⁴⁸

VII. CONCLUSION

For the reasons stated in this Motion and supported by the evidence presented, Class Counsel respectfully ask the Court to approve their fee application and award them **\$873,299.35** in attorney fees, **\$17,700.65** in expenses, and further approve and order an incentive award in the amount of **\$10,000.00** to Plaintiff for putting the interests of the Class above his own to secure an excellent settlement for the Class.

⁴⁷ See **Ex. 3** ¶ 59; **Exs. 8-9**.

⁴⁸ See, e.g., *Sleezer v. Chase Bank USA, N.A.*, Civ. No. 07-0961-HLH (approving \$25,000.00 incentive award).

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

CERTIFICATE OF CONFERENCE

I certify that the relief sought herein is unopposed per the terms of the Settlement Agreement by the parties in this case.

/s/ Britton D. Monts

Britton D. Monts

CERTIFICATE OF SERVICE

I certify that on August 4, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court pursuant to the Electronic Filing Procedures and using the CM/ECF system, and that a true and correct electronic copy was then served on Defendants by and through their counsel of record via the CM/ECF system.

/s/ Britton D. Monts

Britton D. Monts