



**NAILAH K. BYRD**  
**CUYAHOGA COUNTY CLERK OF COURTS**  
1200 Ontario Street  
Cleveland, Ohio 44113

**Court of Common Pleas**

**MOTION FOR...**  
**March 31, 2020 13:40**

By: PATRICK J. PEROTTI 0005481

Confirmation Nbr. 1978469

PATRICK W. CANTLIN, ET AL.

CV 12 790865

vs.

SMYTHE CRAMER CO.,

**Judge:** JOHN P. O'DONNELL

**Pages Filed:** 13

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

PATRICK W. CANTLIN, et al.,

Plaintiffs,

vs.

SMYTHE, CRAMER CO.

Defendant.

CASE NO. CV-12-790865

JUDGE JOHN P. O'DONNELL

**PLAINTIFFS' UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND  
COSTS AND INCENTIVE AWARDS**

Pursuant to the Settlement Agreement, Plaintiffs, by and through their counsel, hereby move for approval of payment attorney fees and costs in the amount of \$8,500,000, plus incentive compensation of \$5,000 each to the named Plaintiffs. Defendants do not object to the attorney fees or incentive compensation.

The total benefit to the class from the Settlement is at least \$47,833,980.82, including \$39,333,980.82 made available for Class Members to claim, plus \$8,500,000 that the Defendant will pay in attorney fees. The requested attorney fees represent 17.77% of that benefit to the Class. In addition, Class Counsel obtained as part of the settlement an agreement by the Defendant to cease and desist the challenged practice and not charge the challenged fee without a full and complete disclosure, in advance, of the charge and its amount, as being part of a so-called hybrid commission.

Each Class Member filing a valid Claim Form receives a full refund of the challenged fee, plus interest. Settlement Agreement. Courts recognize that the right to submit a claim creates a benefit for the Class, regardless of whether class members exercise that right. *Gascho v. Global*

*Fitness Holdings, LCC*, 822 F.3d 269, 286 (6th Cir.2016) (“making claims available to all class members provides them with a benefit”); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir.2007) (an “allocation of fees by percentage should ... be awarded on the basis of the total funds made available, whether claimed or not”); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, \*12 (E.D. Cal. Sept. 2, 2011) (“Where there is a claims-made settlement ... the percentage of the fund approach in the Ninth Circuit is based on the total money available to class members, plus costs ... and fees.”); *Zink v. First Niagara Bank, N.A.*, No. 13-CV-01076-JJM, 2016 WL 7473278, \*7-8 (W.D.N.Y. Dec. 29, 2016); see *Poertner v. Gillette Co.*, 618 Fed.Appx. 624, 628 n. 2 (11th Cir.2015) (“no principled reason counsels against” applying “the percentage-of-recovery rule to claims-made settlements”). Here, Defendant has agreed to pay *all* claims. The value of each individual claim is undisputed and mathematically ascertainable. And, the total value of all the claims is \$39,333,980.82.

A highly unique aspect of this Settlement is the fact that each class member filing a claim receives 100% of their alleged overcharge plus interest, NOT reduced by attorney fees or costs. The payment of attorney fees by Defendant, which is separate from and does not diminish the benefit made available to Class Members, also creates a benefit for the Class. *Rikos v. Proctor & Gamble Co.*, No. 1:11-cv-226, 2018 WL 2009681, \*8 (S.D. Ohio Apr. 30, 2018) (the total benefit includes attorney fees), quoting *Gascho*, 822 F.3d at 282; *Mullins v. Southern Ohio Pizza, Inc.*, No. 1:17-cv-426, 2019 WL 275711, \*4 (S.D. Ohio Jan. 18, 2019) (same); *Zink*, 2016 WL 7473278 at \*8 (“if the fees were not separately paid, then they would be paid out of the amounts otherwise available to the class, thereby diminishing the class recovery”); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. Jan. 20, 2011) (“In cases such as this one, where attorneys’ fees are paid separately from the claim fund, courts base the fee award on the entire

settlement fund as that package is the benefit to the class. This amount includes ... separately paid attorneys' fees and costs."). So, the \$8,500,000 in attorney fees and costs are added to the \$39,333,980.82 available for Class Members to claim, bringing the benefit to the Class to at least \$47,833,980.82. The \$8,500,000 in attorney fees equals 17.77% of the total benefit conferred on the Class.

A fee of 17% of the Settlement's value is extremely reasonable in the context of percentage awards in class action cases. *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 249-50 (S.D. Ohio 1991) ("percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund created"); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1341 (S.D. Fla. Feb. 16, 2007) (collecting cases recognizing that fees of up to 50% of the common fund are appropriate); *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir.1991) ("an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded"); 5 Newberg on Class Actions § 15:83 (5th ed.) ("50% of the fund is the upper limit on a reasonable fee award from any common fund, in order to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented."); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188 (W.D.N.Y. 2005) (approving a percentage fee request of 40%); *Wolfe v. Anchor Drilling Fluids USA Inc*, NO. 4:15-CV-1344, 2015 WL 12778393 (S.D. Tex. Dec. 7, 2015) (same); *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 345 (W.D. Pa. 1997), *aff'd sub nom. Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (same); *Wallace v. Powell*, 288 F.R.D. 347 (M.D. Pa. 2012) ("In private contingency fee cases, attorneys routinely negotiate agreements for between thirty percent (30%) and forty percent (40%) of the recovery.").

A fee of 17% is also well below the contingent fee of 45% that Plaintiffs Cantlin and Hong nka Haggerty agreed to pay Class Counsel if this matter proceeded to an appeal.<sup>1</sup> *Boynton v. Headwaters, Inc.*, No. 102CV01111JPMEGB, 2012 WL 12546853, at \*2 (W.D. Tenn. Mar. 27, 2012) (the court awarded class counsel a fee award of 40% where the contingency agreement with the class representative provided for a 40% fee if appeal was taken).

The fee is also appropriate based on the result achieved against the risk of zero recovery. Class Counsel undertook a significant risk by accepting this case, which involved a novel theory that – to Class Counsel’s knowledge – has not been tested elsewhere in the country, on a contingency basis. See Perotti Declaration. The subsequent litigation was contentious, resulting in multiple motions and appeals over the course of 10 years.<sup>2</sup> And Defendants were represented throughout this litigation by highly sophisticated counsel. In the context of the high risk of nonpayment over the course of 10 years of litigation, a fee of 17% of the benefit created for the class is very reasonable.

The Settlement also provides that each of the named Plaintiffs will receive \$5,000 in recognition of their efforts on behalf of the Class. Courts routinely provide such incentive awards to persons who assume the special litigation burden of class representative and thereby benefit the entire class. *In re Southern Ohio Correctional Facility*, 173 F.R.D. at 275 (“compensation to a class representative over and above what he may be entitled to as a class member can fairly be characterized as a litigation expense”); *In re Dun & Bradstreet*, 130 F.R.D.

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<sup>1</sup>The pertinent portion of the fee agreement provides: “I agree that the contingency will be 33 1/3% in case said claim is settled prior to suit; and if the matter goes to suit ... then 40%; and 45% in the event of first appeal[.]” A copy of the fee agreement is attached to Perotti Declaration which is itself attached to this Motion.

<sup>2</sup> The Plaintiffs originally brought their claims in federal court in 2009. The federal claims were litigated for three years before being dismissed, at which point this case was filed in state court, with the state court claims being litigated for an additional seven years. Perotti Declaration.

366, 373-74 (S.D. Ohio 1990) (approving incentive awards ranging from \$35,000 to \$55,000); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award). This incentive award is proper as a matter of class action practice and economic logic, and will not detract in any way from Class members' recoveries. The named Plaintiffs exposed themselves to investigation to achieve the benefit to the Class that the Settlement represents. They participated in pre-suit investigation, answered paper discovery, and sat for their depositions. *See* Perotti Decl. The absent unnamed Class members, by contrast, are the passive beneficiaries of the efforts of the named Plaintiffs on their behalf.

Based on the foregoing, the payment of fees, costs and incentive awards as provided for in the Settlement Agreement should be approved.

Respectfully submitted,

*/s/Patrick J. Perotti*

Patrick J. Perotti, Esq. (#0005481)

Nicole T. Fiorelli, Esq. (#0079204)

**DWORKEN & BERNSTEIN CO., L.P.A.**

60 South Park Place

Painesville, Ohio 44077

(440) 352-3391 (440) 352-3469 Fax

*pperotti@dworkenlaw.com*

*nfiorelli@dworkenlaw.com*

James A. DeRoche, Esq. (#0055613)

**GARSON JOHNSON LLC**

101 West Prospect Avenue, Suite 1610

Midland Building

Cleveland, Ohio 44115

(216) 696-9330 (216) 696-8558 Fax

*jderoche@garson.com*

*Class Counsel*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Costs and Incentive Awards* was filed electronically on March 31, 2020. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system

/s/ Patrick J. Perotti

Patrick J. Perotti, Esq. (#0005481)

**DWORKEN & BERNSTEIN CO., L.P.A.**

*Counsel for Plaintiffs*

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CUYAHOGA COUNTY, OHIO

PATRICK W. CANTLIN, et al.,

Plaintiffs,

vs.

SMYTHE, CRAMER CO.

Defendant.

CASE NO. CV-12-790865

JUDGE JOHN P. O'DONNELL

**DECLARATION OF PATRICK J. PEROTTI**

Now comes Patrick J. Perotti, and being of sound mind and over the age of 18, declare and state of my personal knowledge that:

1. I am licensed to practice law in the State of Ohio and employed as a partner attorney with Dworken & Bernstein Co., L.P.A.
2. I am one of the attorneys representing the class in this matter.
3. Class Counsel undertook significant risk by accepting this case, which involved a novel theory that – to Class Counsel's knowledge – has not been tested elsewhere in the country, on a contingency basis.
4. Plaintiffs originally brought their claims in federal court in 2009. The federal claims were litigated for three years before being dismissed, at which point this case was filed in state court, with the state court claims being litigated for an additional seven years.
5. A copy of the contingency fee agreement is attached as Exhibit 1 to this declaration.

6. The named Plaintiffs in this case, Patrick W. Cantlin, Elizabeth S. Hong nka Haggerty, Rita Noall, and Cindy Miller, participated in pre-suit investigation, answered paper discovery, and sat for their depositions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 31, 2020

/s/ Patrick J. Perotti  
Patrick J. Perotti

# EXHIBIT 1

## AUTHORIZATION TO REPRESENT

I, Patrick W. Cantlin, retain Andrew Santoy, Nicole T. Fiorelli and Patrick J. Perotti of Dworken & Bernstein Co., L.P.A. ("the attorneys") to represent me and any classes/subclasses which the Court may certify in a suit or other proceeding against Howard Hanna Smythe Cramer for charges relating to their billing practices.

The attorneys will advance and/or guarantee all costs. I will not be personally liable for any costs, and their repayment will be contingent on recovery from any amounts recovered in the litigation, with repayment limited to those amounts.

The attorneys accept said employment and are authorized to effect a settlement or compromise, subject to client's approval, or to institute such legal action and/or actions as may be advisable in attorneys' judgment in order to enforce client's rights.

Fees for services to me and the class(es)/subclass(es) will be contingent on recovery from the defendant(s). The attorneys will be compensated on a contingency of the amount of any settlement or judgment, including the value of any non monetary benefits obtained, whether by suit, settlement, or otherwise, including based upon a common fund, regardless of the amounts distributed or claimed by class members. I acknowledge and agree that if the suit is settled before a final appealable money judgment on the merits, then the attorneys will be paid pursuant to the terms of the Settlement Agreement, as approved by the Court. I understand that the amount which is recovered for the class, or paid for attorneys' fees, may be substantially greater than the amount of my individual recovery as a class member.

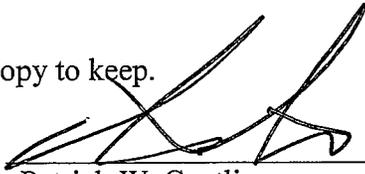
I agree that the contingency will be 33 ⅓% in case said claim is settled prior to suit; and if the matter goes to suit, administrative proceeding, or arbitration, then 40%; and 45% in the event of first appeal, or any post judgment proceedings; and 50% in the event of further appeal, or upon further proceedings upon remand from any appeal.

The attorneys have an enforceable lien on any amounts or other benefits recovered by suit, settlement, or otherwise for legal fees and all advanced and guaranteed costs. All such rights to fees and recovery of costs belong to the attorneys and may not be waived by me. I agree to appeal the failure of any decision to adequately award attorneys fees and costs if such action is recommended by the attorneys.

Attorneys may withdraw from this representation upon written communication to me with reasonable notice, and I agree to permit said withdrawal and to sign a substitution of counsel if required. In the event of any such withdrawal, attorneys shall be entitled to recover compensation as a portion of any future disposition of the case, as allowed by law.

The foregoing is the entire agreement between the parties and any other statements not contained herein are null and void and this agreement may be modified only in a writing signed by both attorney and client. I agree that the attorneys may represent me and the class(es)/subclass(es) on the above terms.

I have read this contract and received a copy to keep.



Patrick W. Cantlin

9/8/09

Date

The attorneys agree to represent this client and any class(es)/subclass(es) certified by the Court on the above terms.



Andrew Samtoy, Esq.  
Nicole T. Fiorelli, Esq.  
Patrick J. Perotti, Esq.  
Dworken & Bernstein Co., L.P.A.

9/8/09

Date

## AUTHORIZATION TO REPRESENT

I, Elizabeth S. Hong, retain Andrew Samtoy, Nicole T. Fiorelli and Patrick J. Perotti of Dworken & Bernstein Co., L.P.A. ("the attorneys") to represent me and any classes/subclasses which the Court may certify in a suit or other proceeding against Howard Hanna Smythe Cramer for charges relating to their billing practices.

The attorneys will advance and/or guarantee all costs. I will not be personally liable for any costs, and their repayment will be contingent on recovery from any amounts recovered in the litigation, with repayment limited to those amounts.

The attorneys accept said employment and are authorized to effect a settlement or compromise, subject to client's approval, or to institute such legal action and/or actions as may be advisable in attorneys' judgment in order to enforce client's rights.

Fees for services to me and the class(es)/subclass(es) will be contingent on recovery from the defendant(s). The attorneys will be compensated on a contingency of the amount of any settlement or judgment, including the value of any non monetary benefits obtained, whether by suit, settlement, or otherwise, including based upon a common fund, regardless of the amounts distributed or claimed by class members. I acknowledge and agree that if the suit is settled before a final appealable money judgment on the merits, then the attorneys will be paid pursuant to the terms of the Settlement Agreement, as approved by the Court. I understand that the amount which is recovered for the class, or paid for attorneys' fees, may be substantially greater than the amount of my individual recovery as a class member.

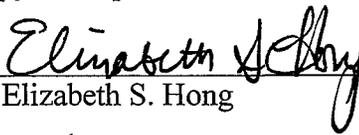
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Attorneys may withdraw from this representation upon written communication to me with reasonable notice, and I agree to permit said withdrawal and to sign a substitution of counsel if required. In the event of any such withdrawal, attorneys shall be entitled to recover compensation as a portion of any future disposition of the case, as allowed by law.

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I have read this contract and received a copy to keep.

  
Elizabeth S. Hong

9/8/09  
Date

The attorneys agree to represent this client and any class(es)/subclass(es) certified by the Court on the above terms.

  
Andrew Samtoy, Esq.  
Nicole T. Fiorelli, Esq.  
Patrick J. Perotti, Esq.  
Dworken & Bernstein Co., L.P.A.

9/8/09  
Date