contracted with Piisemwar municipality for the purchase of motors. The State was not a party to that contract and Shigeto's Store has not raised any other basis for liability other than set-off between the contracts it had with Ruo and Piisemwar municipalities. Therefore, judgment will enter for Shigeto's Store and against Piisemwar municipality in the amount of $9,258.00 plus 9% interest.

* * * *

FSM SUPREME COURT TRIAL DIVISION

THE PEOPLE OF THE MUNICIPALITY OF TOMIL, YAP, by and through CHIEF STEVEN MAR, CHIEF ALFEX GILTAMNGIN, and CHIEF ROBERT FITHING, Plaintiffs, vs. M/C JUMBO ROCK CARRIER III and M/T PAGBILAO I, *in rem*, their engines, masts, bowsprits, boats, anchors, chains, cables, rigging, apparel, furniture, and all necessaries thereunto pertaining; and IDHI PORTS & SHIPPING, INC., *In Personam* Defendant.	CIVIL ACTION NO. 2009 3002

ORDER GRANTING ATTORNEYS' FEES AND COSTS

Dennis K. Yamase
Associate Justice

Decided: August 2, 2010

APPEARANCES:

For the Plaintiffs: Daniel J. Berman, Esq.
Berman O'Connor & Mann
111 Chalan Santo Papa, Suite 503
Hagatna, Guam 96910

Joseph C. Razzano, Esq. (pro hac vice)
Teker Torres & Teker, P.C.
Suite 2A, 130 Aspinall Avenue
Hagatna, Guam 96910

* * * *

HEADNOTES

Civil Procedure – Class Actions – Settlement

When it evaluates whether a class action settlement is fair, adequate, and reasonable, the court considers: 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through trial; 7) the defendants' ability to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; and 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 202 (Yap 2010).

Civil Procedure – Class Actions

Although the court must first consult FSM sources of law rather than begin with a review of other courts' cases, when the court has not previously construed the extent of its duty under FSM Civil Procedure Rule 23(e) (identical to a U.S. rule) to approve or reject class action settlements and attendant attorneys' fee and expense awards, the court may look to U.S. sources for guidance in interpreting the rule. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 203 n.1 (Yap 2010).

Civil Procedure – Class Actions – Settlement

The approval of a plan of allocation of a class action settlement fund is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate, and the court should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 203 (Yap 2010).

Civil Procedure – Class Actions – Settlement

If a payment to the named plaintiffs comes from the attorney fee award [not the attorney expense award] instead of the rest of the common fund, it would not be subject to intense judicial scrutiny. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 203 n.2 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions

While the lodestar method, which multiples the number of attorney-work hours reasonably expended by an hourly rate appropriate for the FSM and the lawyer's experience, is the proper method in statutory (or in contractual) fee-shifting cases, the percentage-of-recovery method is generally used in common fund cases on the theory that class members would be unjustly enriched if they did not adequately compensate the counsel responsible for generating the fund, although it is within a trial court's discretion to use the lodestar instead of the percentage-of-recovery method to calculate attorney's fees in a common fund case. When the percentage-of-recovery method is used, the court must specify the percentage it has utilized in determining the fee award. There is no set standard, however, for determining a reasonable percentage. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 203-04 (Yap 2010).

Attorney's Fees – Paid by Client

Contingent fee contracts are, with some exceptions, acceptable in the FSM since a contingent fee agreement is the freely negotiated expression both of a client's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment. A contingent fee agreement must be in writing and must state the method by which the fee is to be determined. People of Tomil ex rel. Mar v. M/C Jumbo Rock

Carrier III, 17 FSM Intrm. 198, 204 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Attorney's Fees – Paid by Client; Civil Procedure – Class Actions – Settlement

The court has general equitable powers to award fees out of a settlement fund to those attorneys who have brought benefit to class members. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 204 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Attorney's Fees – Paid by Client; Civil Procedure – Class Actions

Although courts are reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties, an attorney's contingent fee must still be reasonable or the court may reduce it. This is especially true when the contingent fee sought is in a class action. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 204 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

The trial court in a class-action settlement is not bound by the parties' agreement as to the amount of attorney fees. A thorough judicial review of fee applications is required in all class action settlements. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 204 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

In the context of a class-action settlement, when determining whether plaintiffs' counsel is in fact entitled to fees, and if so, in what amount, the court must be sensitive to the potential conflict of interest between plaintiffs and their counsel, and must be particularly careful to insure that the ultimate division of funds is fair to absent class members. This is because, even if the court finds, under Rule 23(e), that the settlement is fair and reasonable to absent class members, the court still has an unbending duty to ensure that counsel is not unreasonably benefited by the award of an exorbitant fee, and therefore must scrutinize attorney fee applications with a jealous regard for the rights of those who are interested in the class action settlement fund since the divergence in financial incentives always creates the danger that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees. Thus, under Rule 23(e), a trial court must scrutinize any fee agreement that would be enforced as part of the agreement, because those agreements necessarily put counsel and clients in an adversary relationship. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 204 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

When a contingent fee contract is to be satisfied from a settlement fund approved by the trial judge pursuant to Rule 23(e), the court has an even greater necessity to review the fee arrangement for this rule imposes upon it a responsibility to protect the interests of the class members from abuse. In such circumstances, the attorneys' role is drastically altered; they then stand in essentially an adversarial relation to their clients who face a reduced award to the extent that counsel fees are maximized. Moreover, because of the nature of class representation, the clients may be poorly equipped to defend their interests against those of their attorneys. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 205 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

The court's fee application review must consider not only just compensation for attorneys but also the necessity to protect the rights of the class members. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 205 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

In a common fund case where the attorneys' fees and the clients' award stem from the same source and the fees are based on a percentage amount of the clients' settlement, the trial court should consider: 1) the size of the fund and the number of persons benefitted; 2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; 3) the skill and efficiency of the attorneys involved; 4) the litigation's complexity and duration; 5) the risk of nonpayment; 6) the amount of time plaintiffs' counsel devoted to the case; and 7) the awards in similar cases. Those factors need not be applied in a formulaic way since each case is different. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 205 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions

As a general rule, as the size of a fund increases, the appropriate percentage to be awarded to counsel decreases although sometimes the increase in the recovery is merely due to the size of the class and has no direct relationship to counsel's efforts. And a fund size may be so large as to require the court to decrease the percentage award. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 205 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions – Settlement

The brevity of the litigation before settlement (for instance, a case in which no formal discovery has been conducted before a quick settlement) would require a reduction in attorney fees. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 205 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions

Courts generally use lodestar calculations to "cross-check" percentage-of-recovery fee awards. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 (Yap 2010).

Attorney's Fees – Court-Awarded – Common Fund; Civil Procedure – Class Actions; Costs

Class action counsel in common fund cases are entitled to reimbursement for expenses adequately documented and reasonably and appropriately incurred in the prosecution of the class action. The litigation expenses that may be allowed in such cases are thus more extensive than the costs routinely taxed and awarded to prevailing parties under Rule 54(d). People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 (Yap 2010).

Costs

Costs are not synonymous with a party's litigation expenses since only certain types of expenses are cognizable as Rule 54(d) costs. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 n.3 (Yap 2010).

Civil Procedure – Class Actions; Costs

The $200 for service of a writ of attachment and levy; the $100 for Yapese translation of the class notices; and the $238.75 for the required publication of legal notice are expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of a class action and are expenses which would have been taxable as Rule 54(d) costs if such costs had been taxed separately. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 (Yap 2010).

Civil Procedure – Class Actions; Costs

The $80.50 listed as purchases of beer, bottled water, and the like from a Yap hotel mini-bar; the $2.95 for DVD rental; $34 listed as "no receipts (investigator's beer)" are disallowed since they are not expenses reasonably and appropriately incurred in the prosecution of the class action. The $16.95 listed as breakfast and lunch "no receipts" is disallowed since it is not adequately documented. The

$111.91 for groceries purchased in a Guam supermarket is unexplained and therefore disallowed. The $408.80 in charges for internet access from a Yap hotel, even if used for occasional legal research or case-related e-mail, are excessive and therefore disallowed. The $620.50 claim for "expenses in the form of legal research subscription charges, and long distance phone charges" is undocumented and therefore disallowed and "legal research subscription," although since it is undocumented the court cannot be certain, appears that it may properly be part of overhead and not case specific. Also undocumented, and therefore disallowed, is $521.25 in photocopying and postage fees for filing and service. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 (Yap 2010).

Costs

Photocopying costs may be allowed if they represent payments to others for that service. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206 n.4 (Yap 2010).

Civil Procedure – Class Actions; Costs

Expenses to travel to the case's venue have usually been allowed as costs when there has been a showing that there were no local attorneys or law firm available. This is a sound principle which should also be followed in awarding class action expenses. People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 198, 206-07 (Yap 2010).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On June 10, 2010, judgment was entered in the plaintiffs' favor for $125,000, the amount stipulated to by the parties. On July 5, 2010, the plaintiffs' attorneys filed their affidavits with supporting exhibits in which they jointly seek one-third of the judgment as attorneys' fees and $11,649.44 as litigation expenses ($8,284.03 incurred by Teker Torres & Teker, P.C. attorneys and $3,365.41 incurred by Daniel J. Berman, Esq.). The court awards reasonable attorneys' fees of $41,666.67 and $9,852.58 in reasonable and appropriate expenses (total: $51,519.25). The reasons follow.

I. Basis for Award

The court concluded that the parties' settlement in this matter was the result of zealous advocacy and arm's-length negotiation. It further concluded that the notice to class members was reasonably calculated to apprise the parties (including absent class members) of the class action's pendency and of the proposed settlement. After the parties' submissions and the June 3, 2010 Rule 23(e) fairness hearing, the court considered the following factors when it evaluated whether the settlement was fair, adequate, and reasonable:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted).[1] Briefly put, the court found the settlement to be fair, reasonable, and adequate and approved the settlement because, when balanced, the following weighed in the settlement's favor: 1) the litigation had the potential to become increasingly complex and expensive with the third-party claims and defendants that the settlement released; 2) no class member objected to the settlement; 3) although most discovery had been done, some key discovery, such as the captain's deposition remained; 4) establishment of liability was not wholly certain; 5) there was risk about the amount of damages that could be established because, in part, of the likelihood that some of the reef damage could not be attributed to the defendant vessels; 6) there was minimal risk to the case's continued maintenance as a class action through trial; 7) it was uncertain whether the defendants could have withstood a greater judgment considering their inability to arrange a bond for the vessels' release and their purported lack of marine insurance; 8) the settlement was not greatly disproportionate to the best possible recovery (the bond amount previously set for the vessels' release); and 9) the settlement was well within the range reasonable for a likely recovery in light of the attendant risks.

The plaintiffs also presented a plan for allocation of the settlement common fund. The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate," In re Computron Software Inc., Sec. Litig., 6 F. Supp. 2d 313, 321 (D.N.J. 1998), and "[t]he court should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members," Williams v. Vukovich, 720 F.2d 909, 923 (6th Cir. 1983). The court accordingly determined that the plan allocating $10,000 to be shared among the named plaintiffs (the three chiefs)[2] for their work on the matter with the remainder of the $125,000, minus court-approved sums for the plaintiffs' attorneys' fees and expenses, to be deposited in a trust fund account for the beneficial use of the Tomil community was adequate, reasonable, and fair.

II. Attorneys' Fees

As their contingent fee, the plaintiffs' attorneys seek one-third of the sum recovered from the defendants. While the lodestar method, which multiples the number of attorney-work hours reasonably expended by an hourly rate appropriate for the FSM and the lawyer's experience, is the proper method in statutory (or in contractual) fee-shifting cases, *see, e.g.*, Tolenoa v. Kosrae, 3 FSM Intrm. 167, 170-73 (App. 1987); Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 110 (Chk. 1999); FSM Dev. Bank v. Kaminanga, 12 FSM Intrm. 454, 455-56 (Chk. 2004), the percentage-of-recovery method is generally

---

[1] Although the court must first consult FSM sources of law rather than begin with a review of other courts' cases, when an aspect of an FSM civil procedure rule, which is identical to a U.S. counterpart, has not previously been construed, the court may look to U.S. sources for guidance in interpreting the rule, *see, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008); Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 394 n.1 (App. 2006). The U.S. and FSM Civil Procedure Rule 23(e) are identical and the court has not previously construed the extent of its Rule 23(e) duty to approve or reject class action settlements and attendant attorneys' fee and expense awards.

[2] The court had some concern over this payment to the chiefs and, if the payment had been $10,000 to each chief, the court would not have approved it. The $10,000 payment shared among the named plaintiffs is the upper limit of what the court would approve. If it had been any higher, the court would not have approved it (or may have reduced it) since it causes a substantial reduction in the size of the Tomil community trust fund principal. If the $10,000 payment had instead come from the attorney fee award [not the attorney expense award], it would not be subject to intense judicial scrutiny, *In re* Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 344 (D.N.J. 2002).

used in common fund cases on the theory that class members would be unjustly enriched if they did not adequately compensate the counsel responsible for generating the fund, *see, e.g.*, In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995); In re King Res. Co. Sec. Litig., 420 F. Supp. 610, 628 (D. Colo. 1976), although it is within a trial court's discretion in a common fund case to use the lodestar instead of the percentage-of-recovery method to calculate attorney's fees, Goldberger v. Integrated Res., Inc., 209 F.3d 43, 48-51 (2d Cir. 2000). When the percentage-of recovery method is used, the court "must specify the percentage it has utilized in determining the fee award. There is no set standard, however, for determining a reasonable percentage." In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 129 (D.N.J. 2002).

In support of their fee claim, the plaintiffs' attorneys provide the Attorney-Client Contingency Fee Agreement between Daniel J. Berman, Esq. and Chief Steven Mar (on behalf of the People of Tomil) executed on July 20, 2009. Contingent fee contracts are, with some exceptions, acceptable in the FSM since a contingent fee agreement is the freely negotiated expression both of a client's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment. Aggregate Sys., Inc. v. FSM Dev. Bank, 10 FSM Intrm. 493, 496 (Chk. 2002). A contingent fee agreement must be in writing and must state the method by which the fee is to be determined. *Id.*; Davis v. Kutta, 8 FSM Intrm. 218, 222 (Chk. 1997). The written agreement provides that, "as their contingent fee," the plaintiffs' attorneys are entitled to "[t]hirty-three and one-third percent (33.33%) of all amounts recovered . . . ." Attorney-Client Contingency Fee Agreement ¶2.a (July 20, 2009). The plaintiffs' contingent fee agreement thus complies with FSM law that it be in writing and state the method by which the fee is calculated.

The court has general equitable powers to award fees out of a settlement fund to those attorneys who have brought benefit to class members. *See, e.g.*, Galdi Sec. Corp. v. Propp, 87 F.R.D. 6, 13 (S.D.N.Y. 1979). Although courts are reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties, an attorney's contingent fee must still be reasonable or the court may reduce it. Aggregate Sys., Inc., 10 FSM Intrm. at 496. This is especially true when, as here, the contingent fee sought is in a class action.

The trial court in a class-action settlement is "not bound by the agreement of the parties as to the amount of attorney fees." Foster v. Boise-Cascade, Inc., 577 F.2d 335, 336, *reh'g en banc denied*, 581 F.2d 267 (5th Cir. 1978). "[A] thorough judicial review of fee applications is required in all class action settlements." In re General Motors Corp., 55 F.3d at 819. In the context of a class-action settlement, when "determining whether plaintiffs' counsel is in fact entitled to fees, and if so, in what amount, the court must be sensitive to the potential conflict of interest between plaintiffs and their counsel, and must be particularly careful to insure that the ultimate division of funds is fair to absent class members." Bowen v. SouthTrust Bank of Ala., 760 F. Supp. 889, 892 (M.D. Ala. 1991). This is because, even if the court finds, under Rule 23(e), that the settlement is fair and reasonable to absent class members, the court "still has an unbending duty to ensure that counsel is not unreasonably benefited by the award of an exorbitant fee," Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 680 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978), and therefore must "scrutinize [attorney] fee applications with a jealous regard for the rights of those who are interested in the class action settlement fund," Weiss v. Drew, 465 F. Supp. 548, 552 (S.D.N.Y. 1979), since the divergence in financial incentives always creates "the danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees," Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991). Thus, under Rule 23(e), a trial court must "scrutinize any fee agreement that would be enforced as part of the agreement, because those agreements necessarily put counsel and clients in an adversary relationship." Alexander v. Chicago Park Dist., 927 F.2d 1014, 1024 (7th Cir. 1991).

> When a contingent fee contract is to be satisfied from a settlement fund approved by the trial judge pursuant to [Rule] 23(e), the court has an even greater necessity to review the fee arrangement for this rule imposes upon it a responsibility to protect the interests of the class members from abuse. In such circumstances, the role of the attorneys is drastically altered; they then stand in essentially an adversarial relation to their clients who face a reduced award to the extent that counsel fees are maximized. Moreover, because of the nature of class representation, the clients may be poorly equipped to defend their interests against those of their attorneys.

Dunn . H.K Porter Co., 602 F.2d 1105, 1109 (3d Cir. 1979).

court's fee application review must consider not only just compensation for attorneys "but also necessity to protect the rights of the class members." Galdi Sec. Corp., 87 F.R.D. at 13. In a co n fund case, such as this, where the attorneys' fees and the clients' award stem from the same ce and the fees are based on a percentage amount of the clients' settlement, the trial court shou nsider several factors. Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 200(re AremisSoft, 210 F.R.D. at 129. These factors are:

> the size of the fund and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the . . . fees requested by counsel; the skill and efficiency of the attorneys involved; (4) the complexity and duration of litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunt 223 F.3d at 195 n.1. These factors need not be applied in a formulaic way since each case is di m. *Id.*

e court now applies those factors to this case. The fund's size is $125,000 and expenditures from trust fund should ultimately benefit, directly or indirectly, all of the estimated 1,023 class mem . "As a general rule, as the size of a fund increases, the appropriate percentage to be awarded to co el decreases," In re Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 337 (D.N.J. 200 though sometimes the increase in the recovery is merely due to the size of the class and has no di relationship to counsel's efforts. In re Prudential Ins. Co. of Am. Sales Litig., 148 F.3d 283, 339 Cir. 1998); In re AremisSoft, 210 F.R.D. at 131. In this case, the class size had no bearing on th settlement fund size. The fund size bears no relation to the class size since the settlement was base the amount of reef damage, not the number of people affected. Also, the fund size, since it was er modest, was not so large as to require the court to decrease the percentage award. *See* In re misSoft, 210 F.R.D. at 131. No class member objected to the fee amount. The plaintiffs' atto exhibited some skillfulness and persistence in obtaining the results.

hile this case may have seemed fairly simple at the start, it became more complex with time. Alth settlement was reached after only about nine months, considerable motion practice and disc did occur. This is thus not a case where the brevity of the litigation before settlement (for inst a case in which no formal discovery has been conducted before a quick settlement) would requ reduction in attorney fees. *See id.* at 132-33. Since at all relevant times the defendant vess ere under arrest and were valued more than the plaintiffs' possible total claims and since the plai were (unusual for an admiralty case) not burdened with paying for shipkeepers, the risk of ever nonpayment was not great. While no contemporaneous time records of attorney work done on case were provided (which would have been helpful and which, depending on the circ nces, will likely be required in future cases), it is apparent, from the plaintiffs' motion practice and se request, that a considerable amount of time was spent litigating this action. And, lastly,

because of the paucity of class actions in the FSM, there are no cases similar enough to give guidance for this fee request.

Weighing the factors just discussed, the requested percentage appears reasonable. Courts generally use lodestar calculations to "cross-check" percentage-of-recovery fee awards. *See, e.g.*, In re Prudential Ins., 148 F.3d at 340; In re Cendant, 232 F. Supp. 2d at 340. Since no attorney time records were supplied, the court is unable to properly cross-check the attorneys' fee request. However, a review of the plaintiffs' filings, motion practice, and discovery actions reveals that plaintiffs' counsel reasonably expended considerable time on this matter and that, if the court were able to perform a proper cross-check, the sought fees would likely be within the lodestar range although they probably are on the higher end. The court therefore concludes that, under the circumstances, fees in the amount sought are reasonable. Accordingly, plaintiffs' attorneys are granted $41,666.67 (33⅓% of $125,000) as their reasonable attorneys' fees.

III. Attorneys' Expenses

Class action counsel in common fund cases are "entitled to reimbursement for expenses adequately documented and reasonably and appropriately incurred in the prosecution of the class action." In re AremisSoft, 210 F.R.D. at 135; In re Cendant, 232 F. Supp. 2d at 343. The litigation expenses that may be allowed in such cases are thus more extensive than the costs[3] routinely taxed and awarded to prevailing parties under Rule 54(d). *See, e.g.*, Abrams v. Lightolier, Inc., 50 F.3d 1204, 1222-25 (3d Cir. 1995). The $200 for service of the writ of attachment and levy; the $100 for Yapese translation of the class notices; and the $238.75 for the required, FSM Mar. R. C(4), legal notice in the Pacific Daily News are expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of this class action and are expenses which would have been taxable as Rule 54(d) costs if such costs had been taxed separately.

However, the $80.50 listed as purchases of beer, bottled water, and the like from a Yap hotel mini-bar; the $2.95 for DVD rental; $34 listed as "no receipts (investigator's beer)" are disallowed since they are not expenses reasonably and appropriately incurred in the prosecution of the class action. The $16.95 listed as breakfast and lunch "no receipts" is disallowed since it is not adequately documented. The $111.91 for groceries purchased in a Guam supermarket is unexplained and therefore disallowed. The $408.80 in charges for internet access from a Yap hotel, even if used for occasional legal research or case-related e-mail, are excessive and therefore disallowed. The $620.50 claim for "expenses in the form of legal research subscription charges, and long distance phone charges" is undocumented and therefore disallowed. Furthermore, "legal research subscription," although since it is undocumented the court cannot be certain, appears that it may properly be part of overhead and not case specific. Also undocumented, and therefore disallowed, is $521.25 in "photocopying and postage fees for filing and service."[4] A total of $1,796.86 in "expenses" are thus disallowed.

Expenses to travel to the case's venue have usually been allowed as costs when there has been a showing that there were no local attorneys or law firm available. Ray v. Electrical Contracting Corp.,

---

[3] Costs are not synonymous with a party's litigation expenses since only certain types of expenses are cognizable as Rule 54(d) costs. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

[4] The court has previously disallowed charges for photocopies made in-house but has indicated that photocopying costs may be allowed if they represent payments to others for that service. *E.g.*, Lippwe v. Weno Municipality, 14 FSM Intrm. 347, 354 (Chk. 2006). Counsel have presented $243.52 in receipts for photocopying expenses on Yap. Those charges are included in the allowed expenses.

2 FSM Intrm. 21, 26 (App. 1985). This is a sound principle which should also be followed in awarding class action expenses. In their application, the plaintiffs' attorneys have not even tried to make a showing that there were no qualified attorneys available on Yap to handle this matter. Ordinarily, this would leave the court unable to award the Yap travel expenses. However, it appears that counsel's failure may have been inadvertent. Plaintiffs' counsel in this case were also plaintiffs' counsel in a different admiralty reef damage class action (also involving with a plaintiff class on the Yap main island), for which trial proceedings were held during the same Yap sitting as the this case's fairness hearing and in which counsel were careful to make a strong showing that there were no qualified attorneys available on Yap for that class action. The court will therefore take judicial notice of that showing. Accordingly, except for those items specifically disallowed above, the attorneys' Yap travel expenses are allowed as reasonable and appropriate.

The court has reviewed the other expense items (including travel to Manila) and they all appear to be adequately documented and reasonably and appropriately incurred in the prosecution of this class action. Accordingly, of the $11,649.44 sought in expenses, $1,796.86 are disallowed, leaving $9,852.58 in adequately documented and reasonably and appropriately incurred expenses for which plaintiffs' counsel are entitled to reimbursement from the common fund generated by the settlement in this class action.

IV. TOTAL AWARD

NOW THEREFORE IT IS HEREBY ORDERED that plaintiffs' counsel are granted $41,666.67 (33⅓% of $125,000) as their reasonable attorneys' fees, IT IS FURTHER ORDERED that the plaintiffs' attorneys are awarded their reasonable and appropriate expenses of $9,852.58, AND IT IS FURTHER ORDERED that the interest those sums [$51,519.25 total] have earned while on deposit in the court's registry shall also be remitted to plaintiffs' counsel.

* * * *

FSM SUPREME COURT TRIAL DIVISION

MANUELA ROOSEVELT, Plaintiff, vs. TRUK ISLAND DEVELOPERS and MYRON HASIGUCHI, Defendants.	)	CIVIL ACTION NO. 2008-1112

ORDER DENYING RULE 41(b) DISMISSAL

Ready E. Johnny
Associate Justice

Trial: June 22-23, 2010
Decided: August 4, 2010