UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY GODFREY, et al.,

Plaintiffs,

v.

GREATBANC TRUST COMPANY, et al.,

Defendants.

Case No. 1:18-cv-07918

Judge Matthew F. Kennelly

Magistrate Judge Michael T. Mason

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND CASE CONTRIBUTION AWARDS

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I. INTRODUCTION

Class Counsel's efforts on behalf of Plaintiffs Gregory Godfrey, Jeffery Sheldon, Debra Ann Kopinski, and the Class, resulted in an outstanding settlement for the participants in the McBride & Son Employee Stock Ownership Plan (the "Plan" or the "ESOP"). The main component of the settlement (the "Settlement") is a $16.5 million cash payment by Defendants, to be deposited in a qualified settlement fund (the "Fund"). The Fund will be distributed to the 207 individuals (excluding any Defendants) who held vested shares in the ESOP during the Class Period, after deduction for Court approved attorneys' fees and expenses, administrative costs, and case contribution awards. The Net Settlement Amount for distribution to Class Members will be no less than $9,945,930.53 (averaging $48,000 per shareholder). This Court preliminarily approved the Settlement. Dkt. 311.

To compensate them for their efforts, Class Counsel request a fee of one-third of the Fund, or $5.5 million. The amount requested is well within the market rate for similar cases, taking into account the complexity and risk, the results, the quality of work, and that Plaintiffs agreed to a one-third fee at the outset. In *Young v. Cnty. of Cook*, No. 06-552, 2017 WL 4164238, at *6 (N.D. Ill. Sept. 20, 2017) (Kennelly, J.), this Court held that an attorney fee of one-third of the common fund may be "on the low end of the market contingency rate" for complex and risky contingency class action litigation. In ERISA class actions in particular, a fee of one third of the common fund is the reasonable market rate in the Seventh Circuit and across the country. *See e.g.*, *Bell v. Pension Comm. of ATH Holding Co., LLC*, No. 15-2062, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting 13 ERISA cases, including eight Seventh Circuit cases, approving fees of one-third and determining that a one-third percentage is the market rate for ERISA contingency litigation).

Plaintiffs also request reimbursement of their expenses of $954,069.47, and Case Contribution Awards of $25,000 each for Mr. Godfrey, Mr. Sheldon, and Ms. Kopinski for their

time and effort in bringing this Action and helping secure the Settlement benefits for Plan participants. Without them, there would have been no case at all; and no settlement.

II. BACKGROUND AND SETTLEMENT

A. Background

Plaintiffs incorporate by reference the background information contained in Plaintiffs' Unopposed Motion and Incorporated Memorandum of Law for Preliminary Approval of Settlement (Dkt. 308) (the "Approval Motion"). The Approval Motion demonstrates that the Parties in this litigation vigorously advocated their respective positions, and that the Settlement was the product of extensive arm's length negotiations.

B. The Settlement

The Settlement requires Defendants to pay a total of $16,500,000.00 ("Settlement Amount") into the Fund for the benefit of the Class.

The Net Settlement Fund — the funds remaining after payment of Court approved attorneys' fees and expenses, Plaintiffs' case contribution awards, administrative fees, costs and taxes — will be distributed to members of the Class who held vested shares in the ESOP during the Class Period pursuant to the Plan of Allocation. Dkt. 308-1 at 47 ("the "Plan of Allocation")

The Settlement fully resolves Plaintiffs' claims that Defendants violated ERISA in connection with three transactions: (1) a Recapitalization in late 2013 of MS Companies, Inc. to a limited liability company (the "2013 Recapitalization"); (2) the payment of excessive compensation to executives, including the distribution of Class B and Class C Units of MS Companies, LLC from 2013–2017, thereby diluting the value of the Plan (the "Compensation Decisions"); and (3) the purchase of all the shares of MS Capital stock held by the Plan at a below fair market price of $187 for a total of consideration of $16,493,664, which consisted of 80,094.3643 shares for $14,977,646 in cash and 8,107.0476 shares worth $1,516,018 transferred

to MS Capital in payment of an outstanding loan from the company to the ESOP (the "2017 Transaction").

III. ARGUMENT

A. Legal Standard for Attorneys' Fee Awards

"[A]ttorneys' fees based on the common fund doctrine are appropriate in ERISA cases." *George v. Kraft Foods Glob., Inc.*, No. 07-1713, 2012 WL 13089487, at *1 (N.D. Ill. June 26, 2012) citing *Florin v. Nationsbank*, 34 F.3d 560, 563 (7th Cir. 1994). Under the common-fund doctrine, class counsel is entitled to a reasonable fee drawn from the common fund created by a settlement for the benefit of the class. *See, e.g., Boeing Co. v. VanGemert*, 444 U.S. 472, 478 (1980). In determining a reasonable fee, the Seventh Circuit directs courts to "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir 2007) quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). With respect to the market price, "a court's objective is to find the rates 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). "Ultimately, the goal is to award a fee that most closely approximates 'the market price for legal services,' which is the price to which plaintiffs and their attorneys would have agreed had they negotiated *ex ante*." *Young*, 2017 WL 4164238, at *2 quoting *In re Synthorid Mktg. Litig.*, 264 F. 3d at 718–19).

B. Class Counsel's Requested Fee is Reasonable Because it is Consistent with the Relevant Market Rate

"In a common fund class action settlement, the Seventh Circuit Court of Appeals uses a percentage of the relief obtained rather than a lodestar or other basis" to determine the market rate.

Bell, 2019 WL 4193376, at *3 citing *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998). This is particularly the case for a complex ERISA class-action litigation alleging breaches of fiduciary duties and prohibited transactions on behalf of a large class where no one class member would otherwise have the incentive to finance the litigation. *See Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004)(explaining benefits of class-action litigation where individuals have modest claims for damages, but the class as a whole has a sizable one). The rights of plan participants can therefore only be protected and enforced through a contingent fee arrangement.

"[T]he Seventh Circuit has explained that the goal of approximating the market rate can be 'informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and (4) information from other cases, including fees awarded in comparable cases.'" *In re Broiler Chicken Antitrust Litig.*, No. 16-8637, 2021 WL 5709250, at *1 (N.D. Ill. Dec. 1, 2021) quoting *Hale v. State Farm Mut. Auto. Ins. Co*., No. 12-660, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) citing *Synthroid*, 264 F.3d at 719. Those factors support the requested fee here.

1. <u>The actual fee agreement between Class Counsel and the Plaintiffs, like in other similar ERISA class actions, is a one-third fee.</u>

The fee agreements between plaintiffs and their counsel are relevant in determining the reasonability of a fee award. *See Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005)(noting that courts also may examine "actual fee contracts that were negotiated for private litigation" in analyzing market price); *Martin v. Caterpillar Inc.*, No. 07–1009, 2010 WL 11614985, at *2 (C.D. Ill. Sept. 10, 2010)("[E]ach plaintiff has signed a contingency-fee contract with Class Counsel calling for a one-third fee plus costs. Considering the paucity of cases, successfully challenging ... alleged ERISA violations, it would be unrealistic to believe that any

lawyer would undertake such a case on other than a contingency-fee basis.").

Here, all three Plaintiffs entered into a contingency representation agreement in which Plaintiffs agreed that Class Counsel would receive a one-third contingency fee, plus expenses. Declaration of Mark G. Boyko in support of this Motion and Plaintiff's Unopposed Motion for Final Approval of Settlement ("Boyko Decl.") ¶16. This agreed upon fee is in line with representation agreements commonly entered into in this District, including between plaintiffs in other similar cases and Class Counsel.

The one-third fee is also consistent with customary contingency agreements in this Circuit, ranging from 33% to 40% of the total recovery. *Kirchoff,* 786 F.2d at 323 (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled before trial); *Retsky Family Ltd. P'ship v. Price Waterhouse, LLP*, No. 97-7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001)(recognizing that customary contingent fee is "between 33 1/3% and 40%" and awarding counsel one-third of the common fund). It is also consistent with fee agreements signed by plaintiffs in other ERISA class actions. *See, e.g.*, *Martin*, 2010 WL 11614985, at *2; *Will v. General Dynamics Corp.*, No. 06–698, 2010 WL 481817, at *3 (S.D. Ill. Nov. 22, 2010).

2. <u>The risk of non-payment at the outset of the litigation justifies the requested fee.</u>

Without question, this case required a willingness by Class Counsel to risk very significant amounts of time and money in the face of vigorous resistance by Defendants. *See Ramsey v. Philips N.A.*, No. 18-1099, Dkt. 27 at 2 (S.D. Ill. Oct. 15, 2018)(granting fee request of one-third in ERISA class action in part because of plaintiff's "commitment of vast resources in the face of vigorous resistance by employers"). It is well-established that contingent fees compensate lawyers for the risk of nonpayment. "The greater the risk of walking away empty-handed, the higher the award

must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citation omitted). Thus, the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and must be incorporated into any ultimate fee award. *Florin*, 34 F.3d at 565 ("The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." (quotations and citations omitted)); *Sutton*, 504 F.3d at 694 (finding abuse of discretion where court refused to account for the risk of loss and therefore "the possibility exists that Counsel ... was undercompensated").

ERISA class actions, particularly those involving employee stock ownership plans, are a relatively recent development, and accordingly, courts have stressed the substantial risk associated with bringing such claims on contingency. *See e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147–48 (S.D.N.Y. 2010) (the newness and unsettled nature of ESOP class action litigation is in "stark contrast" to antitrust and securities class actions and therefore was far riskier to take the case on contingency for plaintiff's counsel). Indeed, this action involved very complex questions of law that have not been widely litigated. *See Ramos v. Banner Health*, No. 15-2556, 2020 WL 6585849, at *4 (D. Colo. Nov. 10, 2020) (approving fee of one third on ground that ERISA fiduciary breach litigation involves complex questions of law that have not been widely litigated and thus, come with extraordinary risk).

Here, the risk of non-payment, or payment of only part of Plaintiffs' alleged damages, was acute, particularly when the litigation commenced. The Court dismissed many of Plaintiffs' claims in their First Amended Complaint (Dkt 74), and Defendants likewise moved to dismiss Plaintiffs' Second Amended Complaint (the "SAC"). *See* Dkts. 111 and 114. The Court denied in part, and granted in part, Defendants' motions to dismiss the SAC on August 19, 2020. Dkt. 154. The SAC contains 607 paragraphs of factual allegations and sixteen legal claims for relief relating to three

extremely complex financial transactions and reorganizations. Dkt. 127. Plaintiffs' allegations relating to the three contested transactions described above were extremely complex and unique to the alleged wrongdoing in this action and, accordingly, were untested by prior litigation. Boyko Decl. ¶19. In addition to the risks of maintaining untested complex litigation against Defendants, here, Class Counsel bore the usual risk inherent in any contingent litigation — the risk that they would receive nothing at all despite investing the time and resources necessary to adequately prosecute this case. *See Gaskill*, 160 F.3d at 363. Those resources were substantial given the expenses noted below and the required use of multiple experts with various specialized backgrounds. Boyko Decl. ¶¶ 21, 23–25, 31–33.

Although Plaintiffs and Class Counsel remain confident in their claims, the outcome of this litigation was always uncertain, as was a meaningful recovery sufficient to compensate the Class and their counsel. The risks and obstacles Plaintiffs faced in obtaining a recovery are described more fully in Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Final Approval of Settlement ("Final Approval Br."), at §IV(C), but included a litany of factual disputes to be resolved at trial. Indeed, Defendants only fully admitted, without any objection or clarification, to 12 out of the 189 separate facts Plaintiffs set forth as part of their Rule 56 Statement of Material Facts in support of their motion for partial summary judgment. *See* Dkt. 290-1. And, Plaintiffs only fully admitted, without any objection or clarification, to 28 out of the 150 separate facts set forth in Defendants' Rule 56 Joint Statement of Material Facts. *See* Dkt. 267-1. Factual disputes between the parties relating to Plaintiffs' allegations were hotly contested, extensive, and would have to be resolved at trial through evidence and fact and expert testimony. Given the complex nature of Plaintiffs' allegations regarding Defendants' liability and the measure and amount of damages flowing from that liability — and Defendants' vigorous opposition to these allegations

— it would be highly likely that numerous disputes would have been resolved in battles between competing experts, each with an uncertain outcome. Defendants came well equipped for that battle, with liability and damages experts prepared to dispute the assertions of Plaintiffs and their experts as to liability and the appropriate measure of damages for each of the underlying transactions and claims. *See, e.g.*, Dkt No. 258 at 4–5, 14, 19–20. If the Court found Defendants' experts to be credible, the Class may well have been left with nothing even if Plaintiffs prevailed on all of the questions of law.

Given the extent of these fact and legal disputes, proceeding through the conclusion of a trial presented the risk of no recovery, along with additional delay. And, even if Plaintiffs had succeeded at trial, damages were uncertain and Defendants likely have appealed any judgment, resulting in further delay of any actual monetary recovery. The considerable risk undertaken by Class Counsel in prosecuting this Action on a purely contingent fee basis therefore further supports the requested fee award.

3. The caliber of Class Counsel's work justifies the requested fee.

The quality of Class Counsel's performance is also relevant to determining the market rate. *See Sutton*, 504 F.3d at 693; *Taubenfeld*, 415 F.3d at 600. Class Counsel's performance was exceptional, as shown not only by the tenacity they showed in the bringing this litigation, but also by the terms of the Settlement. As noted below, Class Counsel investigated this case in depth through massive research based on their vast experience in this space.

Class Counsel are national leaders in ERISA litigation. *See* Boyko Decl. at ¶¶5–11; Declaration of Thomas E. Clark filed in support of this Motion and Plaintiff's Unopposed Motion for Final Approval of Settlement, ("Clark Decl.") ¶¶ 4–8. Bailey Glasser attorneys have extensive ESOP litigation experience, including through trial and appeal. *See Brundle v. Wilmington Tr. Ret. & Int'l Servs. Co.*, 241 F. Supp. 3d 610 (E.D. Va. 2017)($29.7 million trial judgment); *Brundle v.*

Wilmington Trust, N.A., 919 F.3d 763, 788 (4th Cir. 2019)(affirming trial judgment); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 681 (7th Cir. 2016)(reversing trial court ruling on motion to dismiss in an ESOP class action; lawsuit settled for $2.3 million); *Jessop v. Larsen*, No. 14-916, Dkt. 195 (D. Utah May 12, 2017)($19.8 million settlement secured for ESOP plan participants in 2017); *Swain v. Wilmington Tr., N.A.*, No. 17-71, Dkt. 123 (D. Del. June 9, 2020)($5 million settlement); *Casey v. Reliance Tr. Co.*, No. 18-424, Dkt. 176 (E.D. Tex. Aug. 6, 2020)($6.25 million settlement for ESOP plan participants); *Nistra v. Reliance Tr. Co.*, No. 16-4773, Dkt. 291 (N.D. Ill. June 19, 2020)($13.36 million settlement). The Wagner Law Group is a nationally recognized law firm in the areas of ERISA & Employee Benefits, with a Tier 1 ranking from *U.S. News & World Report* in the areas of ERISA and employee benefits. Clark Decl. ¶¶4–5. The firm has provided legal advice for decades to plan sponsors and trustees involving ESOPs. *Id.* ¶5. Attorneys Clark and Mamorsky also have specialized knowledge and experience in the area of ERISA fiduciary litigation representing both plaintiffs and defendants. *Id.* ¶¶ 6–8.

As discussed in Plaintiffs' Final Approval Br., the work invested by counsel was extensive. Class Counsel vigorously prosecuted this Action and engaged in robust discovery, including exchanging and responding to Interrogatories and Requests for Documents and receiving and reviewing approximately 100,000 pages of discovery produced by the Parties and various third Parties. Boyko Decl. ¶¶13–14. Class Counsel retained and consulted with four experts, who prepared detailed reports and analyses on valuation, due, due diligence, and compensation. *Id*. ¶¶13, 19. Class Counsel took their full entitlement of fact and expert depositions and defended depositions of their clients and their experts. *Id*. ¶¶12–13.

Motion practice in this case was extensive. Class Counsel successfully defended their complaints in opposing the three motions to dismiss filed by Defendants. *See* Dkts. 23, 48, 111,

114 (the motions to dismiss) and Dkts. 74, 154 (the Court's orders denying portions of the motions to dismiss). The Parties also litigated several discovery-related motions. *See* Dkts. 30, 82, 85, 180, 191, 215. Plaintiffs filed a Motion for Class Certification on September 16, 2020. Dkt. 158. Defendants filed a joint opposition to this Motion on October 7, 2020. Dkt. 166. The Court granted Plaintiffs' Motion and certified the Class under Rule 23(b)(1) on February 21, 2021. Dkt 205. The Parties filed motions to exclude certain evidence in advance of summary judgment briefing. On June 18, 2021, Defendants filed a Motion to Strike portions of Plaintiffs' expert Daniel VanVleet's testimony. Dkt. 223. Plaintiffs filed an opposition to this Motion on June 28, 2021. Dkt. 231. The Court granted Defendants' Motion on August 30, 2021. Dkt. 248. On June 24, 2021, Plaintiffs filed a Motion to Exclude Evidence Pursuant to Rule 37(c)(1). Dkt. 227. Defendants filed an opposition to this Motion on July 6, 2021. Dkt. 242. On August 30, 2021, the Court denied Plaintiffs' Motion but permitted additional discovery. Dkt. 248. Defendants filed Motions for Summary Judgment on November 12, 2021. Dkts. 257, 260. Plaintiffs filed a Partial Motion for Summary Judgment against McBride Defendants and GreatBanc on January 14, 2022. Dkts. 265, 266. The Parties submitted extensive oppositions and replies to the Summary Judgment Motions and Partial Summary Judgment Motions, which were fully briefed as of April 4, 2022.

The parties attempted to resolve this matter with mediator Robert A. Meyer, Esq. of JAMS. Boyko Decl. ¶14. The Parties submitted mediation statements to Mr. Meyer. *Id*. Counsel for the Parties attended a one-day in-person and partly virtual mediation at the JAMS offices in New York on July 28, 2021. *Id*. The attendees vigorously engaged in the mediation process, during which the Parties' counsel each gave presentations to Mr. Meyer. *Id*. Despite much deliberation, discussion, and compromise, the Parties were not able to reach a resolution at that time. *Id*. Nevertheless, after summary judgment briefing was submitted by all sides, the Parties engaged in another all-day

virtual mediation on April 7, 2022, with the same mediator. *Id*. That mediation was also unsuccessful, but vigorous negotiations continued between the Parties, facilitated by the continued involvement of the mediator. Ultimately, the Parties were able to reach an agreement on April 18, 2022 and informed the Court that same day. *Id*.

4. Fee awards in comparable cases underscore the reasonableness of the requested fee.

Courts within the Seventh Circuit routinely award attorney's fees of one-third as a standard rate in class action cases. In the 2005 *Taubenfeld v. AON Corp.* decision for example, the district court considered a table of thirteen class actions in the Northern District of Illinois in which fees of 30% to 39% were awarded, as a benchmark to confirm that the requested fee was consistent with awards in similar cases. 415 F.3d 600 (7th Cir. 2005). A review of more recent decisions and fee awards in other districts within the Seventh Circuit confirms that a one-third percentage continues to represent the market rate.[1] The widespread approval of the one-third market rate is in line with the leading treatises on class action litigation, which identifies the average attorney fee

[1] *T.K. Through Leshore v. Bytedance Tech. Co.*, No. 19-7915, 2022 WL 888943, at *25 (N.D. Ill. Mar. 25, 2022)("In the Seventh Circuit, and elsewhere, courts regularly award percentages of 33.33% or higher to counsel in class action litigation." (internal quotation omitted)); *In re Broiler Chicken Antitrust Litig.*, No. 16-8637, 2021 WL 5709250, at *4 ("There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the 'market rate' being one-third, that is what the Court will award."); *Chambers v. Together Credit Union*, No. 19-842, 2021 WL 1948452, at *2 (S.D. Ill. May 14, 2021)(awarding attorney fees of 33.3% of common fund and collecting cases demonstrating it is market rate); *Hale*, No. 12-660, 2018 WL 6606079, at *14 (awarding one-third); *Coleman v. Sentry Ins. a Mut. Co.*, No. 15-1411, 2016 WL 6277593, at *3 (S.D. Ill. Oct. 27, 2016)(awarding one-third of the common fund and noting that "Class Counsel has shown the Court that they have routinely been awarded a contingent 33 1/3% (and in some cases more) of a Settlement Fund"); *In re Dairy Farmers of Am. Inc. Cheese Antitrust Litig*., 80 F. Supp. 3d 838, 853 (N.D. Ill. 2015) (awarding fees of one-third of common fund); *Std. Iron Works v. ArcelorMittal*, No. 08-5214, 2014 WL 7781572, at * 1–2 (N.D. Ill. Oct. 22, 2014)(same); *Fosbinder-Bittorf v. SSM Health Care of Wis.*, No. 11-592, 2013 WL 5745102, at * 2 (W.D. Wis. Oct. 23, 2013)(same). Indeed, awards exceeding one-third are not uncommon. Some courts in the District award fees at a higher percentage after deducting administrative costs, to account for the risk undertaken. *See Martin v. JTH Tax, Inc.*, No. 13-6923, Dkt. 85 (N.D. Ill. Sept. 16, 2015) (awarding 37% of fund minus notice and administrative costs and incentive award); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015) (awarding 36% of fund minus notice and administrative costs and incentive award).

as one third of the common fund. *See* Alba Conte & Herbert Newberg, *Newberg on Class Actions* §14:6 at 551 (4th ed. 2002)("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUD. 27, 35 (2004)("Taken as a whole, the evidence suggests that one third is the benchmark for privately negotiated contingent fees.").

Additionally, "attorney's fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases." *Kolinek*, 311 F.R.D. at 493–94 (citation omitted). A one-third contingency fee has been consistently approved by District Courts in this Circuit, including the Southern, Central, and Northern Districts of Illinois, for ERISA class action litigation. *See e.g.*, *Allegretti v. Walgreen Co.*, No. 19-5392, 2022 WL 484216, at *2 (N.D. Ill. Jan. 4, 2022)(approving 1/3 of $13.75 million monetary recovery plus expenses)*; Spano v. Boeing Co.*, No. 06–743, 2016 WL 3791123, at *3–4 (S.D. Ill. Mar. 31, 2016)(approving 1/3 of $57 million monetary recovery plus expenses); *Kraft Foods*, 2012 WL 13089487, at *4 (approving 1/3 of $9.5 million monetary recovery plus expenses); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *3–4 (S.D. Ill. July 17, 2015)(approving 1/3 of $62 million monetary recovery plus expenses); *Will*, 2010 WL 4818174, at *3 (approving 1/3 of $15 million monetary recovery, finding "the market rate for complex plaintiffs' attorney work in this [ERISA] case and similar cases is a contingency fee," and agreeing "a one-third fee is consistent with the market rate"); *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014)(approving 1/3 of $30 million monetary recovery plus expenses); *Nolte v. Cigna Corp.*, No. 07–2046, 2013 WL 12242015, at *4 (C.D. Ill. Oct. 15, 2013)(approving 1/3 of $35 million monetary recovery

plus expenses); *Martin*, 2010 WL 11614985, at *6 (approving 1/3 of $16.5 million monetary recovery plus expenses). *See also* Boyko Decl. ¶17. "A fee of one third of the common fund is 'the market rate for settlements of this size and in settlements concerning this particularly complex area of law,' and ***courts routinely award that percentage to class counsel in ERISA cases***.'" *Allegretti*, 2022 WL 484216, at *10 (emphasis added) quoting *Kraft Foods*, 2012 WL 13089487, at *2; *see also Bell*, 2019 WL 4193376, at *3 (noting widespread approval of contingency fee of one-third in ERISA cases). One-third is "the standard contingent percentage that employment lawyers in the Northern District of Illinois charge individual clients." *Brewer v. Molina Healthcare, Inc.*, No. 16-9523, 2018 WL 2966956, at *4 (N.D. Ill. June 12, 2018).

Courts across the country have also routinely awarded fees of one-third in complex ERISA class actions. *See e.g.*, *Kelly v. Johns Hopkins Univ.*, No. 16-2835, 2020 WL 434473, at *3 (D. Md. Jan. 28, 2020)(collecting cases and noting that the "great weight of authority more than demonstrates that a one-third fee is justified" in ERISA case alleging breaches of fiduciary duty and prohibited transactions); *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015)("[I]n comparing the requested fee with fee awards in similar cases, the relevant comparators are ERISA class actions asserting breaches of fiduciary duties[.]…In such cases, courts have consistently awarded one third contingent fees."); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 ("Courts have awarded percentage fees of one-third or higher in ERISA company stock cases."). [2]

[2] In addition to these cases, it should be noted that a volume of court opinions have approved fee requests of one-third in similar actions alleging ERISA breach of fiduciary duty and/or prohibited transactions. *See Pledger v. Reliance Tr.* Co., No. 15-4444, 2021 WL 2253497, at *11 (N.D. Ga. Mar. 8, 2021); *Moitoso et al. v. FMR LLC et al.*, No. 18-12122, Dkt. 271 (D. Mass. Feb. 26, 2021); *Henderson v. Emory Univ.*, No. 16-2920, 2020 WL 9848978, at * 5 (N.D. Ga. Nov. 4, 2020); *Beach et al. v. JPMorgan Chase Bank et al*, No. 17-563, Dkt. 232 (S.D.N.Y. Oct. 7, 2020); *Marshall v. Northrop Grumman Corp.*, No. 16-6794, 2020 WL 5668935, at *12 (C.D. Cal. Sept. 18, 2020); *Troudt v. Oracle Corp*, No. 16-175, Dkt. 236 (D. Colo.

C. The Requested Fee is Reasonable Under a Lodestar Crosscheck

While the lodestar method is "no longer recommended" in the Seventh Circuit, some courts in this Circuit employ a "rough" check against the percentage of fund method. *See, e.g., Will*, 2010 WL 4818174, at *3; *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("[C]onsideration of a lodestar cross check is not an issue of required methodology."); *Martin*, 2010 WL 11614985, at *4; *Heekin v. Anthem, Inc.*, No. 05-1908, 2012 WL 5878032, at *2 (S.D. Ind. Nov. 20, 2012)(considering "summary reports" of time, not detailed billing records). The cross check here confirms that the fee is reasonable.

To determine the reasonableness of attorneys' fees under the lodestar method, the first step is to "multiply[] a reasonable hourly rate by the number of hours reasonably expended." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983)). A reasonable hourly rate should be in line with the prevailing rate in the "community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489 (7th Cir. 2009); *see also Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003).

For purposes of the lodestar calculation, Class Counsel's hourly rates are reasonable, "considering the experience, skill, and reputation of the attorney[s] requesting fees." *Ruiz, v. JCP Logistics, Inc.*, No. 13-1908, 2016 WL 6156212, at *9 (C.D. Cal. Aug. 12, 2016). ERISA class action litigation is a national market, because the number of plaintiff's firms who have the

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July 10, 2020); *Kelly*, 2020 WL 434473, at *2; *Tussey v. ABB, Inc*., No. 06-4305, Dkt. 869 (W.D. Mo. Aug. 16, 2019); *Sims v. BB&T Corp*., No. 15-1705, 2019 WL 1993519 , at *4 (M.D.N.C. May 6, 2019); *Clark v. Duke*, No. 16-1044, 2019 WL 2579201, Dkt. 166 (M.D.N.C. June 24, 2019); *Cassell v. Vanderbilt Univ*., No. 16-2086, 2019 WL 13160853, Dkt. 174 (M.D. Tenn. Oct. 22, 2019); *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2017 WL 9614818, at * 8 (C.D. Cal. Oct. 24, 2017); *Gordan v. Mass. Mutual Life Ins. Co*., No. 13-30184, 2016 WL 11272044, at * 3 (D. Mass. Nov. 3, 2016); *Kruger v. Novant Health, Inc*., No. 14-208, 2016 WL 6769066. at * 6 (M.D.N.C. Sept. 29, 2016); *Krueger*, 2015 WL 4246879, at *2.

necessary expertise and are willing to take the risk and devote the resources to litigate complex ERISA fiduciary breach claims is small. *See Beesley*, 2014 WL 375432, at *11; *Abbott*, 2015 WL 4398475, at *11–12; Bokyo Decl.¶17; Clark Decl. ¶11. The cases are defended by national firms with ERISA expertise. Class Counsel has brought ERISA class actions in district courts within the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Boyko Decl. ¶¶6–10; Clark Decl. ¶¶ 6, 8. Thus, the relevant community for determining the hourly market rate for ERISA class actions "is a national one." *Beesley*, 2014 WL 375432, at *11; *Spano*, 2016 WL 3791123, at *11 n.2.

Class Counsel's hourly rates ranged from $650 – $975 for partners, $850 – $695 for of-counsel, $370 – $475 for associates, and $265 – $275 for paralegals. Boyko Decl. ¶25; Clark Decl. ¶15. Time spent by legal assistants and law clerks were not billed. Boyko Decl. ¶25. As of this date, Class Counsel have spent 9,134.4 hours combined litigating this case, resulting in a combined lodestar of $5,850,736.5 million to date. Boyko Decl. ¶25; Clark Decl. ¶15. The requested fee represents a lodestar multiplier of just under 1.0, which is well within (indeed, below) the range of lodestar multipliers approved by this court and others. *See e.g.*, *Spano*, 2016 WL 3791123, at *3 (ERISA class action noting lodestar multipliers can be reasonable in a range between 2 and 5) (citation omitted); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103, 123 (2d Cir. 2005) (approving multiplier of 3.5).

The hourly rates contained in the Boyko Decl. and Clark Decl. are within the range of rates approved by courts in this jurisdiction in similar cases. Another firm practicing in this narrow area of law charges approved hourly rates of $1,060 per hour for attorneys with at least 25 years of experience, $900 per hour for attorneys with 15–24 years of experience, $650 per hour for attorney with 5–14 years of experience, $490 per hour for attorneys with 2–4 years of experience, and $330

for Paralegals and Law Clerks. *Kelly*, 2020 WL 434473, at *6–7.[3] Had Class Counsel sought these rates, the lodestar multiplier would drop further below 1.0. Litigation defense attorneys also bill at similar rates.[4]

D. The Court Should Also Award Class Counsel's Reasonable Expenses Incurred in Prosecuting This Litigation

"It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigations costs and expenses, which includes such things as expert witness costs; computerized research; court reporters; travel expense; copy, phone and facsimile expenses and mediation." *Abbott*, 2015 WL 4398475, at *4 citing Fed. R. Civ. P. 23; *Boeing*, 444 U.S. at 478; *see also In re Marsh*, 265 F.R.D. at 150 (awarding reasonable expenses from common fund in ERISA class action). Bailey & Glasser has incurred $516,557.07 in reasonable litigation expenses and co-counsel The Wagner Law Group has incurred $437,512.40. Boyko Decl. ¶¶31–33; Clark Decl. ¶17. Class counsel is requesting $954,069.47, which is less than the cap of $979,000, included in the Class Notice. The largest portion of these expenses, $763,796.04, was for experts needed to prove valuation, industry practices, and due diligence. Boyko Decl. ¶¶31, 33. Other expenses included deposition transcripts, mediation fees, electronic case hosting, and travel. *Id.* ¶¶32, 33. Class Counsel's expenses here were all reasonably incurred in pursuing this litigation. Boyko Decl. ¶¶31–33; Clark Decl. ¶17. Class Counsel have reviewed the expense records carefully and determined that the expenses were necessary to the successful prosecution of this case. *Id.* These expenses were necessary to prosecute litigation of this size and complexity on behalf of the Class, and they are typical of expenses regularly awarded in large-scale class actions. Further,

[3] Other courts have approved comparable rates for the same firm in other cases in previous years. *Gordan*, 2016 WL 11272044, at *3; *Novant Health*, 2016 WL 6769066, at *4; *Spano*, 2016 WL 3791123, at *3.
[4] *See* Boyko Decl. ¶26 (Valeo Report excerpts showing that among financial litigation practice groups within the top law firms, the 2021 hourly rate average for senior partners was $1,185, for partners was $992, and for senior associates was $712).

because Class Counsel represent Plaintiffs on a contingent-fee basis, "they had a strong incentive to keep these expenses at a reasonable level." *Ameriprise*, 2015 WL 4246879, at *3 (approving over $782,000 in litigation expenses for ERISA class settlement achieved after fact discovery). Accordingly, Class Counsel request that the Court approve as reasonable expenses in the amount of $954,069.47.

E. The Case Contribution Awards to the Plaintiffs Should be Approved

Class Counsel also request that the Court grant a case contribution award of $25,000 to each of the Plaintiffs for their efforts on behalf of the Class. Case contribution awards compensating named plaintiffs for work done on behalf of the class are routinely awarded. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)(ERISA case recognizing that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *Synthroid*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

Here, Mr. Godfrey, Mr. Sheldon, and Ms. Kopinski, have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Class. Since they joined this Action, they have remained in frequent contact with Class Counsel. Boyko Decl. ¶34. Their decision to pursue this case as a class action, and not simply seek individual damages, directly benefited the Class. *Id*. They have provided documents related to their involvement in the ESOP, prepared for and sat for a deposition, were actively involved in informing Class Counsel of potential avenues for further discovery before and during the litigation, and were active participants in the settlement deliberations and process. *Id*. They should be compensated for their time and efforts on behalf of the Class, which has benefited greatly from

their representation.

The amount requested, $25,000, is comparable to other awards approved by courts in this Circuit in ERISA and other types of class action cases. *Beesley*, 2014 WL 375432, at *4 (ERISA case noting "[a]wards of $15,000 to $25,000 for a Named Plaintiff award and total Named Plaintiff awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases"); *Cook*, 142 F.3d at 1016 (upholding award of $25,000 to class representative, based on plaintiff's time expended and results obtained for the class); *Heekin*, 2012 WL 5878032, at *1 (approving $25,000 incentive award to lead class plaintiff over objection); *Desai v. ADT Security Servs., Inc.*, No. 11-1925, Dkt. 243 at ¶ 20 (N.D. Ill. Feb. 27, 2013)(awarding $30,000 incentive award to each plaintiff in TCPA class settlement). Here, the total amount requested is less than one half of one percent of the total settlement and the individual incentive awards are less than the average class member recovery, both further supporting the reasonableness of the request.

IV. THERE HAVE BEEN NO OBJECTIONS TO THE PROPOSED DISTRIBUTIONS

Finally, Class members have been on notice about the potential amount of the fee request and expenses since notice was provided, but no objections have been received to date. The objection deadline is September 19, 2022, and if any objections are received before the deadline, Class Counsel will address those in a supplemental filing. Boyko Decl. ¶35. The Settlement Notices that the Court approved and the Settlement Administrator has mailed, explicitly disclosed that (1) Class Counsel would seek attorneys' fees from the Settlement Amount, plus expenses they incurred in prosecuting the case, of no more than $5.5 million in fees and $979,000 in expenses, and a Service Award for the Plaintiffs from the Class Settlement Amount of up to $25,000 each ($75,000 total); (2) that the fee application and supporting papers will be filed on or before August

19, 2022, and that (3) objections to the Settlement must be filed with the Court on or before September 19, 2022. *See* Dkt No. 312.

V. CONCLUSION

For the reasons stated herein, Class Counsel respectfully request that the Court grant this motion and award Class Counsel's attorneys' fees in the amount of $5.5 million, Class Counsel's litigation expenses and costs in the amount of $954,069.47, and the requested case contribution award of $25,000 to each of the three Class Representatives.

Dated: August 19, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 19, 2022, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system and to be thereby served upon all registered participants identified in the Notice of Electronic Filing in this matter on this date.

/s/ Mark G. Boyko
Mark G. Boyko