UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA C. RICHARDS, individually, and on behalf of others similarly situated,	:	No. 3:04CV1638 (JCH)
Plaintiff,	:	
v.	:	
FLEETBOSTON FINANCIAL CORP. and the FLEETBOSTON FINANCIAL PENSION PLAN,	:	
Defendants.	:	
	:	MAY 28, 2008

Memorandum in Support of Incentive Payment

1. Summary.

If the Court approves the settlement in this case, Richards respectfully asks it to approve this request for an incentive payment. If the Court approves this request, the defendant Plan has agreed to pay Richards an incentive payment of $15,000 on top of the benefits the Plan will pay to plan participants. This payment is reasonable under the applicable law because of the large amount of time Richards spent working on the case and the risk she assumed by agreeing to be the sole Class Representative.

2. Facts.

Donna Richards holds masters degrees in business and library sciences.[1] She has worked for 35 years as a trust officer for Bank of America and its predecessors. She is 60 years old. She began suspecting something was wrong with the Fleet cash balance plan after looking into her retirement figures and asking questions about how these plans worked. The more Richards learned about the plans, the more suspicious she became. No one seemed to understand how the cash balance plan worked. While others at FleetBoston also expressed concern about the plan, no one appeared willing to act on their concerns. For a time, Richards hoped a retiree would bring this lawsuit, but when it was obvious no one was going to, she decided to call an attorney. In 2003, Richards contacted Attorney Gregg Adler.

Ultimately, Attorney Adler challenged the calculation of Richards' pension benefits in an administrative claim to Plan administrators. During the administrative phase, Richards helped Attorney Adler prepare the claim and appeal letters by providing plan documents, benefit statements, and personal information.

Attorney Adler and Richards discussed bringing a lawsuit in federal court. He told her that although it could be brought on behalf of a class, there was substantial risk involved, and that the chances of prevailing were not good. Attorney Adler suggested that Richards consult an attorney who specialized in ERISA matters.

[1] All facts in this section are contained in Richards' Declaration (Exhibit 1).

In April 2004, Attorney Adler introduced Richards to Class Counsel, a lawyer Attorney Adler knew to be a successful ERISA litigator. After several meetings and phone calls, in May 2004, she hired Class Counsel's firm on a one-third contingency basis to bring a class action lawsuit against the bank and the cash balance plan. Richards would never have been able to hire Class Counsel to bring this suit on a billable hourly basis, and she does not know anyone who could have.

Between April and September 2004, through many meetings, telephone calls and emails, Richards helped Class Counsel investigate the factual basis for the allegations of the complaint, reviewed issues to be referred to an expert actuary, and communicated with other class members. Between October 2004 and March 2005, Richards read the complaint and the Bank's March 2004 brief and exhibits in support of dismissing her lawsuit; she worked with Class Counsel to prepare an affidavit and brief supporting class certification, and she communicated with other class members.

From April 2005 to January 2007, Richards assisted Class Counsel with substantial discovery. She responded to four sets of written-discovery requests, one set of requests for written admissions, and she produced 738 pages of documents to the defendants. Some of the requests were personally intrusive examinations of her finances; they took considerable time to properly answer.

The defendants deposed Richards twice. Some of the questioning was again personally intrusive, including a request that she name colleagues and friends who had approached her privately about the negative effect the cash balance conversion had on

their benefits, and she was asked more about her personal finances. Richards consulted many times with Class Counsel during the discovery phase on defendants' discovery responses, depositions, and briefs, and she communicated with other class members regularly. During this time, she also read the Amended Complaint, Second Amended Complaint, and the Court's Rulings on Class Certification and both Motions to Dismiss.

From January 2007 to the date of her declaration, Richards has worked with Class Counsel to settle the case. Over this period, she has consulted with Class Counsel by email, telephone and in person; she attended seven mediation sessions in Boston and actively participated in them; she read drafts of mediation documents; and she communicated with class members.

Because Richards has worked for 35 years as a trust officer, she understands what it means to be a fiduciary for other class members. She has taken her role seriously and has endured the stress and put in the time needed to bring the lawsuit and bring it to a successful close.

Because Richards still works for Bank of America, having her name on the caption of a 23,000 class member lawsuit against her employer was obviously uncomfortable; she will likely never know, whether it has affected or will affect any of her career opportunities. Richards attempted to keep the lawsuit separate from her employment. She used her vacation time to address any matter related to the lawsuit. And because Richards did not wish to use work resources, she used Staples or Kinkos

for copying and faxing documents for the lawsuit. When Richards received email at work or phone calls on the lawsuit, she attempted to return the emails from home and the calls from her cell phone after business hours.

Dealing with clients was also awkward, because many of them knew that Richards had originally planned to retire on her 55th birthday because she was working toward a Master of Library Science degree and intended to change careers. But Richards ultimately chose not to retire when she took on the lawsuit because her retirement income remained in doubt. In addition, Richards believed it would be better that she remain employed during the lawsuit so class members would be able to find her, and because she is still working she has had instant access to her benefit information. When asked by clients why she did not retire early as planned, Richards told clients "there was a problem with my pension." Some of the explanation was ultimately provided when stories about the lawsuit appeared in the newspapers.

Although Class Counsel and Richards had discussed the hours she spent working on the case, Richards never discussed the possibility of an incentive bonus with Counsel until the end of all the settlement negotiations. To date, Richards calculates that she has spent at least 128.5 hours working on the lawsuit, not including the time during the administrative phase with Attorney Adler and any time she will spend after the date of this motion. In the process, Richards used 92.5 hours of work/vacation time. Her base salary (excluding bonus and benefits) is $130,000 ($62.50 for a 40-hour week). Based upon her experience, Richards believes the Bank

would bill her time at $250/hour. Calculating her time at $100.00 per hour—a conservative point between her base salary and billing rate— Richards 128.5 hours are worth $12,850.00 (128.5 x $100). Richards also spent $620.06 out of her own pocket for mileage and parking expenses traveling to and from the mediation sessions in Boston.[2] Therefore, as of the date of this motion, the total value of Richards' time and expense on this lawsuit is $13,470.06—nearly the entire value of the proposed incentive payment and including nothing for the intangible risks and burdens Richards assumed when she agreed to be the lone class representative in this case.

3. Argument.

A. Courts award incentive payments to compensate class representatives for the work done on behalf of the class and for the risks they take on.

As the Eastern District of Pennsylvania said in 2000 in *Cullen v. Whiteman Med Corp.*, "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."[3] They are an important function of the judicial system, particularly where the named plaintiffs participated actively in the litigation.

The amount of an incentive payments is often determined by whether the representatives' actions resulted in a benefit to the class, what risks they faced when deciding to sue, and the actual time and effort spent throughout the duration of the

[2] Each of Richards' expenses are listed in Exhibit A to her Declaration (Exhibit 1).
[3] *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000).

litigation. As the Eastern District of Pennsylvania put it in 1994 in *In re United States Bioscience Sec. Litig.*:

> among the reasons courts cite for approving such awards are that representative plaintiffs (1) take on risks when commencing class action litigation (2) shoulder heavier workloads than the other plaintiffs and (3) help to secure substantial benefits to the class. [4]

The risks courts should consider include the risk of subtle and not-so-subtle retaliation resulting in personal or financial harm, discrimination, trouble finding employment, and financial risk.[5] The work courts should consider includes class representatives' work on discovery requests, depositions, reading briefs, answering class counsel's questions, or appearing as witnesses or at mediations.[6]

B. Donna Richards took significant risk, gave up vacation time, spent over 100 hours on this case and did what no one else was willing to do.

(1) Richards' work for the class supports the request.

The incentive payment requested is reasonable in light of the time and effort Richards has spent on this litigation considering the value of the work done. Not including time spent during her administrative claim, or the time she will spend after the date of this motion, Donna Richards has spent at least 128.5 hours working on this lawsuit (92 hours of which were suppose to be her vacation). During this time

[4] *In re United States Bioscience Sec. Litig.*, 155 F.R.D. 116, 121 (E.D. Pa. 1994).
[5] *See, e.g., Cook,* 142 F.3d at 1016 (workplace retaliation); *Women's Comm for Equal Employment Opportunity v. Nat'l Broad. Co.,* 76 F.R.D. 173, 181 (S.D.N.Y. 1977) (discrimination); *Glass v. UBS Fin. Servs.,* 2007 U.S. Dist. LEXIS 8476, at *52 (N.D. Cal. Jan. 26, 2007) (trouble finding employment)(Exhibit 2); *Enter. Energy Corp.,* 137 F.R.D. at 251 (significant financial risk).
[6] *In re United States Bioscience Sec. Litig.*, at 121. *See also*, *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, 57-58 (E.D. Pa. June 2, 2004)(Exhibit 3). *In re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 374 (S.D. Ohio 1990).

she responded to four sets of discovery requests, requests for admission, produced 738 pages of documents, and was deposed twice. She was required to answer personally intrusive questions and name colleagues who approached her about the cash balance plan. She answered many inquiries from class members. And she was not just present during the mediation, she played an active role in it during her seven trips to the mediator's Boston office.

Richards 128.5 hours added value. Her education (which includes an MBA), her experience as a bank trust officer, and 35 years working for the bank made her point of view particularly valuable. Richards is the only class representative. There were no others to share the burden with and there would be no lawsuit if Donna Richards had not been willing to allow it to proceed in her name.

(2) Richards' took a risk by agreeing to be class representative.

Donna Richards assumed a significant risk by agreeing to be class representative. She agreed to do it knowing the case raised many novel issues and was rated as risky. This meant that the normal notoriety that would attach to any employee suing her large corporate employer would be magnified and the chance for even subtle forms of retaliation would increase. That the lawsuit has succeeded and that she still holds her job is not to the contrary. Richards assumed a risk when she allowed her name to be used on this lawsuit. That she managed it and her job skillfully does not detract from this reality—and she may never know if it actually cost

her. The result of her decision to sue, now wise in retrospect, is the $83.4 million dollar settlement value.

C. The incentive payment is reasonable compared to those awarded in similar suits.

Richards' risks were similar to those assumed by the four named class representatives in *Glass v. UBS Fin. Servs.*, a $45 million dollar, 13,000-member, class action settled in 2007 in the Northern District of California.[7] As the *Glass,* Court described it, the "four representatives, all of whom were still currently employed in the securities industry, placed something at risk by putting their names on a complaint against one of the largest brokerage houses in America."[8] Richards, still a bank employee, was the only one who offered to put her name on the complaint against the second largest bank in America. In *Glass*, the Court found this risk sufficient to support the approval of the requested per person $25,000 incentive payment, $10,000 more than the single payment Richards requests.[9]

Richard's work is similar to those assumed by the five class representatives in the 2004 case, *In re Linerboard Antitrust Litig.* Here, the Eastern District of Pennsylvania awarded $25,000 to each of five class representatives as a reward for their work on the case:

> [T]he five class representatives performed considerable work advancing the litigation. Each of the class representatives provided verified

[7] *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007)(Exhibit 2).
[8] *Id.* at *52.
[9] *Id.*

> answers to interrogatories and produced documents in response to document requests. Each of them also expended time in preparing for depositions and gave testimony at depositions."[10]

Richards took on similar tasks and also traveled to Boston and participated in seven mediation sessions without any other class representative to share the burden. Moreover, the incentive payments in *In re Linerboard Antitrust Litig.* were paid from the common fund, while the incentive payment here, if granted, will be paid by the defendant Plan on top of the settlement funds, not out of them.

4. Conclusion.

Donna Richards has spent significant time and expense representing herself and others and producing an $83.4 million result. Together with the risks she assumed by bringing this lawsuit, this means that the requested incentive payment of $15,000 is reasonable under the applicable law. It is particularly reasonable because it will be paid by the defendant Plan and will not reduce Class Members' benefits. Therefore, Richards respectfully requests the Court approve the incentive payment.

[10] *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, 57-58 (E.D. Pa. June 2, 2004)(Exhibit 3).

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2008, a copy of foregoing memorandum was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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