

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

Benjamin Reetz, individually and as the representative of a class of similarly situated persons, and on behalf of the Lowe’s 401(k) Plan,

Plaintiff,

v.

Lowe’s Companies, Inc., Administrative Committee of Lowe’s Companies, Inc., and Aon Hewitt Investment Consulting, Inc.,

Defendants.

Case No. 5:18-cv-00075-KDB-DCK

**DECLARATION OF
KAI RICHTER IN SUPPORT OF
PLAINTIFF’S MOTION FOR
APPROVAL OF ATTORNEYS’
FEES AND COSTS,
ADMINISTRATIVE EXPENSES,
AND CLASS REPRESENTATIVE
SERVICE AWARD**

I, Kai Richter, hereby submit this Declaration in support of Plaintiff’s Motion for Approval of Attorneys’ Fees and Costs, Administrative Expenses, and Class Representative Service Award.

Professional Overview

1. I am a partner at Nichols Kaster, PLLP (“Nichols Kaster”), and I am one of the attorneys appointed by the Court to represent the Settlement Class in the above-captioned action.
2. I am currently licensed in good standing to practice law in the State of Minnesota, and also have been admitted to practice in several federal district courts and appellate courts across the country. A list of jurisdictions and courts in which I am admitted is set forth below:

Supreme Court of the United States
1st Circuit Court of Appeals
2nd Circuit Court of Appeals
3rd Circuit Court of Appeals
6th Circuit Court of Appeals
8th Circuit Court of Appeals
9th Circuit Court of Appeals
U.S.D.C. for the District of Minnesota
U.S.D.C. for the Eastern District of Michigan
U.S.D.C. Western District of New York
U.S.D.C. Eastern District of Wisconsin
Minnesota Supreme Court

I am in good standing in every jurisdiction in which I have been admitted to practice.

3. I have been actively engaged in the practice of law since 1999, and have substantial class action experience and other complex litigation experience.

4. Since joining Nichols Kaster in April 2010, my practice has focused exclusively on class action cases. I have been appointed class counsel for litigation or settlement purposes in over thirty class cases, including over twenty ERISA cases. In connection with those cases, I have personally negotiated class action settlements providing for more than \$450 million in available relief to class members nationwide. A more detailed explanation of my professional background is contained in my prior Declaration in support of Plaintiff's Motion for Preliminary Approval of Partial Class Action Settlement (Dkt. 221-1) ("First Declaration").

Law Firm Overview

5. Nichols Kaster has been engaged in the practice of law for over 30 years, and is devoted to representing the interests of both consumers and employees. The firm has offices in Minneapolis and San Francisco, and currently employs 39 attorneys and a sizeable staff of paralegals, legal assistants, class action clerks, and information technology professionals. A copy of Nichols Kaster's law firm resume (which includes attorney biographies) was previously filed in this action as Exhibit C to my First Declaration (Dkt. 221-5).

6. Nichols Kaster has extensive class action experience, including experience litigating ERISA class actions such as this. The firm has been appointed lead counsel or co-counsel on hundreds of class and collective actions, and has recovered over \$750 million for its clients.

7. Nichols Kaster was named one of the top 50 elite trial firms by National Law Journal in September 2014, and also has been ranked as a Best Law Firm by U.S. News and World Report.

8. The firm's lawyers have litigated dozens of cases through trial, and have managed discovery in cases involving millions of pages of documents. The firm is also well regarded for its appellate work, and has been involved in two successful appeals before the United States Supreme Court, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2010).

Work Performed by Class Counsel

9. Nichols Kaster has devoted a significant amount of time to this matter. Among other things, we (1) conducted a thorough investigation of the class-wide claims; (2) drafted a detailed Class Action Complaint (Dkt. 1) and First Amended Complaint (Dkt. 84); (3) responded to the Lowe's Defendants' Motion to Dismiss the Complaint (Dkt. 38) and appeared in-person for the motion to dismiss hearing; (4) responded to the Lowe's Defendants' appeal from the Magistrate Judge's Report and Recommendation; (5) propounded numerous discovery requests and repeatedly met and conferred with Defendants regarding discovery; (6) analyzed over 400,000 pages of documents produced by Defendants and additional data regarding the class; (7) produced over 2,400 pages of documents; (8) pursued relevant discovery from six non-parties¹ and reviewed nearly 25,000 pages of documents produced by those non-parties; (9) took seven depositions of fact witnesses and defended the deposition of the named Plaintiff; (10) engaged five experts (Brian Becker, Eric Dyson, David Donaldson, Steve Pomerantz, and Marcia Wagner) to consult on fiduciary process, conflicts of interest, Plan investment, and appropriate damages comparators and calculation methods; (11) defended or deposed a total of nine expert witnesses; (12) filed a Motion to Compel Discovery from Defendant Aon Hewitt Investment Consulting, Inc. (Dkt. 106); (13)

¹ These non-parties included Callan LLC, Gallagher Fiduciary Advisors LLC, NEPC LLC, PricewaterhouseCoopers LLP, Wells Fargo Bank N.A., and Willis Towers Watson.

filed a Motion to Strike the Lowe's Defendants' amended Rule 26(a) disclosures (Dkt. 121); (14) filed and responded to cross motions for summary judgment (Dkt. 134, 137, & 140); (15) responded to Defendants' *Daubert* motions (Dkt. 173, 174); (16) participated in a mediation with Martin F. Scheinman and all parties, and prepared a lengthy mediation statement in advance; (17) engaged in a second mediation with the Lowe's Defendants, which resulted in the present Settlement with the Lowe's Defendants; (18) drafted the Settlement Agreement and exhibits thereto (including the Settlement Notices, Former Participant Rollover Form, and the proposed preliminary and final approval orders); (19) prepared Plaintiff's Preliminary Approval Motion papers; (20) reviewed the bid received from the settlement administrator (Analytics Consulting LLC); (21) reviewed the final drafts of the Settlement Notices prepared by Analytics, and ensured that they were timely mailed by Analytics; (22) worked with Analytics to create a settlement website and telephone line for Class Members who wished to obtain additional information about the Settlement; (23) communicated with Class Members who contacted our office; (24) consulted with Plaintiff as the named Class Representative throughout the course of the case; and (25) prepared the present motion and supporting papers. This work is further detailed in my First Declaration (Dkt. 221-1).

10. The work summarized above required the efforts of numerous attorneys and professional staff at Nichols Kaster. Attached hereto as **Exhibit 1** is a true and correct copy of Nichols Kaster's timekeeper summary in this action. As reflected by this summary, Nichols Kaster attorneys and professional staff have expended approximately 8,203 hours pursuing this matter (exclusive of time spent on the trial or other non-settlement related matters after reaching a partial settlement). Our co-counsel and his firm invested approximately 260 additional hours (as reported in his declaration), for a grand total of approximately 8,463 hours invested by all Class Counsel.

We would be happy to provide detailed timekeeper descriptions supporting this time if the Court deems it necessary or helpful.

11. Nichols Kaster's reported timekeeper rates for ERISA actions such as this range from \$650 to \$900 per hour for attorneys with more than 10 years of experience, \$425 to \$600 per hour for attorneys with 10 years or less experience, and \$250 per hour for paralegals, law clerks, and other support staff. In setting these rates, our firm is cognizant of the rates approved in other ERISA class action cases (as set forth in our accompanying Memorandum of Law), as well as the rates charged by the defense bar in this field.

12. All of the work of Class Counsel has been undertaken on a contingent basis. To date, Class Counsel have not been compensated for any of this work. Based on the hourly rates and work performed, the reported lodestar for our firm amounts to \$4,648,248.75, and the total lodestar for all firms amounts to \$4,763,951.25. *See Ex. 1.*

13. In my professional opinion, and based on my personal knowledge of the work that was performed and the requirements of this case and similar cases, the time that our firm and Mr. Allen's firm expended on this action was reasonable and necessary.

14. After the date of this Declaration, we expect to perform additional work on behalf of the Settlement Class, including (1) drafting Plaintiff's motion for final approval of the Settlement; (2) communicating with the Independent Fiduciary engaged by the Lowe's Defendants as part of the independent review of the proposed release on behalf of the Plans (as called for by Prohibited Transaction Exemption 2003-39 and Paragraph 2.2 of the Settlement Agreement); (3) preparing for and attending the final approval hearing; (4) if final approval is granted, supervising the Settlement Administrator and Escrow Agent to ensure proper and efficient distribution of

payments to the Class Members; (5) responding to questions from Class Members; and (6) taking other actions necessary to support the Settlement until the conclusion of the Settlement Period.

Litigation Costs

15. In connection with the action, Nichols Kaster advanced all costs of litigation. Because our law firm handled this action on a contingent basis, we have not yet received reimbursement for any of these expenses.

16. Through the date of Settlement (April 22, 2021), Nichols Kaster has incurred \$1,225,767.08 in litigation costs in connection with this action. These expenses are broken down below:

Category	Cost
Expert Fees	\$1,066,770.50
Travel Expenses	\$12,046.26
Transcripts	\$36,251.70
Financial Data Charges	\$23,473.71
Postage, Shipping, Copies	\$1,232.41
PACER	\$26.80
Public Records	\$6.50
Relativity Database Hosting and Storage	\$5,035.98
Filing Fees	\$2,648.00
Mediation Fee	\$13,175.00
Videoconferencing	\$16.18
Process/Courier Service	\$1,800.00
Subpoena Charges	\$5,666.45
Class Notice (pre-settlement)	\$57,617.59
TOTAL (Nichols Kaster only)	\$1,225,767.08

Our co-counsel has reported \$443.84 in additional litigation costs, for a total of \$1,226,210.92. We are only seeking reimbursement of half of these expenses (\$613,105.46) in connection with the present Settlement.

17. The above expenses do not include expenses of settlement administration, which are broken out separately below. *See infra* at ¶¶ 19-21. Nor do they include expenses associated

with the recent trial. In the event that the Court would like further detail or documentation concerning our litigation expenses, we would be happy to provide it.

18. In my professional opinion, and based on my experience prosecuting this action and overseeing the conduct of the litigation, these expenses were reasonable and necessarily incurred in connection with the action.

Settlement Administration Expenses

Settlement Administrator

19. Analytics Consulting LLC (“Analytics”) has been selected to serve as the Settlement Administrator in this matter. *See Settlement Agreement at ¶ 1.49.* Analytics has extensive experience administering class action settlements, including several ERISA settlements.² Based on the bid submitted by Analytics, it will cost \$160,545 (under \$2.20 per Settlement Class Member) to administer the settlement in this action. This covers all settlement administration work required by the Settlement Agreement, including: (1) preparing and mailing the Settlement Notices (including postage costs); (2) searching for valid addresses for any Settlement Class Members whose Notices were returned as undeliverable; (3) reviewing and processing Former Participant Rollover Forms submitted by Former Participant Class Members; (4) establishing a telephone support line for Settlement Class Members; (5) creating and maintaining the Settlement Website; (6) distributing the notices to government officials required by the Class Action Fairness Act (“CAFA”); and (7) managing the project and communicating with the parties regarding the status of settlement administration. In addition, upon final approval of the Settlement, Analytics will calculate payments to Settlement Class Members pursuant to the

² A copy of Analytics’ company profile was previously submitted with Plaintiff’s motion for preliminary approval of the Settlement. *See ECF No. 221-6.*

Plan of Allocation, and facilitate delivery of settlement payments to Settlement Class Members as provided by the Settlement.

Escrow Agent

20. Alerus Financial (“Alerus”) has been selected to perform the duties of the Escrow Agent under the Settlement Agreement. *See Settlement Agreement (Dkt. 221-3) at ¶ 1.23.* Alerus has successfully performed a similar role with respect to several other ERISA class action settlements. Consistent with the rate charged in other cases, Alerus has agreed to a flat fee of \$2,500 (representing 0.02% of the Settlement Fund) for its services as Escrow Agent.

Independent Fiduciary

21. Additional administrative expenses will be incurred relating to the review of the proposed release on behalf of the Plan by the Independent Fiduciary appointed pursuant to PTE 2003-39 and Paragraph 2.2 of the Settlement Agreement. Under the Settlement Agreement, the Lowe’s Defendants are responsible for arranging the required review by the Independent Fiduciary, and the expense is an Administrative Expense that may be paid from the Settlement Fund. *See Settlement Agreement ¶¶ 1.3; 2.2.* We understand that Defendants have engaged Jim Carroll of Carroll Services LLC to perform the role of the Independent Fiduciary, and the fee for his services in this matter will be \$40,000.

Assistance of the Class Representative

22. It has been my honor to represent Plaintiff Benjamin Reetz as the class representative in this matter.³

³ Our firm had no relationship with Mr. Reetz prior to being engaged in this matter. At the outset of the litigation, we agreed to take the matter on a one-third contingent fee basis, and also agreed to advance all necessary costs and expenses subject to reimbursement.

23. Throughout the course of this action, Mr. Reetz has been mindful of his responsibilities as class representative, and has actively participated in the action. Among other things, he (1) reviewed the allegations in the Complaint and operative First Amended Complaint; (2) provided information and documents to our firm and communicated with our firm throughout the case; (3) produced documents in response to Defendants' discovery requests; (4) reviewed and signed answers to interrogatories; (5) appeared for his deposition; and (6) reviewed the Settlement Agreement with the Lowe's Defendants. In addition, Mr. Reetz traveled from McCleary, Washington to Charlotte, North Carolina to testify as the class representative and be present during the entirety of the trial held in this matter.

24. Based on the time and assistance that Mr. Reetz has provided as Class Representative, the risks he assumed, and the benefits that he has helped obtain for the Settlement Class, I believe that the requested class representative service award is reasonable and appropriate.

No Objections

25. The Settlement Notices that were approved by the Court disclosed the terms of the Settlement and also contained an explanation of the attorneys' fees, expenses, and class representative service award that would be sought in connection with the Settlement. To my knowledge, none of the Class Members have objected to the Settlement terms or the proposed fees, expenses, or service award as of the date of this motion.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 13, 2021

/s/ Kai H. Richter
Kai H. Richter