

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

Wendy Berry, Lorri Hulings, and Kathleen Sammons, individually and as representatives of a class of similarly situated persons, and on behalf of the FirstGroup America, Inc. Retirement Savings Plan,

Plaintiffs,

v.

FirstGroup America, Inc., FirstGroup America, Inc. Employee Benefits Committee, and Aon Hewitt Investment Consulting, Inc.,

Defendants.

Case No. 1:18-cv-00326-KLL

Judge Karen L. Litkovitz

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION
FOR ATTORNEYS' FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CLASS
REPRESENTATIVE SERVICE AWARDS**

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INTRODUCTION

In light of the Settlement that they have achieved for the participants and beneficiaries of the FirstGroup America, Inc. Retirement Savings Plan at issue in this case, Plaintiffs and Class Counsel respectfully petition the Court to approve: (1) attorneys' fees to Class Counsel in the amount of \$3,000,000 (one-third of the \$9,000,000 Settlement Fund); (2) reimbursement of \$614,047.43 in litigation costs and \$116,444.00 in settlement administration expenses; and (3) service awards in the amount of \$10,000 to each of three named Plaintiffs as Class Representatives. As discussed below, the requested distributions are appropriate under the Settlement and reasonable in comparison to awards in similar cases. Class Counsel's requested fee of one-third of the Settlement Fund is authorized under the Settlement, *see ECF No. 175-1, Am. Class Action Settlement Agreement ("Settlement")*, ¶ 6.1, and on par with the percentage fees that this Court and other courts have regularly approved in ERISA suits and similar class action settlements. Likewise, the proposed \$10,000 Class Representatives' service awards are authorized under the Settlement, *Settlement* ¶ 6.2, and within the bounds of what has been approved in other ERISA cases. Finally, the requested expenses are typical and reasonable in comparison to other cases. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions. As of the date of this motion, no Class Member has objected to the proposed distributions and Defendants do not oppose them.

BACKGROUND

I. CLASS COUNSEL'S WORK

Class Counsel has expended significant time and effort in this action and achieving the Settlement on behalf of the Settlement Class. A summary of the work Class Counsel did over more than six years of litigating this case is detailed in the accompanying declaration from Class Counsel and is summarized below.

A. Work Conducted to Date

Prior to filing, Class Counsel thoroughly investigated the claims asserted and their factual bases. *ECF No. 144-2, Decl. of Brock J. Specht Supp. Pls.’ Mot. Prelim. Approval (“First Specht Decl.”)* ¶ 9; *Decl. of Brock J. Specht Supp. Pls.’ Mot. Attys’ Fees & Costs, Admin. Expenses, & Class Reps.’ Comp. Awards (“Third Specht Decl.”)* ¶ 11. Thereafter, Class Counsel drafted the Complaint and subsequent Amended and Second Amended Complaints and successfully opposed Defendants’ motions to dismiss. *Third Specht Decl.* ¶ 11.

Class Counsel engaged in extensive discovery, including propounding numerous discovery requests, repeatedly conferring with Defendants regarding discovery, analyzed approximately 350,000 pages of documents produced by Defendants and additional data regarding the class, produced over 7,000 pages of documents to Defendants, issued subpoenas and pursued discovery from five non-parties, and reviewed documents produced by these non-parties. Class Counsel also took 14 depositions of fact witnesses and defended the depositions of the three named Plaintiffs. *Id.* Class Counsel engaged three experts and assisted them in drafting their expert reports, and either defended or deposed a total of seven expert depositions. *Id.* Class Counsel also responded to the FGA Defendants’¹ motion for summary judgment and *Daubert* motion. *Id.*

Class Counsel also engaged in substantial settlement negotiations. From approximately August 2022 to October 2022, Class Counsel and Defendant Aon Hewitt Investment Consulting, Inc.’s (“Aon”) Counsel engaged in arms-length settlement negotiations, leading to a comprehensive settlement agreement. *First Specht Decl.* ¶¶ 16-17. Class Counsel drafted a settlement agreement and exhibits thereto (including the settlement notices, former participant

¹ “FGA Defendants” means FirstGroup America, Inc. and FirstGroup America, Inc. Employee Benefits Committee.

rollover form, and the proposed preliminary approval order) to resolve the claims against Aon. *ECF No. 144-03, Class Action Settlement Agreement*. Class Counsel also prepared Plaintiffs' Preliminary Approval Motion papers and responded to FGA Defendants' objection to the proposed settlement. *ECF 144-144-06, Pls.' Mot. for Prelim. Approval & Supp. Docs.*; *ECF 154, Pls.' Reply Memo. Supp. Mot. Prelim. Approval*; *ECF 175, Suppl. Decl. of Brock J. Specht Supp. Pls.' Mot. Prelim. Approval Am. Class Action Settlement ("Second Specht Decl.")* ¶¶ 2-3. In April 2023, Class Counsel participated in a mediation with the FGA Defendants before David Geronemus and prepared a lengthy mediation statement in advance. *Second Specht Decl.* ¶ 4. Despite the good-faith efforts of the parties, the mediation was unsuccessful. *Id.* The parties later resumed arm's-length settlement negotiations and achieved a global settlement-in-principle on February 8, 2024. *Id.* ¶ 6. Class Counsel drafted the Settlement including the settlement notices, former participant rollover form, and the proposed preliminary approval order) to reflect the global settlement. *Third Specht Decl.* ¶ 11; *see Settlement*.

Class Counsel reviewed the bid received from the Settlement Administrator, Analytics Consulting LLC, ("Analytics"), reviewed the final drafts of the settlement notices prepared by Analytics, and ensured that they were timely mailed by Analytics. *Third Specht Decl.* ¶ 11. Class Counsel worked with Analytics to create a settlement website and telephone line for Class Members who wished to obtain additional information about the Settlement and communicated with Class Members who contacted our office. *Id.* Finally, Class Counsel also consulted with the Named Plaintiffs as the Class Representatives throughout the course of the case. *Id.*

B. Remaining Work to Be Performed

Class Counsel's work remains ongoing. Class Counsel will communicate with the Independent Fiduciary and will provide it with all information in connection with its review. *Id.* at ¶ 17. Class Counsel will then attend the Fairness Hearing and, if final approval is granted, supervise

the distribution of payments to eligible Class Members. *Id.* In addition, Class Counsel will continue to respond to questions from Class Members and take other actions necessary to support the Settlement through the Class Period. *Id.*

C. Class Representatives' Work

The Settlement Class Representatives (Wendy Berry, Lorri Hulings, and Kathleen Sammons) have also worked to advance the Class Members' interests. *Id.* at ¶ 25. Specifically, they (1) reviewed the allegations in the complaints bearing their names; (2) provided information and documents to Class Counsel to assist with the investigation and prosecution of this action; (3) reviewed and signed answers to interrogatories; (4) appeared for their depositions; and (5) made themselves available to answer questions from Class Counsel and stayed informed on the status of the action. *Id.*

D. Work of the Settlement Administrator and Independent Fiduciary

Analytics, the approved Settlement Administrator, disseminated the CAFA Notice, disseminated class notices to Class Members, and established the settlement websites and telephone line for Class Members. *Id.* at ¶ 22. Analytics will also review rollover forms submitted by Former Participant Class Members, calculate payments to Class Members under the Plan of Allocation, and facilitate distribution of payments if the Settlement is approved. *Id.*; *Settlement* ¶ 5.1. In addition, as Escrow Agent, Analytics will invest the monies in the Qualified Settlement Fund while approval of the Settlement and distributions to Class Members are pending, and will handle any necessary tax payment, withholding, and reporting. *Settlement* ¶¶ 4.5, 4.9. Finally, the Independent Fiduciary, Fiduciary Counselors Inc., will review the Settlement, and independently determine whether it is in the Plan's best interest to release its claims against Defendants in exchange for the relief provided. *Third Specht Decl.* ¶ 23; *Settlement* ¶ 2.2. Both DOL guidance and the Settlement call for this Independent Fiduciary review. *Settlement* ¶ 2.2.

II. REQUESTED ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE COMPENSATION

In consideration of the work summarized above and associated expenses, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys' Fees: \$3,000,000 (one-third of the Settlement Amount)
- Litigation Expenses: \$614,047.43
- Total Settlement Administrative Expenses: \$116,444 (inclusive of the below expenses)
 - Settlement Administrator and Escrow Agent: \$101,444
 - Independent Fiduciary: \$15,000
- Class Representatives' Service Awards: \$30,000 in total (\$10,000 for each Class Representative).

Third Specht Decl. ¶¶ 22-23 (addressing settlement administrative expenses). These disbursements are authorized under Article 6 of the Settlement Agreement. *Settlement* ¶¶ 6.1-6.2.

ARGUMENT

I. LEGAL STANDARD

When counsel obtain a settlement for a class, courts “may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Here, the requested distributions are authorized both under Article 6 of the Settlement Agreement and by applicable law.

A. Attorneys’ Fees

The Supreme Court “has recognized consistently 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 a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (explaining that this rule has been applied in a wide range of circumstances). “When awarding attorney’s fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved.” *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir.

1993); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (S.D. Ohio 2006). “The Court’s function is to determine what the lawyer would receive in the market and to compensate counsel at the fair market value.” *Connectivity Sys. Inc. v. Nat’l City Bank*, No. 2:08-CV-1119, 2011 WL 292008, at *12 (S.D. Ohio Jan.26, 2011); *In re Broadwing*, 252 F.R.D. at 380 (same). “Absent adequate compensation, counsel will not be willing to undertake the risk of common fund class action litigation.” *In re Broadwing*, 252 F.R.D. at 380.

“When assessing the reasonableness of a fee petition, district courts engage in a two-part analysis.” *Swigart v. Fifth Third Bank*, No. 1:11-CV-88, 2014 WL 3447947, at *5 (S.D. Ohio July 11, 2014). The court first determines the method for calculating attorneys’ fees and then considers the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974). *Satterly v. Airstream, Inc.*, No. 3:19-CV-107, 2020 WL 6536342, at *10 (S.D. Ohio Sept. 25, 2020); *Swigart*, 2014 WL 3447947, at *5; *see In re Broadwing*, 252 F.R.D. at 379-82 (applying this two-part analysis).

Courts may choose to employ either the percentage-of-the-fund method or the lodestar method to calculate attorneys’ fees, considering the unique characteristics of the case before them. *Rawlings*, 9 F.3d at 516-17; *Swigart*, 2014 WL 3447947 at *5; *In re Broadwing*, 252 F.R.D. at 381. “[I]n the Southern District of Ohio, the preferred method is to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier.” *In re Broadwing*, 252 F.R.D. at 381; *see also Swigart*, 2014 WL 3447947, at *5; *Connectivity Sys.*, 2011 WL 292008, at *13). This preference is particularly relevant in an ERISA case, where “it most closely approximates how lawyers are paid in the private market and incentivizes lawyers to maximize the Class recovery, but in an efficient manner.” *In re Broadwing*, 252 F.R.D. at 381; *see also Connectivity Sys.*, 2011 WL 292008, at *13 (providing a similar explanation in a class action

concerning the alleged breach of commercial loan agreements).

Courts next consider the six *Ramey* factors to evaluate the overall reasonableness of the fee. *Swigart*, 2014 WL 3447947 at *5; *see In re Broadwing*, 252 F.R.D. at 381 (considering the *Ramey* factors after concluding that the common-fund-percentage approach was appropriate to determine the fee). The *Ramey* factors include:

1. The value of the benefit rendered to the class;
2. Society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
3. Whether the services were undertaken on a contingent fee basis;
4. The value of the services on an hourly basis;
5. The complexity of the litigation; and,
6. The professional skill and standing of counsel on both sides.

In re Broadwing, 252 F.R.D. at 381 (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974)); *see also Swigart*, 2014 WL 3447947 at *6; *Connectivity Sys.*, 2011 WL 292008, at *13. There is no formula for weighing these factors. *Satterly*, 2020 WL 6536342, at *10; *Godec v. Bayer Corp.*, No. 1:10-CV-224, 2013 WL 1089549, at *2 (N.D. Ohio Mar. 14, 2013). Rather, a court must be mindful of the facts and circumstances of the specific case before it. *Satterly*, 2020 WL 6536342, at *10; *Godec*, 2013 WL 1089549, at *2. However, district courts in the Sixth Circuit widely regard the first *Ramey* factor as the most important. *Godec*, 2013 WL 1089549, at *3.

B. Litigation and Administrative Expenses

“Under the common fund doctrine, Class Counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs incurred in the prosecution of claims and in obtaining settlement. Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.” *Satterly*, 2020 WL 6536342, at *11 (internal citation omitted); *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-CV-516, 2019 WL 6310376, at *7 (S.D. Ohio Nov. 25, 2019) (same). The same principle applies to administrative expenses. *See Treviso v. Nat'l Football Museum, Inc.*, No. 5:17-CV-00472-CAB, 2024 WL 753560, at *8 (N.D. Ohio

Feb. 12, 2024), *report and recommendation adopted*, No. 5:17CV00472, 2024 WL 724530 (N.D. Ohio Feb. 22, 2024); *Mullins v. S. Ohio Pizza, Inc.*, No. 1:17-CV-426, 2019 WL 275711, at *5 (S.D. Ohio Jan. 18, 2019).

C. Service Awards

Finally, courts customarily approve awards for class representatives “for their efforts in [bringing the] case.” *In re Broadwing*, 252 F.R.D. at 382; *see also Brandenburg*, 2019 WL 6310376, at *7. These awards are justified because representatives’ “initiative, time, and effort [are] essential to the successful prosecution of the case.” *In re Broadwing*, 252 F.R.D. at 382. Additionally, these awards compensate class representatives for the risks undertaken in bringing the action. *See Baird v. BlackRock Institutional Tr. Co., N.A.*, No. 17-CV-01892-HSG, 2021 WL 5113030, at *9 (N.D. Cal. Nov. 3, 2021) (considering the risks the plaintiffs undertook and the duration of the ERISA case in determining the amount of the service awards); *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 SRN/JSM, 2015 WL 4246879, at *3 (D. Minn. July 13, 2015) (considering the risks ERISA litigation carries when determining the amount of the incentive awards).

In summary, the requested distributions are customary in a class action suit such as this and should be approved for the reasons set forth below.

II. THE COURT SHOULD GRANT CLASS COUNSEL’S REQUEST FOR ATTORNEYS’ FEES

The Court should grant Class Counsel’s request for attorneys’ fees because all six *Ramey* factors support the reasonableness of the amount requested and because the amount requested is in line with the fees awarded in similar actions. *See Griffin v. Flagstar Bancorp, Inc.*, No. 2:10-CV-10610, 2013 WL 6511860, at *8 (E.D. Mich. Dec. 12, 2013) (“[S]tandard fee awards as a percentage of the fund in ERISA actions . . . typically award between 30% and 33% on a percentage of the fund fee calculation.”); *see, e.g., Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153,

2021 WL 757123, at *7-9, 13 (S.D. Ohio Feb. 18, 2021) (approving \$3,500,000 in attorneys' fees, representing one-third of the settlement fund); *High St. Rehab., LLC v. Am. Specialty Health Inc.*, No. 2:12-CV-07243-NIQA, 2019 WL 4140784, at *10, 13, 15 (E.D. Pa. Aug. 29, 2019) (approving \$3,916,666.67 in attorneys' fees, representing 33.3% of the total settlement amount and explaining that "[i]n complex ERISA cases, courts in th[e] [Third] Circuit and others also routinely award attorneys' fees in the amount of one-third of the total settlement fund"); *Krueger*, 2015 WL 4246879, at *1-3 (approving \$9,166,666 in attorneys' fees, representing one-third of the monetary settlement, and explaining that courts have consistently awarded one-third contingent fees in ERISA class actions asserting breaches of fiduciary duties in the selection and retention of plan investment options and the reasonableness of defined contribution plan fees); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149-51 (S.D.N.Y. 2010) (approving \$11,665,500 in attorneys' fees, representing one-third of the recovery); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 464, 468 (E.D. Pa. 2008) (approving the requested \$4,200,000 in attorneys' fees, representing 30% of the settlement amount).

A. The Value of the Settlement Fund Supports the Requested Fees

When determining the reasonableness of a fee award, courts in the Sixth Circuit generally regard the first *Ramey* factor as the most important. *Godec*, 2013 WL 1089549, at *3. The Settlement here establishes a \$9,000,000 Qualified Settlement Fund. *Settlement* ¶¶ 1.35, 4.2. According to Plaintiffs' expert, aggregate damages to the Plan had a present value between \$40,800,000 and \$65,000,000 as of February 28, 2022. *Third Specht Decl.* ¶ 27. Based on these values, the Settlement recovers approximately 14% to 22% of the total claimed damages. This degree of recovery is in line with other class settlements and confers a valuable monetary benefit to the Class. *See Karpik*, 2021 WL 757123, at *8 (collecting cases where settlements representing between 18% and 25% of estimated damages were approved); *see, e.g., High St. Rehab.*, No. 2:12-

CV-07243-NIQA, 2019 WL 4140784, at *12, 15 (E.D. Pa. Aug. 29, 2019) (approving settlement where, “after deduction of the requested attorneys’ fees and expenses and notice and administrative expenses, the \$11.75 million fund is large enough to provide Settlement Class Members with checks that . . . would represent a recovery of 11% of the amount that Settlement Class Members would have been paid if their claims had not been denied in whole or in part”); *Mehling*, 248 F.R.D. at 462 (concluding that the monetary recovery in an ERISA class action settlement, which “represent[ed] approximately 20% of the ‘best possible’ recovery,” was comparable to other approved class settlements); *see also Griffin*, 2013 WL 6511860, at *8 (recognizing that monetary settlement is particularly valuable in ERISA suits, which are particularly uncertain given the complexity of this area of litigation). For these reasons, the first *Ramey* factor supports approving the requested attorneys’ fees.

B. The Public Interest Supports the Requested Fees

“[T]here is a public interest in ensuring that attorneys willing to represent employees in ERISA litigation are adequately paid so that they and others like them will continue to take on such cases.” *In re Broadwing*, 252 F.R.D. at 381; *see Amos v. PPG Indus., Inc.*, No. 2:05-CV-70, 2019 WL 3889621, at *1, 14 (S.D. Ohio Aug. 16, 2019) (concluding that “an award of fees incentivizes attorneys to take such cases” in a case brought under the LMRA and ERISA), *report and recommendation adopted*, No. 2:05-CV-70, 2019 WL 3980570 (S.D. Ohio Aug. 22, 2019). “Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.” *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio), *decision clarified*, 148 F. Supp. 2d 936 (S.D. Ohio 2001). This public interest is particularly relevant in the ERISA context, where “[p]rotecting retirement funds of workers is of genuine public interest” and class action suits “promote private enforcement of and compliance with important areas of federal law.” *In re Broadwing*, 252 F.R.D.

at 381. By representing approximately 26,000 Settlement Class members in this litigation, *First Specht Decl.* ¶ 3, Class Counsel gave those members the opportunity to be compensated for the injury they experienced, serving the public interest described above. Therefore, this factor supports approving the requested attorneys' fees.

C. The Risk of Taking this Case on a Contingency-Fee Basis Supports the Requested Fees

Class Counsel have worked on this case for more than six years on a contingent basis. When counsel take a case under a contingency-fee agreement, they “assume[] a real risk in taking the case, investing time, effort, and money over a period of years with no guarantee of recovery. This factor weighs in favor of approving the requested fee award.” *Karpik*, 2021 WL 757123, at *8; *see Koenig v. USA Hockey, Inc.*, No. 2:09-CV-1097, 2012 WL 12926023, at *10 (S.D. Ohio Jan. 10, 2012) (noting that a suit’s contingency-fee basis supports approving an award of attorneys’ fees that exceed the lodestar because of the risk taken by counsel in undertaking those claims).

Class Counsel also faced significant risks unique to this area of law. *See Karpik*, 2021 WL 757123, at *5-6 (discussing the significant litigation risk involved in ERISA cases). “The risk of zero recovery here was present from the inception of this case. Dismissals have been obtained in cases alleging imprudent investment selection in 401(k) plans.” *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020). Although Plaintiffs are confident that they would have prevailed at trial, there is a risk that Defendants could have prevailed if the litigation continued. *See, e.g., Lauderdale v. NFP Ret., Inc.*, No. 821CV00301JVSKEs, 2024 WL 751005, at *1 (C.D. Cal. Feb. 23, 2024); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019). And “[e]ven if Plaintiffs established a fiduciary breach, it is ‘difficult’ to measure damages in cases alleging imprudent or otherwise improper investments.” *Karpik*, 2021 WL 757123, at *5 (citing Restatement (Third) of Trusts §

100 cmt. b(1)). Thus, the increased risk associated with litigating ERISA cases also weighs in favor of approving the requested attorneys' fees.

D. The Lodestar Cross-Check Supports the Requested Fees

The fourth *Ramey* factor, the lodestar cross-check, also supports awarding the requested fees. "In this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award." *In re Broadwing*, 252 F.R.D. at 381. The cross-check is employed to evaluate the reasonableness of the fee with respect to "the value of the services on an hourly basis." *Shanechian v. Macy's, Inc.*, No. 1:07-CV-828, 2013 WL 12178108, at *6 (S.D. Ohio June 25, 2013); *Amos*, 2019 WL 3889621, at *14.

Given the complexity of the claims asserted here, Class Counsel undertook a thorough investigation of the matter prior to filing suit. *First Specht Decl.* ¶ 9. Class Counsel also engaged in extensive discovery, including reviewing approximately 350,000 pages of documents, pursuing third-party discovery, conducting 14 depositions of fact witnesses, defending the depositions of three named Plaintiffs, engaging three experts, and either defending or deposing a total of seven expert witnesses. *Third Specht Decl.* ¶ 11. In reaching this settlement, Class Counsel engaged in prolonged negotiations, including a full-day in-person mediation. *Second Specht Decl.* ¶ 4. Finally, while undertaking these negotiations, Class Counsel also continued to proceed with the litigation, replying to FGA Defendants' opposition to the proposed settlement with Aon, and conferring with the FGA Defendants regarding their concerns with the original partial settlement. *Id.* at ¶¶ 2-3.

As of the date of this motion, Class Counsel's lodestar is already \$3,501,735.00² and exceeds Class Counsel's request for attorneys' fees. *Third Specht Decl.* ¶ 15. By the time the action is concluded, and all work is complete, Class Counsel's lodestar will be even higher as ongoing work will be necessary to carry out the terms of the Settlement. *Id.* ¶ 17. Moreover, Class Counsel staffed the case efficiently. Despite the factual complexity of the case and the extensive amount of work involved in litigating for several years against two sets of well-represented defendants, over 70% of the total attorney hours were performed by a core team of four attorneys, comprising two associates and two partners. *Third Specht Decl.* ¶ 15 & *Ex. 1*. Class Counsel's efficient staffing provides further context for the reasonableness of the requested fee.

Although not requested here, "[c]ourts typically do adjust the awards upwards in common fund cases, increasing the lodestar amount by a multiple of several times itself." *Bailey v. AK Steel Corp.*, 2008 WL 553764, at *2 (S.D. Ohio Feb. 28, 2008). This multiplier can "serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved." *Amos*, 2019 WL 3889621, at *14 (quotation marks omitted). "Because of the inherent risks of litigation, courts in this district award multipliers of between approximately 2.0 and 5.0." *Karpik*, 2021 WL 757123, at *8 (quotation marks omitted) (collecting cases).

² Nichols Kaster's current billing rates for ERISA actions range from \$675 to \$975 per hour for attorneys with ten or more years of experience, \$475 to \$575 per hour for attorneys with less than ten years of experience, and \$250 per hour for paralegals and clerks. See *Third Specht Decl. Ex. 1*. These rates are consistent with the rates approved for other experienced ERISA litigators. See, e.g., *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (adopting rates of \$460 to \$998 per hour for attorneys based on years of experience); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (adopting rates of \$447 to \$974 per hour for attorneys based on years of experience).

Class Counsel does not request any multiplier. Rather, “the fee requested is less than the [lodestar], making it eminently appropriate for the risk taken by Plaintiffs’ Counsel; particularly when courts routinely grant fees that exceed the lodestar.” *Koenig*, 2012 WL 12926023, at *10; *see Amos*, 2019 WL 3889621, at *14 (concluding that a requested fee that was below the lodestar was “more than reasonable under the [l]odestar analysis,” especially because courts may enhance the lodestar with a multiplier in class action settlements to account for the risk undertaken, work quality, and public benefit achieved). Here, the requested attorneys’ fees are *less* than the actual hourly value of the work Class Counsel has already performed in this case, not to mention the remaining work that will be completed. Thus, the lodestar cross-check also weighs in favor of approving the requested attorneys’ fees.

E. The Complexity Inherent in ERISA Litigation Supports the Requested Fees

The complexity of litigating a class action alleging violations of fiduciary duties under ERISA also supports the requested fees. *See Bekker*, 504 F. Supp. 3d at 269 (“ERISA 401(k) fiduciary breach class actions are extremely complex and require a willingness to risk significant resources”); *In re Broadwing*, 252 F.R.D. at 382 (“The type of claims brought here, breaches of duty by the Plan’s fiduciaries, are based on rapidly evolving legal theories.”). “In general, ‘[m]ost class actions are inherently complex,’” and this is doubly true for ERISA class actions. *In re Broadwing*, 252 F.R.D. at 373, 382. “It is well known that ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation.” *Karpik*, 2021 WL 757123, at *9 (quotation marks omitted); *see also Griffin*, 2013 WL 6511860, at *8 (“The complexity of this ERISA litigation cannot be questioned”). “Handling a complex case such as this requires counsel with specialized skills.” *Karpik*, 2021 WL 757123, at *9. “In addition to legal expertise, counsel must possess ‘expertise regarding industry practices.’” *Id.* at *9 (quoting *Kruger*, at *3). The complexity of this litigation therefore supports the requested

attorneys' fees.

F. The Professional Skill and Standing of Counsel Supports the Requested Fees

The quality of the representation also supports the requested fees. Nichols Kaster is recognized as “experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans.” *Karpik*, 2021 WL 757123, at *6 (quoting *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017)). Class Counsel leveraged this experience throughout the prosecution of this case. The experience and qualifications of Class Counsel are summarized in Brock J. Specht’s Declaration. *Third Specht Decl.* ¶¶ 2-9. In sum, Nichols Kaster “is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this.” *Karpik*, 2021 WL 757123, at *9. Class Counsel’s experience was crucial to the outcome that was obtained and gave Plaintiffs credibility at the bargaining table.

III. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES

In addition to awarding the requested fees, the Court should approve the requested litigation and administrative expenses, as “[e]xpense awards are customary when litigants have created a common settlement fund for the benefit of a class.” *Satterly*, 2020 WL 6536342, at *11; *Brandenburg*, 2019 WL 6310376, at *7 (same).

A. Litigation Expenses

“Under the common fund doctrine, Class Counsel is entitled to reimbursement of all reasonable out-of-pocket expenses and costs incurred in the prosecution of claims and in obtaining settlement.” *Satterly*, 2020 WL 6536342, at *11 (internal citation omitted); *Brandenburg*, 2019 WL 6310376, at *7 (same). The requested expenses of \$614,047.43 reflect exactly these kinds of expenses. The requested expenses are reasonable in light of the advanced stage at which the case was settled and by comparison to the amounts awarded in similar cases. *See, e.g., Amos*, 2019 WL

3889621, at *15 (approving \$302,935 in costs and expenses); *Krueger*, 2015 WL 4246879, at *3-4 (approving \$782,209.69 in expenses); *Shanechian*, 2013 WL 12178108, at *7 (approving \$435,916 in expenses); *In re Marsh ERISA Litig.*, 265 F.R.D. at 150-52 (approving \$1,270,915.40 in expenses).

B. Administrative Expenses

The requested administrative expenses are also reasonable. The settlement notice, review of the former participant rollover forms, and payment distribution services provided by Analytics are essential to carry out the Settlement. The cost of those services (\$101,444) is reasonable in light of the services provided and amounts to approximately \$3.90 per class member. Finally, review of the Settlement by the Independent Fiduciary is called for by DOL regulations and is deemed to be a “critically important” benefit to plan participants. *Karpik*, 2021 WL 757123, at *9. Accordingly, the requested settlement administration expenses in the amount of \$116,444 should be approved. Both the total amount of these expenses and the underlying components are reasonable and customary in ERISA cases such as this. *See, e.g., id.* at *9, 13 (approving \$107,214 in settlement administration costs).

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS

The Court also should approve the requested service award to Plaintiffs as the Class Representatives. “Courts within the Sixth Circuit . . . recognize that, in common fund cases and where the settlement agreement provides for incentive award[s], class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.” *Shanechian*, 2013 WL 12178108, at *7 (quotation marks omitted). Courts reason that such awards are compensatory in nature, reimbursing class representatives whose “initiative, time, and effort were essential to the successful prosecution of the case and resulted in a significant recovery for the Class.” *In re*

Broadwing, 252 F.R.D. at 382; *see also Mehling*, 248 F.R.D. at 467 (approving awards to two named plaintiffs and explaining that they “dedicated significant amounts of time on behalf of the class, and they may have incurred risks to future employment”). Service awards are particularly important in ERISA cases, which can entail risks to the named plaintiffs and are often prolonged. *See Baird*, 2021 WL 5113030, at *9 (considering the risks the plaintiffs undertook and the duration of the ERISA case in determining the amount of the service awards); *Krueger*, 2015 WL 4246879, at *3 (considering the risks ERISA litigation carries when determining the amount of the incentive awards).

The requested award in this case is fully consistent with these recognized rationales, as Ms. Berry, Ms. Hulings, and Ms. Sammons invested significant time reviewing pleadings, providing information and documents to assist with the investigation and prosecution of the action, reviewing and signing answers to interrogatories, appearing for their depositions, making themselves available to answer questions from Class Counsel, and staying informed on the status of the action. *Third Specht Decl.* ¶ 25. Their engagement in the litigation was crucial to reaching this settlement, and they should be compensated for their contributions.

The amount of the requested service award (\$30,000 total, with \$10,000 allocated to each Class Representative) is also reasonable. *See, e.g., Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2021 WL 8013824, at *6 (S.D. Ohio Nov. 18, 2021) (approving a \$10,000 service award to each of four named plaintiffs); *Baird*, 2021 WL 5113030, at *9 (approving a \$10,000 service award to each of two named plaintiffs); *Karpik*, 2021 WL 757123, at *10, 13 (approving a \$7,500 service award to each of seven class representatives); *Kruger*, 2016 WL 6769066, at *6 (approving a \$25,000 case contribution award to each of seven class representatives) (collecting cases); *Krueger*, 2015 WL 4246879, at *3-4 (approving a \$25,000 incentive award to each of five named

plaintiffs). Given the reputational risks that they undertook and their diligence over the more than six-year duration of this case, a \$10,000 service award to each Class Representative is reasonable to compensate them for their efforts.

V. THERE HAVE BEEN NO OBJECTIONS TO THE PROPOSED DISTRIBUTIONS

Finally, it is worth noting that there have been no objections to the distributions allowed under the Settlement as of the date of this motion. The settlement notices that the Court approved explicitly disclosed that Class Counsel and the Class Representatives would seek these distributions. *See Settlement, Ex. 1-2; ECF 179, Order Prelim. Approving Am. Class Action Settlement, Approving Proc. & Form of Notice, & Sched. Final Approval Hrg.* ¶ 3. In response, no Class Member has lodged an objection. *First Specht Decl.* ¶ 3; *Third Specht Decl.* ¶ 28. This further supports the fairness of the Settlement and the reasonableness of the requested distributions. *See Bekker*, 504 F. Supp. 3d at 268 (finding the lack of objection to the request for fees and costs “to be an indication of the class’s overwhelming and justified support for their Class Counsel and the Motion”); *Satterly*, 2020 WL 6536342, at *11 (“The fact that there has been only one request to opt out of the settlement and no objections demonstrates that class members recognize the settlement’s substantial benefit as a result of Class Counsel’s efforts.”).

CONCLUSION

For the reasons set forth above, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions from the Settlement Fund.

Dated: November 7, 2024

NICHOLS KASTER, PLLP

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CERTIFICATE OF SERVICE

I, Brock J. Specht, hereby certify that I served this document on counsel of record via ECF on November 7, 2024.

/s/ Brock J. Specht
Brock J. Specht