IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

DENNIS KOYLE, CHARLES K. TURNER, and the CARAVELLE CORPORATION, INC. on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LEVEL 3 COMMUNICATIONS, INC., a Delaware Corporation, LEVEL 3 COMMUNICATIONS, LLC, a Delaware Limited Liability Corporation, LEVEL 3 TELECOM HOLDINGS, INC., a Delaware Corporation, and SPRINT COMMUNICATIONS COMPANY, L.P., a Delaware Limited Partnership,

Defendants.

Case No. 1:01-CV-286-BLW

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY'S FEES AND EXPENSES TO SETTLEMENT CLASS COUNSEL

Under Federal Rules of Civil Procedure 23(h)(1) and 54(d)(2), Plaintiffs in this class action have moved for an award of attorney's fees and expenses to Settlement Class Counsel. Under Rule 23(h)(3), the Court must make findings of fact and state its conclusions of law. The Court does so, as follows, in granting the motion:

Findings of Fact

1. This class-action settlement resolves a property-rights dispute, which arises out of the installation of fiber-optic cable on railroad rights of way by the Settling Defendants

— Level 3 Communications, Inc., Level 3 Communications, LLC, and Level 3 Telecom Holdings, Inc. (collectively, "Level 3") and Sprint Communications Company L.P. ("Sprint")." The claims resolved by the Settlement affect approximately 1,445 parcels of land in Idaho, covering 246 miles of rights of way throughout the state.

2. This case has a lengthy history. The "right-of-way" litigation commenced more than a decade ago in state and federal courts around the country. Contemporaneous with the parties' longstanding efforts to reach settlement of the litigation nationwide, this case proceeded on its own path. On June 19, 2001, Plaintiffs filed their Complaint (Dkt. 1). On December 1, 2005, the Court certified a litigation class comprising all owners of land in Idaho that underlies or is adjacent to a railroad right of way within which the Level 3 Defendants own, operate or use fiber-optic cable. (Dkt. 122). On December 14, 2005, the Level 3 Defendants petitioned the Ninth Circuit for permission to appeal the class certification order, and on February 24, 2006, the petition was denied. (Dkt. 126.)

3. The case was stayed on April 13, 2007, (Dkt. 152), and on June 25, 2007, the Court granted Plaintiffs' and the Level 3 Defendants' joint motion to transfer venue to the District of Massachusetts to be heard with *Kingsborough v. Sprint Commc'ns Co.*, Civil Action No. 07-10651-LTS — an ultimately unsuccessful effort to resolve the right-of-way claims nationwide. (Dkt. 153.) On February 6, 2010, the Court ordered the Idaho matter reopened, (Dkt. 157), and on December 16, 2010, Plaintiffs filed a Motion for Leave to File Second Amended Class Action Complaint, (Dkt. 194), adding Sprint as a Defendant. On December 20, 2010, the Court granted the motion. (Dkt. 196).

4. During a Telephone Scheduling Conference on December 10, 2010, the Parties advised the Court of the Settlement. The preliminary-approval hearing was held on January 25, 2011. On January 28, 2011, the Court entered an order preliminarily approving the settlement, certifying the settlement class, and approving the form and manner of notice. (Dkt. 207.) On June 14, 2011, the Court held a final Fairness Hearing.

5. The Settlement Agreement provides in pertinent part: "Settlement Class Counsel may seek from the Court a cash award of fees and expenses from the Settling Defendants, in an amount not to exceed the Maximum Attorneys' Fee Award, to which the Settling Defendants will not object." Settlement Agreement § II.E.1. The Settlement Agreement defines the Maximum Attorneys' Fee Award as $426,000. Settlement Agreement at 5 (definitions). The Settlement Agreement further provides that "the Settling Defendants shall deposit any attorneys' fee award approved by the Court, which shall not exceed the Maximum Attorneys' Fee Award, into an interest-bearing escrow account, at the direction of Settlement Class Counsel, no later than ten (10) days after the date on which the Order and Judgment becomes Final." Settlement Agreement § II.E.2.

6 Settlement Class Counsel and certain Plaintiffs' Counsel in Other Pending Cases, *see* Settlement Agreement at 6, have entered into an agreement to mediate, and if necessary, arbitrate the division of the fee-and-expense award. Under the mediation-arbitration agreement, the participants in the mediation-arbitration, or the arbitrators, shall inform the Court of the final fee-and-expense allocation, and the participants in the mediation-arbitration will jointly move the Court to adopt it.

7. Settlement Class Counsel estimate that a minimum of $1.2 million in cash benefits are available for class members to claim. Administrative costs — to be paid separately by the Settling Defendants — in creating and updating a sophisticated database to notify class members, implement the Settlement, and process claims, are estimated at an additional $171,000. The agreed-to attorney's fees and non-taxable costs of approximately $426,000 — which will not reduce benefits payable to class members — bring the total gross value of the Settlement to roughly $1.8 million.

8. Beginning on March 4, 2011, the claims administrator mailed notices to 2,446 current and prior property owners along railroad rights of way in Idaho containing telecommunications facilities installed by the Settling Defendants, and opened a settlement call center and website. The notice, which was posted on the website, advised in pertinent part:

> The Court will decide how much Class Counsel and any other lawyers will be paid. Class Counsel will ask the Court for attorneys' fees, costs and expenses of $426,000. . . . The Defendants will separately pay these fees and expenses and the payment will not reduce the benefits available for the Class.

Notice at 9. The Notice further advised that the Court would hold a Fairness Hearing at 11:00 a.m. on June 14, 2011, at which time the Court would "consider how much to pay Class Counsel." *Id*. at 10.

9. Following publication of the class notice, no class members objected to the proposed award of attorneys' fees and expenses. (*See* Dkt. 211: Declaration of Robert V. Mitchell of Rust Consulting, Inc., ¶ 12.) No class members appeared at the Fairness Hearing to object to the proposed award.

Conclusions of Law

10. Rule 23(h)(1) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by . . . the parties' agreement." The Rule further provides that "[a] claim for an award must be made by motion under Rule 54(d)(2)," notice of which must be directed to class members in a reasonable manner and that the Court "must find the facts and state its legal conclusions under Rule 52(a)." Fed. R. Civ. P. 23(h)(1) and (3). In turn, Rule 54(d)(2) requires a claim for fees to be made by motion, and specifies its timing and content, including, in relevant part, "the grounds entitling the movant to the award" and "the amount sought."

11. Notice of this fee-award motion in satisfaction of Rule 23(h)(1) was provided in the class notice and on the website.

12. In awarding attorney's fees, the Court "has discretion to use either a percentage or lodestar method." *Hanlon*, 150 F.3d at 1029 (citation omitted). "The percentage-of-recovery method is favored in common-fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *Alberto v. GMRI, Inc.*, 2:2007cv01895, 2008 WL 489120, at *11 (E.D. Cal. Nov. 12, 2008) (internal quotation marks and citation omitted). Under that approach, it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the Settling Defendants' separate payment of attorney's fees and expenses, and the expenses of administration. *See Boeing v. Gemert*, 444 U.S. 472, 479 (1980) ("Although the full value of the benefit

to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.").

13. The Court adopts the percentage-of-the-fund approach, and finds that, under it, the agreed-to attorney's-fee request is reasonable as a matter of law. Here, Settlement Class Counsel estimate that, based on the miles of rights of way covered by the Settlement, if each class member were to claim the available cash benefits, approximately $1.2 million would be paid to qualifying class members. When the estimated administrative costs of $171,000 — to be borne by the Settling Defendants — and the agreed-to attorneys' fees and expenses of $426,000 — also to be paid separately by the Settling Defendants — are factored in, the gross value of the Settlements is approximately $1.8 million.

14. The $426,000 fee-and-expense award therefore represents 24 percent of the fund as a whole. A 24-percent fee-and-expense award is well within the range of reasonable percentage-fee awards in this Circuit. *See, e.g., Fischel v. Equitable Life Assur. Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002) ("We have established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be adjusted upward or downward to account for any unusual circumstances involved in [the] case.") (internal quotation marks and citation omitted); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("[t]wenty-five percent is the 'benchmark' that district courts should award in common fund cases").

15. The 24-percent fee-and-expense award is especially reasonable here, where, in reaching the Settlement Agreement, Settlement Class Counsel engaged in lengthy and

hard-fought litigation, and lengthy and hard-bargained negotiations under the auspices of a nationally recognized mediator.

16. Furthermore, there were no objections to the proposed fee-and-expense award. "The existence or absence of objectors to the requested attorneys' fee is a factor is determining the appropriate fee award." *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005). Here, the Court-approved notice stated that, at the conclusion of the fairness hearing, counsel would seek a fee-and-expense award up to $426,000. The notice also informed class members of their ability to object to the fee request. No class members objected to it, and no class members appeared at the Fairness Hearing to object to it. "The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable." *Id*.

IT IS THEREFORE ORDERED that the motion for an award of attorney's fees and expenses to Settlement Class Counsel is **GRANTED (Dkt. 210)**.

It is further **ORDERED** that the Court approves a fee-and-expense award of $426,000 to Settlement Class Counsel,

It is further **ORDERED** that the Settling Defendants shall deposit the fee-and-expense award approved by the Court into the interest-bearing escrow account established with U.S. Bank in New York, New York, no later than ten (10) days after the date on which the Order and Judgment becomes Final; and

It is further **ORDERED** that the escrow agent for the aforementioned escrow account shall distribute the fee-and-expense award to counsel only pursuant to an order of this Court, upon motion to adopt the allocation reached in the mediation-arbitration.

DATED: June 23, 2011

B. Lynn Winmill
Chief Judge
United States District Court