UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 21-CV-61275-RAR

WENSTON DESUE, *individually and as legal guardian of N.D. and M.D. and all others similarly situated,*

Plaintiff,

v.

20/20 EYE CARE NETWORK, INC., *et al.,*

Defendants,

AND ALL CONSOLIDATED ACTIONS

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PLAINTIFFS' UNOPPOSED MOTION FOR FEE AWARD AND LITIGATION COSTS AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, Stephany Alcala; Benjamin J. Liang; Amber Lowe, on behalf of herself and her minor children C.B., K.B., M.B., and G.M; David Runkle; and Suzanne Johnson ("Plaintiffs" or "Settlement Class Representatives"), respectfully move for approval of their request for attorneys' fees of twenty-five percent of the $3 million Settlement Fund, totaling $750,000.00, and litigation costs of $10,754.15 in this preliminarily approved class action settlement with Defendant 20/20 Eye Care Network, Inc. ("ECN"), a subsidiary of Defendant iCare Acquisition ("iCare") (collectively with ECN, "Defendants").

I. INTRODUCTION

In 2021, Defendants disclosed they experienced a data breach resulting in the potential exposure of sensitive and private information of approximately 4 million individuals. The information exposed included personally identifiable information (PII) such as their names, dates

of birth, Social Security numbers, and protected health information (PHI), such as the patients' medical identification numbers and health insurance information (the "Data Incident"). In the wake of the Data Incident, Plaintiffs filed six proposed class action lawsuits in the U.S. District Court for the Southern District of Florida (one having been removed), alleging that Defendants breached the legal duties they owed to Plaintiffs and Class Members to keep sensitive information confidential and protected from unauthorized disclosure or access. All six matters were consolidated by Court order. [Order Consolidating Cases and Setting Status Conf., June 28, 2021, ECF No. 11; *see also* ECF Nos. 22, 35.]

Thereafter, the parties engaged in litigation. Plaintiffs filed two consolidated amended complaints, [ECF Nos. 37, 52]; responded to Defendants' motion to dismiss Plaintiffs' First Amended Consolidated Class Action Complaint; analyzed Defendants' Motion to Strike Punitive Damages and Special Relationship Allegations [ECF No. 59] and Defendant's Motion to Dismiss Plaintiffs' Second Amended Consolidated Class Action Complaint [ECF No. 60]; and prepared and filed a Motion for Leave to File a Third Amended Consolidated Class Action Complaint [ECF No. 62].

On July 11, 2022, the parties engaged in mediation with an experienced mediator, Judge John Thornton (Ret.). Before that date, the parties exchanged and submitted detailed mediation briefs with their respective positions on the merits of their respective claims and defenses. The parties mediated via Zoom Video Conference, and engaged in arms' length, hard fought negotiations with a considerable exchange of information between the parties and Judge Thornton. Although the parties were unable to reach settlement that day, extensive settlement negotiations continued until a settlement was reached on August 26, 2022. [ECF No. 25].

On December 5, 2022, the Court issued an order preliminarily approving the proposed

nationwide class action settlement with ECN. [ECF No. 85]. Plaintiffs now respectfully request an award of attorneys' fees of 25% of the Settlement Fund, totaling $750,000.00, and litigation costs of $10,754.15 consistent with the Settlement Agreement ("Settlement Agreement" or "S.A.") and notice of class action settlement.[1]

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties agreement." Fed. R. Civ. P. 23(h). "It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d at 1358 (citing *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir.1991); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Fee awards totalling up to one third of the common fund are routinely approved in the Eleventh Circuit. *See, e.g.*, *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1255 (S.D. Fla. 2016) (recognizing that "a fee award of 33% . . . is consistent with attorneys' fees awards in federal class actions in [the Eleventh] Circuit"); *Waters v. Intern. Precious Metals Corp.*, 190 F. 3d 1291, 1292–98 (11th Cir. 1999) (same).

III. ARGUMENT

Pursuant to the Settlement Agreement (S.A. § IV(2)(a)(4) and the notice of class action settlement (*see* ECF No. 81-1, at 49), and consistent with recognized class action practice and procedure, Plaintiffs respectfully request an attorneys' fee award of $750,000.00 or twenty-five percent (25%) of the $3,000,000.00 Settlement Fund created by the Settlement (*see generally*,

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[11] Plaintiffs notified the class that Class Counsel intended to ask the Court to award attorneys' fees from the Settlement Fund not to exceed $750,000.00 and up to $35,000.00 in reasonable litigation expenses. [ECF No. 81-1, at 49].

Declaration of Gayle M. Blatt, filed concurrently herewith at Exhibit A ("Blatt Decl.")). Plaintiffs and Defendants negotiated and reached agreement regarding attorneys' fees, costs and expenses only after reaching agreement on all other material Settlement terms. Blatt Decl. ¶ 15. The requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Plaintiffs submit that the requested fee is appropriate, fair, and reasonable and respectfully request that it be approved by the Court.

A. The Law Awards Class Counsel Fees Based Upon the Fund Established for the Benefit of the Class.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig*., 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and district courts in this Circuit have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *In re Sunbeam Sec's. Litig.*, 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001).

In the Eleventh Circuit, class counsel are awarded a percentage of the funds made available through a settlement. *Hanley v. Tampa Bay Sports & Entm't Ltd. Liab. Co.*, No. 8:19-cv-00550-

CEH-CPT, 2020 WL 2517766, at *5 (M.D. Fla. Apr. 23, 2020) (noting that the percentage of the fund analysis applies to claims made settlements and that the "percentage applies to the total fund created, even where the actual payout following the claims process is lower") (quoting *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007)); *see also Marty v. Anheuser-Busch Cos., LLC*, No. 13-cv-23656-JJO, 2015 WL 6391185 (S.D. Fla. Oct. 22, 2015) (same); *Montoya v. PNC Bank*, N.A., No. 14-20474, 2016 WL 1529902, *23 (S.D. Fla. Apr. 14, 2016) ("the valuation of counsel's fee should be based on the opportunity created for the Settlement Class … [a]nd counsel should not be penalized for class members' failure to take advantage of such a settlement").

In *Camden I*—the controlling authority regarding attorneys' fees—the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774; *see also, Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 WL 5419507 (S.D. Fla. Oct. 24, 2014) (finding that attorneys representing a class action are entitled to an attorneys' fee based solely upon the total benefits obtained in or provided by a class settlement); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014) (noting that in a claims made situation, the attorneys' fees in a class action are determined based upon the total fund, not just the actual payout to the class); *Carter v. Forjas*, 701 F. App'x 759, 766-67 (11th Cir. 2017) (same).

The Court has discretion in determining the appropriate fee percentage. "There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee

because the amount of any fee must be determined upon the facts of each case." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774).

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions: (1) the time and labor required; (2) the novelty and difficulty of the relevant questions; (3) the skill required to properly carry out the legal services; (4) the preclusion of other employment by the attorney as a result of his acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the clients or the circumstances; (8) the results obtained, including the amount recovered for the Clients; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the clients; (12) fee awards in similar cases. *See Camden I*, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717-19 (5th Cir. 1974)).

These 12 factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). The Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. The *Camden I* factors support the requested fee.

1. The Claims Against Defendant Required Substantial Time and Labor.

Prosecuting and settling these claims demanded considerable time and labor on a contingency fee basis, supporting the reasonableness of this fee request . Blatt Decl. ¶ 20. Class Counsel devoted substantial time to investigating the claims against Defendants and determining

the proper parties. *Id.* at ¶¶ 24. Class Counsel also expended resources researching and developing the legal claims at issue. *Id.* Substantial time and resources were dedicated to developing, serving, and reviewing Plaintiffs' Amended Consolidated Class Action Complaints, as well as engaging in motion practice with this Court. *Id.*

The mediation session held before Judge Thornton required substantial preparation and review of Defendant's motions to dismiss, as well as this Court's ruling in the MDL pending before it; *In re MedNax Servs., Customer Data Sec. Breach Litigation*; Case No. 21-MD-002994-RAR (S.D. Fla.). Blatt Decl. ¶ 13. Following the initial mediation session, substantial time was devoted to evaluating potential avenues of resolution to which the parties could agree. *Id*. Subsequent settlement negotiations consumed time and resources. *Id.* Finally, significant time was devoted to negotiating and drafting the Settlement Agreement, addressing settlement administration issues, the language of the supporting documents such as the Notice, Claim Form, Settlement Website, the preliminary approval process, and to all actions required thereafter pursuant to the preliminary approval order. *Id.* ¶ 24. All of this time was spent without any assurance that the commitment of time and effort to this case would result in the payment of any fees. Class Counsel should be compensated for the substantial time and labor invested to obtain this outstanding settlement on behalf of the Class and for its persistence and efficiency in achieving the positive result for the Class.

2. The Novelty and Difficulty of the Questions Involved in this Litigation Required the Skill of Highly Talented Attorneys.

"[P]rosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). This is particularly true for data breach litigation. *See e.g.*, *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("The realm of data

breach litigation is complex and largely undeveloped."); *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *21 (E.D. Pa. Sep. 23, 2019) ("This is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare."). The Court in *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA, 2011 U.S. Dist. LEXIS 103222, at *36 (N.D. Cal. Sep. 12, 2011) has noted that "many [data breach class actions] have been dismissed at the pleading stage."

While the protracted litigation history evidences the complex issues as outlined above, so to does the caliber of lawyers representing the parties. *Walco Inv., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3 (in assessing the quality of representation by Class Counsel, the court should also consider the quality of their opposing counsel); *see also Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) (same). "[T]hat this level of legal talent was available to the Settlement Class is another compelling reason in support of the fee requested . . . . In the private marketplace, as pointed out by several of Plaintiffs' experts, counsel of exceptional skill commands a significant premium." *In re Checking*, 830 F. Supp. 2d at 1363.

Here, Class Counsel have a strong reputation in the area of complex, and in particular privacy and data breach class action litigation. Blatt Decl. ¶ 16; and Exhibit B.[2] Class Counsel have successfully litigated and settled similar cases across the country and, in this case, have been

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[2] Exhibit B includes the Declarations of Bryan Bleichner ("Bleichner Decl."), Jean S. Martin ("Martin Decl."), Dory P. Antullis ("Antullis Decl."), Terence R. Coates ("Coates Decl."), Joseph Lyon ("Lyon Decl."), Nathan D. Prosser ("Prosser Decl."), M. Anderson Berry ("Berry Decl.") and Gary Mason ("Mason Decl.").

challenged by highly experienced and skilled counsel who deployed very substantial resources on Defendants' behalf. Blatt Decl. ¶ 16.

3. Class Counsel Achieved a Successful Result.

Given the significant litigation risks Class Counsel faced, the Settlement represents a successful result. Rather than facing years of costly and uncertain litigation, each Settlement Class Member is eligible to receive not only claims for reimbursement for out-of-pocket expenses up to $2,500.00, but also either thirty-six months of identity theft protection services or an alternative cash payment in the amount of $50.00 per person (subject to proration based on number of claims). SA §§ IV(2)(1-4). Also, all Class Members have the right to make a claim for reimbursement for time spent dealing with issues arising from the breach of up to ten hours at $25 per hour upon attestation. *Id*. Moreover, a separate fund, in addition to the $3,000,000 common fund is established to pay expenses claimed by Class Members who suffered actual identity fraud, and all mnotice and claims administration costs are borne solely by Defendants.

With regard to the monetary benefits provided to Settlement Class Members alone, this settlement compares favorably to other data breach class action settlements. *See e.g*., *Kuss v. American HomePatient, Inc.*, No. 8:18-cv-02348-EAK-TGW (M.D. Fla. Aug. 13, 2020) (Doc. 70) (finally approving healthcare data breach with monetary benefits up to $1,400 per class member); *Parsons v. Kimpton Hotel & Restaurant Group, LLC,* No. 3:16-cv-05387-VC (N.D. Cal. July 11, 2019) (finally approving claims made settlement that would reimburse up to $250 per claim including, *inter alia*, expenses for lost time, payment for each card on which fraudulent charges

incurred, costs of obtaining credit report, costs of credit monitoring and identity theft protection, as well as up to $10,000 per claim for extraordinary expenses).[3]

4. The Claims Entailed Serious Risk.

Given the context of this case—a data breach class action—the risks incurred in pursuing it were significant. "The simple fact is that there were a larger than usual number of ways that Plaintiffs could have lost this case, and they still managed to achieve a successful settlement. A significant amount of the credit for this must be given to Class Counsel's strategy choices, effort and legal acumen." *In re Checking*, 830 F. Supp. 2d at 1364. "A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk." *In re Sunbeam*, 176 F. Supp. 2d at 1336. Further, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988).

The Settlement is particularly noteworthy given the combined litigation risks. Defendants raised substantial and potentially meritorious defenses. Indeed, prosecuting this matter was risky from the outset. *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving data breach settlement, in part, because "proceeding through the litigation process in this case is unlikely to produce the plaintiffs' desired results"). Few cases in this area have gone though the certification stage, and none have yet been tried.

[3] *See also, In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, 851 F. Supp. 2d 1040, 1048 1069 (S.D. Tex. 2012) (approving settlement that provided up to $2.4 million to pay for out-of-pocket losses); *In re Countrywide Financial Corp. Customer Data Security Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *1-4 (W.D. Ky. Dec. 22, 2009) (approving settlement that provided up to $1.5 million to pay out-of-pocket costs, up to $5 million to pay identity theft losses, and 2 years of free credit monitoring services).

Through this Settlement, however, Plaintiffs and Class Members gain significant benefits without having to face further risk. The benefits obtained here are substantial, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. Any of these risks could easily have impeded, if not prevented, Plaintiffs' and the Settlement Class' successful prosecution of these claims.

As explained in Plaintiffs' motion for preliminary approval, data breach cases are especially risky, expensive, and complex. *See, e.g.*, *In re Sonic*, 2019 WL 3773737, at *7 ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."). Although data breach law is continuously developing, data breach cases are still relatively new, and courts around the country are still grappling with what legal principles apply to the claims. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). Since the "legal issues involved [in data breach litigation] are cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Security Breach Litig.*, No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiffs were able to certify a class; (ii) Plaintiffs were able to defeat Defendants' Motion to Dismiss their upcoming Third Amended Consolidated Class Action Complaint; (iii) summary judgment; (iv) Plaintiffs were able to establish liability and damages at trial; and (v) the final judgment was affirmed on appeal. The Settlement here is a fair and reasonable recovery for the Settlement Class in light of Defendant's defenses, and the challenging

and unpredictable path of likely protracted litigation Plaintiffs and the certified class would have faced absent the Settlement. Blatt Decl. ¶ 15.

5. Class Counsel Assumed Considerable Risk to Pursue This Matter on a Pure Contingency Basis.

In undertaking to prosecute this case on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Blatt Decl. ¶ 20. That risk warrants the requested fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 548 (1988)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award"); *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir. 1986); *York v. Alabama Senate Bd. of Ed.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986). As Judge King observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer... A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548.

The progress of this case to date shows the inherent risk faced by Class Counsel in accepting and prosecuting this matter on a contingency fee basis. Despite Class Counsel's effort in litigating this case, Class Counsel remain uncompensated for the time invested, in addition to the expenses they advanced. Blatt Decl. ¶ 20. There can be no dispute that this case entailed

substantial risk of nonpayment for Class Counsel. As of March 15, 2023, Class Counsel have devoted approximately $1,142,844.50 in attorney time and incurred litigation costs of at least $10,754.15, without the assurance that they would recover those expenses. Blatt Decl. ¶¶ 16, 17.

6. The Requested Fee Comports with Fees Awarded in Similar Cases.

An award of twenty-five percent of the Settlement Fund is below the benchmark and growing trend in this Circuit.[4] Numerous decisions within Florida District Courts and the Eleventh Circuit have found that even a 33.33% fee is well within the range of reason under the factors listed by the court in *Camden I*. *See Wolff v. Cash 4 Titles*, No. 03-22778- CIV, 2012 WL 5290155, at *5–6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third.") (collecting case law from the Middle and Southern District of Florida awarding attorneys' fees comprising one third of common fund).

Class Counsel's fee request not only falls below benchmark percentage in class actions, but also below the range of the private marketplace, where contingency fee arrangements often

[4] *Waters v. Intern. Precious Metals Corp., supra* at 1292–98 (11th Circ. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million); *Seghroughni v. Advantus Rest, Inc.*, No. 12-2000, 2015 WL 2255278, at *1 (M.D. Fla. May 13, 2015) ("An attorney's fee . . . which is one-third of the settlement fund . . . is fair and reasonable in light of the results obtained by the Lead Counsel, the risks associated with this action, the Lead Counsel's ability and experience in class action litigation, and fee awards in comparable cases."); *Wolff v. Cash 4 Titles*, No. 03-22778, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement."); *Morefield v. NoteWorld, LLC*, No. 10-117, 2012 WL 1355573 (S.D. Ga. April 18, 2012) (awarding fees of 33 1/3% of the $1,040,000 settlement fund in addition to expenses); *Atkinson v. Wal-Mart Stores, Inc.*, No. 08-691, 2011 WL 6846747, at *6 (M.D. Fla. Dec. 29, 2011) (approving class settlement with one-third of the maximum $2,020,000 common fund); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-1317, (Doc. 1557 at 8–10) (S.D. Fla. Apr. 19, 2005) (awarding class counsel 33.3% of settlement fund in part because they prosecuted the action on a wholly contingent basis); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million); *Gutter v. E.I. DuPont De Nemours & Co.*, No. 95-2152, (Doc. 626 at 7) (S.D. Fla. May 30, 2003) (awarding class counsel 33.3% of the Settlement Fund as attorneys' fees ($1,201,728.42) after expending significant time and resources on a purely contingent basis under the common fund theory).

approach or equal forty percent of any recovery. *See Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig*., Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring). Moreover, the requested fee represents a negative lodestar relative to the time spent by Class Counsel in this case.

Consequently, the attorneys' fees of $750,000.00 and litigation costs of $ 10,754.15 is appropriate and should be awarded.

7. The Remaining *Camden I* and Other Factors Favor Approval.

The remaining *Camden I* factors also support Class Counsels' fee request. The burdens of this litigation and the results obtained on behalf of Plaintiffs and the Class weigh in favor of the fee requested. The fee request is firmly rooted in "the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F.Supp.2d at 1333. "[P]roper incentives must be maintained to insure that attorneys of this caliber are available to take on cases of significant public importance like this one." *In re Checking*, 830 F. Supp. 2d at 1368.

In addition, the fact that the parties negotiated arduously and at length during mediation and numerous subsequent settlement sessions to finalize the Settlement, and that to date no class member has objected[5] to the Settlement or its provision on attorneys' fees, weighs in favor of the fee requested. *See, e.g.*, *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204 (S.D. Fla. 2006) ("The lack of significant objection from the Class supports the reasonableness of the

[5] The objection deadline is April 3, 2023.

fee request.") (collecting cases); *Gevaerts v. TD Bank*, No. 14-20744, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015).

B. An Analysis of Lodestar Confirms the Reasonableness of the Requested Attorneys' Fees

Under *Camden I*, use of the lodestar analysis is improper in common fund cases. *See In re Checking*, 830 F. Supp. 2d at 1362–63 (declining to perform lodestar cross-check because *Camden I* "mandated the exclusive use of the percentage approach in common fund cases" and noting that "courts in this Circuit regularly award fees . . . without discussing lodestar at all") (internal marks omitted). Still, other courts have used lodestar as a "cross-check" to the percentage-of-the-fund analysis. *Waters*, 190 F.3d at 1289 ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison."); *Pinto*, 513 F. Supp. 2d at 1343 (nothing that "[s]ome courts use the lodestar method as a cross-check of the percentage of the fund approach") (citing *Sunbeam*, 176 F. Supp. 2d at 1336).

To determine the lodestar amount, the "court must multiply the number of hours reasonably expended by a reasonable hourly rate." *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). "After the lodestar is determined…the court must next consider the necessity of an adjustment for results obtained." *Id*. at 1302. "If the results obtained were exceptional, then some enhancement of the lodestar might be called for." *Id*. (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987)).

The combined lodestar for all counsel who participated in the prosecution of this case on behalf of plaintiffs is $1,142.844.50, representing a combined total of 1496.40 hours[6].

Here, for the duration of this litigation, Class Counsel have expended over 1496.40 hours. Blatt Decl. ¶ 16. At their firms' respective hourly rates, the lodestar is at least $1,142.844.50. *Id.* Of course, as this Court is aware, Class Counsel will continue to invest significant time in this matter through the settlement administration process, communicating with the settlement administrator and Class Members, preparing for and attending the hearing to obtain final approval, addressing any objections and defending the Court's final judgment against appeals (if any). *Id*. That additional time will certainly bring the lodestar to an even higher amount. *Id*.

Had there been no common fund in the proposed Settlement and attorneys' fees were determined based solely on the lodestar method, Class Counsel would have sought a "substantial multiplier" to apply to their lodestar for reasons earlier discussed, in particular, the result achieved for the Class, the complexity of the dispute and issues Class Counsel had to skillfully address, and the contingent nature of Class Counsel's fee arrangement. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-3066, 2012 WL 12540344, at *5 (N.D. Ga. Oct. 26, 2012) (applying a multiplier of four times lodestar to "reflect such considerations as (1) the contingent nature of the fee; (2) the risk of the case (*i.e.*, the likelihood of success viewed at the tune of the filing); (3) the quality of representation; and (4) the result achieved," and surveying cases applying multipliers of approximately 4 to 9 times lodestar)). This would further dwarf the fees requested under the percentage-of-the-fund approach and the Settlement.

Therefore, although not required in this Circuit, it is clear from a lodestar cross-check that the requested attorneys' fees in this case are reasonable.

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[6] Please see Exhibit B to the Blatt Declaration.

C. The Litigation Costs Are Reasonable

Class Counsel seeks reimbursement of litigation costs totalling $10,754.15. Pursuant to Fed. R. Civ. P. 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). Here, a cost award is authorized by both the Settlement Agreement and the common fund doctrine. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for the benefit of a class); As detailed above, these litigation costs were advanced without guarantee of repayment and benefited the Settlement Class: filing fees, mediation fees, and other typical litigation costs that a litigant would ordinarily incur in pursuit of a favorable recovery. The total expenses incurred on behalf of Plaintiffs in this matter up through March 15, 2023 are 10,754.15[7]

Plaintiffs respectfully submit that the expenses are reasonable and the Court should approve reimbursement of their litigation costs.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the requested award of attorneys' fees twenty-five percent of the Settlement Fund, $750,000.00 and litigation costs of $10,754.15.[8]

Dated: March 17, 2023

Respectfully submitted,

/s/ Francesca Kester
Francesca Kester
Florida Bar No. 1021991

[7] *See* Exhibit B for detail on costs expended by each firm.
[8] Counsel submitted a Proposed Judgment and Final Approval Order as Exhibit A to the Settlement Agreement, which includes a provision for attorneys' fees and costs. If the Court would prefer a separate proposed order for this motion, counsel would be happy to provide one.

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Interim Co-Lead Counsel for Plaintiffs and the Class

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 2023, I electronically filed a true and correct copy of the foregoing unopposed motion with the Clerk of the Court using the CM/ECF system, which will send notification to all attorneys of record in this matter.

/s/ Francesca Kester
Francesca Kester