

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

David Kinder, Tracy Scott, Elbert Peay, and
Cherry Crawford, individually and as
representatives of a class of similarly situated
persons, and on behalf of the Georgia-Pacific
LLC Hourly 401(k) Plan, the Georgia-Pacific
LLC 401(k) Retirement Savings Plan, and the
Koch Industries Inc. Employees' Savings
Plan,

Plaintiffs,

v.

Koch Industries, Inc., Koch Business
Solutions, LP, the Koch Benefits
Administrative Committee, and
John Does 1-30,

Defendants.

Case No. 1:20-cv-02973-MHC

**PLAINTIFFS'
MEMORANDUM OF LAW
IN SUPPORT OF 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 Koch-affiliated defined contribution plans 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 \$1,000,000 (25% of the \$4 million Settlement Fund); (2) reimbursement of \$17,658.77 in litigation costs and \$209,532 in settlement administration expenses; and (3) service awards in the amount of \$5,000 to each of the 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 25% of the Settlement Fund is authorized under the Settlement, *see Settlement, Dkt. 67-03, ¶ 8.2*, and is less than the one-third fee that this Court and other courts have "consistently recognized" as "the market rate in complex ERISA matters such as this." *Pledger v. Reliance Tr. Co.*, 2021 WL 2253497, at *8 (N.D. Ga. Mar. 8, 2021) ("*Pledger II*") (Cohen, J.).¹ Likewise, the proposed \$5,000 service

¹ *See also Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases.") *Kruger v. Novant Health*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter"); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) ("In such cases, courts have consistently awarded one-third contingent fees.").

awards are authorized under the Settlement, *see Settlement* ¶ 8.2, and within the bounds of what has been approved in other ERISA cases.² 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 also do not oppose the motion.

BACKGROUND

I. PLEADINGS AND MOTION TO DISMISS

On July 16, 2020, the initial Class Representatives, David Kinder and Tracy Scott, filed a Class Action Complaint (*Dkt. 1*) asserting claims against Defendants under ERISA in relation to management of the at-issue Plans. On September 16, 2020, Defendants filed a motion to dismiss the Complaint. *Dkt. 30*. On September 30, 2020, an Amended Complaint was filed, adding Elbert Peay and Cherry

² *See Pledger II*, 2021 WL 2253497, at *9 (approving \$25,000 service awards); *see also, e.g., Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101, Dkt. 23 (S.D. Fla. Dec. 20, 2018) (approving five \$7,500 service awards); *Alford v. United Cmty. Banks, Inc.*, No. 2:11-cv-00309, Dkt. 77, at *7 (N.D. Ga. Jan. 9, 2014) (approving a \$5,000 service award where an ERISA class action settlement was reached shortly after defendants' motion to dismiss was denied); *In re Beazer Homes USA, Inc. ERISA Litig.*, 2010 WL 11508545, at *5 (N.D. Ga. Nov. 15, 2010) (same); *In Re: HealthSouth ERISA*, No. 2:03-cv-01700, Dkt. 157, at *13 (N.D. Ala. June 28, 2006) (same); *In re Colonial BancGroup, Inc. ERISA Litig.*, 2012 WL 4856704, at *3 (M.D. Ala. Oct. 12, 2012) (approving a \$5,000 service award where ERISA class action settlement was reached while defendants' motion to dismiss was pending).

Crawford as additional Class Representatives. *Dkt. 34*. Pursuant to Fed. R. Civ. P. 15(a)(2), a Second Amended Complaint (*Dkt. 39*) and Third Amended Complaint (*3d Am. Compl., Dkt. 47*) were subsequently filed.

In their Third Amended Complaint, Plaintiffs allege that Defendants failed to prudently monitor or control recordkeeping expenses, and allowed Plaintiffs and other class members to be charged excessive amounts for recordkeeping services. *See generally 3d Am. Compl.* On October 22, 2020, Defendants filed a motion to dismiss the Third Amended Complaint. *Dkt. 48*. Plaintiffs filed a memorandum of law in opposition to Defendants' motion on November 5, 2020 (*Dkt. 50*), to which Defendants replied on November 18, 2020 (*Dkt. 51*). Defendants' motion to dismiss remained pending at the time the Court stayed the litigation pending negotiation of the present Settlement. *See Dkt. 58, 60*.

II. EARLY DISCOVERY, MEDIATION, AND SETTLEMENT

While Defendants' motion to dismiss was pending, the Settling Parties agreed to engage in early discovery to facilitate settlement discussions, which included the production of over 8,200 pages of documents and other information by Defendants. *Declaration of Kai Richter in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("First Richter Decl.")*, *Dkt. 67-02*, ¶ 11. Following production and review of these materials, and submission of written mediation

statements and supporting materials, the parties engaged in a full-day mediation with a neutral mediator, Martin F. Scheinman, on April 13, 2021. *Id.* ¶ 12. After extensive arm's length negotiations, the parties reached a settlement in principle at the conclusion of the mediation, and then prepared a comprehensive Settlement Agreement. *Id.* ¶ 13.

III. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the terms of the proposed Settlement, a Gross Settlement Amount of \$4 million will be paid to resolve the claims of the Class Members. *Settlement* ¶ 2.30. After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Compensation approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶¶ 2.35, 5.9, 6.1.³ In addition, the Settlement also provides that Defendants shall issue a new request for proposals for recordkeeping services for the Plans within 180 days of the Settlement Effective Date. *Id.* ¶ 7.1.

³ Current Participants will have their Plan accounts automatically credited with their Entitlement Amount. *Id.* ¶ 6.5. Former Participants will have the opportunity to submit a Rollover Form allowing them to have their distribution rolled over into an individual retirement account or other eligible employer plan. *Id.* ¶ 6.6. Former Participants who do not timely submit a Rollover Form will be sent a check. *Id.*

Plaintiffs filed a motion seeking preliminary approval of the Settlement on July 12, 2021. *Dkt. 67*. The Court granted that motion on July 30, 2021. *Dkt. 69*. Plaintiffs are filing the present motion 30 days in advance of the deadline for objections, pursuant the Court’s order preliminarily approving the Settlement. *Id.* ¶ 10. To date, no objections to the Settlement or the requested distributions have been received. *Declaration of Kai Richter in Support of Motion for Attorneys’ Fees and Costs, Administrative Expenses, and Class Representatives’ Compensation (“Second Richter Decl.”)* ¶ 35.

IV. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. This work is detailed in the accompanying declaration from Class Counsel, and is briefly summarized below.

A. Work Conducted to Date

Prior to filing this action, Class Counsel conducted an in-depth investigation of the Plans and the Plans’ expenses. *First Richter Decl.* ¶ 9. Thereafter, Class Counsel vigorously prosecuted the action on behalf of the Class. Among other things, Class Counsel: (1) drafted the initial class action Complaint and subsequent amended complaints; (2) responded to Defendants’ motion to dismiss; (3) drafted a comprehensive set of early discovery requests; (4) met and conferred with

Defendants during the course of informal discovery; (5) reviewed over 8,200 pages of documents, as well as several spreadsheets produced by Defendants; (6) drafted a written mediation statement; (7) participated in a full-day mediation with Defendants; and (8) consulted with the Class Representatives throughout the course of the case. *Second Richter Decl.* ¶ 18.

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) drafting the Settlement and exhibits thereto; (2) preparing Plaintiffs' Preliminary Approval Motion papers; (3) reviewing the bid received from the Settlement Administrator; (4) reviewing the final drafts of the Settlement Notices and Former Participant Rollover Form, and ensuring that they were timely mailed; (5) working with the Settlement Administrator to create a settlement website and telephone support line for Class Members; (6) communicating with Class Members; (7) communicating with the Independent Fiduciary and providing it with information in connection with its review of the proposed release on behalf of the Plans; and (8) preparing the present motion. *Id.*

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiffs' motion for final approval of the

Settlement and respond to any objections. *Id.* ¶ 24. Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to Class Members. *Id.* In addition, Class Counsel will continue to respond to questions from Class Members and take any other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

V. WORK OF CLASS REPRESENTATIVES

The Class Representatives also have worked to advance the interests of the class. Among other things, the Class Representatives: (1) reviewed the allegations in the Complaints bearing their names; (2) provided information to counsel in connection with the lawsuit; (3) communicated with counsel regarding the litigation and Settlement; and (4) reviewed the Settlement Agreement in its entirety. *Id.* ¶ 34; *see also Dkts. 67-07, 67-09, 67-11, 67-13* (Class Representative declarations).

VI. WORK OF THE SETTLEMENT ADMINISTRATOR, ESCROW AGENT, AND INDEPENDENT FIDUCIARY

In order to be administered and effectuated, the Settlement also requires time, resources, and expertise from several non-parties.

Analytics, as the approved Settlement Administrator, disseminated the Settlement Notices to Class Members, and established the settlement website and telephone support line. *Id.* ¶¶ 3.3, 12.1, 12.2; *see also Second Richter Decl.* ¶ 29. Analytics also will review the Rollover Forms submitted by Former Participant

Class Members, and coordinate distribution of payments to Class Members in the event that the Settlement receives final approval. *Settlement* ¶¶ 6.1–6.6.

The Escrow Agent will hold the monies in the Escrow Account while approval of the Settlement and distributions to Class Members are pending. *See id.* ¶¶ 5.1–5.2, 5.7.⁴ Upon final approval of the Settlement, the Settlement Administrator (or the Escrow Agent, acting as its agent) will release these funds and also execute the investment and tax qualification mandates in the Settlement. *Id.* ¶¶ 5.8, 5.10.

Finally, the Independent Fiduciary (Fiduciary Counselors, Inc.) will review the Settlement, and independently determine whether it is in the best interest of the Plans to release its claims against Defendants in exchange for the relief provided. *Id.* ¶ 3.1. This independent fiduciary review is called for by DOL regulations,⁵ and is also required by Paragraph 3.1 of the Settlement.

VII. REQUESTED ATTORNEYS’ FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CLASS REPRESENTATIVE COMPENSATION

In consideration of the work summarized above and associated expenses, the Settlement provides that Plaintiffs may seek (1) reasonable attorneys’ fees of no

⁴ Following this Court’s preliminary approval of the Settlement, the Parties learned that Northern Trust Company was unable to perform according to the terms of Article 5 the Settlement. The Parties thereupon agreed to retain Alerus Financial (“Alerus”) as the Escrow Agent. *See Second Richter Decl.* ¶ 30.

⁵ *See* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830.

more than one-fourth of the Gross Settlement Amount; (2) reasonable litigation costs and administrative expenses; and (3) class representative compensation of up to \$5,000 for each Class Representative. *Settlement ¶¶ 8.1–8.2*. Accordingly, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys’ fees: \$1,000,000 (25% of the gross settlement amount)
- Litigation Expenses: \$17,658.77
- Settlement Administration Expenses: \$209,532
 - Settlement Administrator (Analytics): \$192,032
 - Escrow Agent (Alerus): \$2,500
 - Independent Fiduciary (Fiduciary Counselors): \$15,000
- Class Representative Compensation: \$20,000 total (\$5,000 each)

ARGUMENT

I. STANDARD OF REVIEW

When counsel obtain a settlement for a class, courts “may award reasonable attorneys’ 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 8 of the Settlement and by applicable law.

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 attorneys’ fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (collecting cases). Likewise, “reasonable expenses of litigation”

may be recovered from a common fund, *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970), as well as administrative expenses of settlement, *see Benzion v. Vivint, Inc.*, 2014 WL 11531917, at *3 (S.D. Fla. June 9, 2014). Finally, class representative service awards may be awarded in ERISA cases to compensate class representatives for the risks they assumed in enforcing the statute on behalf of the class. *See Pledger II*, 2021 WL 2253497, at *9. 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 APPROVE THE REQUESTED ATTORNEYS' FEES

In a common fund settlement such as this, attorneys' fees "shall be based upon a reasonable percentage of the fund established for the benefit of the class." *In re Home Depot Inc.*, 931 F.3d 1065, 1081 (11th Cir. 2019) (quoting *Camden I Condo. Assn. v. Dunkle*, 946 F. 2d 768, 774 (11th Cir. 1991)). Although there is "no hard and fast rule mandating a certain percentage," *Camden I*, 946 F.2d at 774, "[t]he average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third." *Wolff v. Cash 4 Titles*, 2012 WL 5290155, at *5 (S.D. Fla. Sept. 26, 2012); *see also Lunsford v. Woodforest Nat'l Bank*, 2014 WL 12740375, at *15 (N.D. Ga. May 19, 2014) (collecting cases). Indeed, in ERISA actions such as this, "courts have consistently recognized that a one-third fee is the

market rate.” *Pledger II*, 2021 WL 2253497, at *8 (citing, *inter alia*, *Sims v. BB&T Corp.*, 2019 WL 1993519 (M.D.N.C. May 6, 2019) (“*Sims II*”).⁶ Here, Class Counsel’s requested fee is *less* than the typical one-third fee in ERISA cases, and falls squarely within the benchmark range for this Circuit. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested attorneys’ fees.

A. The *Camden I* Factors Confirm that a 25% Fee Is Reasonable

“The decision as to whether to award more or less than the benchmark fee is a matter committed to the discretion of this Court, guided by what have become known as the [*Camden I*] factors.”⁷ *McLendon v. PSC Recovery Sys., Inc.*, 2009 WL 10668635, at *1 (N.D. Ga. June 2, 2009). The *Camden I* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client

⁶ Lead Class Counsel (Nichols Kaster, PLLP) also served as class counsel in *Sims*. See *Second Richter Decl.* ¶ 7.

⁷ The *Camden I* factors are sometimes referred to as the *Johnson* factors by district courts; they are the same. See *Camden I*, 946 F.2d at 772 & n.3 (quoting *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989)).

or the circumstances; (8) the amount involved and the results obtained; (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 client; (12) awards in similar cases. *Camden I*, 946 F.2d at 772 n.3. Courts may also consider any objections by class members, the risks undertaken by Class Counsel, the economics involved in prosecuting class actions, and any other relevant circumstances. *Pledger II*, 2021 WL 2253497, at *6. These factors are guidelines; they are not exclusive, nor will all of the *Camden I* factors be pertinent in every case. *Monroe Cnty. Emps.’ Ret. Sys. v. S. Co.*, 2021 WL 451670, at *3 n.6 (N.D. Ga. Feb. 5, 2021). Here, the pertinent *Camden I* factors, as analyzed below, support the requested fee.⁸

1. The time and labor required (first *Camden I* factor)

The requested fee is reasonable and appropriate considering the efforts expended by counsel. *See Gevaerts v. TD Bank*, 2015 WL 6751061, at *11–12 (S.D. Fla. Nov. 5, 2015) (use of “significant resources researching, developing, pleading and prosecuting the legal claims”, as well as reviewing documents and working

⁸ The seventh and eleventh *Camden I* factors, the “time limitations imposed by the client or the circumstances” and the “the nature and length of the attorney-client relationship,” respectively, do not appear to be pertinent in this case. *See Monroe Cnty. Emps.’ Ret. Sys.*, 2021 WL 451670, at *3 nn.4–5 (concluding the same).

toward settlement, supported requested fee). As noted above, Class Counsel have invested significant time investigating the claims, drafting the various complaints, responding to Defendants' motion to dismiss, preparing early discovery requests and reviewing the documents produced by Defendants, drafting Plaintiffs' mediation statement and appearing for mediation, drafting the Settlement Agreement, seeking Court approval of its terms, liaoning with the Settlement Administrator, and communicating with the class representatives and other class members. *See supra* at 5-6. Moreover, additional work remains to be done before final approval can be granted, monies can be distributed, and the matter can be resolved. *See supra* at 6-7.

Although a lodestar cross-check is not required in the Eleventh Circuit, "courts may use it to see whether a requested fee is in the 'ballpark' of an appropriate fee." *Henderson v. Emory Univ.*, 2020 WL 9848978, *2 (N.D. Ga. Nov. 4, 2020). In "large and complicated class actions," typical lodestar multipliers⁹ "range from 2.26 to 4.5 while three appears to be the average." *Pledger II*, 2021 WL 2253497, at *8 (quoting *Cox v. Cmty. Loans of Am., Inc.*, 2016 WL 9130979, at *3 (M.D. Ga. Oct. 6, 2016)). In many cases, "much higher" multipliers have also been approved. *Pinto*

⁹ A lodestar multiplier is customary in cases such as this this, to account for the contingent nature of the representation. *See infra* at 19. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir. 1974).

v. Princess Cruise Lines, Ltd., 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (citing cases awarding lodestar multipliers between 6 and 12). Here, Class Counsel’s lodestar corresponds to a multiplier of 2.65. *See Second Richter Decl., Ex. 2.*¹⁰ This is just below “average,” *Cox*, 2016 WL 9130979, at *3, and confirms the reasonableness of the requested fee.

2. The novelty and difficulty of the questions; skill required; and experience, reputation, and ability of counsel (second, third, and ninth *Camden I* factors)

“ERISA litigation of this type is a rapidly evolving, complex, and demanding area of the law.” *Pledger II*, 2021 WL 2253497, at *7 (quoting *In re BellSouth Corp. ERISA Litig.*, No. 1:02-cv-2440, 2006 WL 8431178, at *7 (N.D. Ga. Dec. 5, 2006)).¹¹

¹⁰ The hourly rates used to calculate Class Counsel’s lodestar (and the resulting multiplier) are “reasonable and are comparable to fees that have been recently approved in [other] ERISA class actions.” *Sims II*, 2019 WL 1993519, at *3 (addressing and approving Nichols Kaster, PLLP billing rates); *see also Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (finding Nichols Kaster’s billing rates in ERISA class action to be “reasonable”). Indeed, these rates are *less* than the rates approved by this Court and other courts in similar actions. *See Pledger II*, 2021 WL 2253497, at *7 (adopting rates of \$490 to \$1,060 per hour based on years of experience); *see also Henderson*, 2020 WL 9848978, at *2 (same); *Kruger*, 2016 WL 6769066, at *4 (adopting rates of \$460 to \$998 per hour based on years of experience); *Spano v. Boeing Co.*, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same). Moreover, the hours expended were reasonable given the complex nature of the action. Other firms with less experience would not have been able to litigate the case nearly as efficiently.

¹¹ *See also Krueger*, 2015 WL 4246879, at *1 (“ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation.”); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015)

To effectively prosecute an ERISA breach of fiduciary duty action such as this, counsel must have “specialized knowledge and expertise.” *Id.*; *see also Savani v. URS Prof. Sols. LLC*, 121 F. Supp. 3d 564, 573 (D.S.C. 2015) (“Very few plaintiffs’ firms possess the skill set or requisite knowledge base to litigate... class-wide, statutorily-based claims for pension benefits”).

Class Counsel here were well-suited to the challenge. Lead class counsel (Nichols Kaster, PLLP) “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 v. Huntington Bancshares Inc.*, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021).¹² As set forth in the accompanying attorney declaration, Class Counsel have won favorable rulings on class certification and dispositive motions in several ERISA cases, recently tried three other ERISA class actions, successfully litigated an appeal before the First Circuit, and have negotiated class action settlements that have received court approval in numerous cases in addition to this case. *Second Richter Decl.* ¶¶ 7–8. Class Counsel’s specialized expertise was

(noting that ERISA 401(k) cases are “particularly complex”); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (“Many courts have recognized the complexity of ERISA breach of fiduciary duty actions.”).

¹² *See also Moreno v. Deutsche Bank Ams. Holding Corp.*, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017) (“*Moreno I*”) (“Plaintiffs’ counsel [Nichols Kaster, PLLP] are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]”)

beneficial to the class and instrumental in achieving the fair and efficient result that was obtained. Accordingly, the complexity of the case and “Class Counsel’s unique experience representing plaintiffs like Class Members in this case supports Plaintiffs’ fee request.” *Pledger II*, 2021 WL 2253497, at *7.

3. The undesirability of the case (tenth *Camden I* factor)

The same factors that made the case complex and difficult to litigate also made it undesirable to other counsel. Due to their complexity, ERISA class cases such as this “often lead[] to lengthy litigation.” *Krueger*, 2015 WL 4246879, at *1. These cases can extend for a decade before final resolution, sometimes going through multiple appeals.¹³ Moreover, “[t]he difficulty of the questions posed is borne out by recent decisions that have been decided against claims of breach of fiduciary duties.” *Pledger II*, 2021 WL 2253497, at *7. Indeed, this Court previously granted summary judgment in the defendants’ favor on a similar claim in another recent ERISA case involving allegedly excessive recordkeeping fees. *See Pledger v. Reliance Tr. Co.*, 2019 WL 10886802, at *28 (N.D. Ga. Mar. 28, 2019) (“*Pledger I*”)

¹³ *See, e.g., See Fuller v. SunTrust Banks, Inc.*, No. 1:11-cv-00784, Dkt. 295-1 at 10-11 (N.D. Ga. June 5, 2020) (“Plaintiffs and their counsel persisted despite the denial of the administrative claim, the appeal of that claim, dismissal of two of the constituent cases, and one unsuccessful appeal to the Eleventh Circuit.”); *Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time); *Tibble v. Edison Int’l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007).

(Cohen, J.). In light of these considerations, the nature of the case also supports Class Counsel's fee request. *See Henderson*, 2020 WL 9848978, at *3 (“The commitment to litigation like this may require tens of thousands of hours, years of litigation, trial, appeals, and other proceedings. Given this reality... few law firms ... are willing take the risk and devote the substantial resources necessary, all at risk of nonpayment, to litigate these complex ERISA claims.”); *McLendon*, 2009 WL 10668635, at *3 (litigation known to be “time consuming” that involves claims that “can be difficult to prove” renders a case “highly undesirable at the outset”).

At the time Class Counsel filed this action, there were no similar actions pending. *See 3d Am. Compl.* ¶ 62 (“Plaintiffs are unaware of any similar claims against Defendants by any Class members”). “[C]ounsel should be rewarded for taking on a case from which other law firms shrunk.” *In re Sunbeam Sec. Litig.* 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001). As other courts have recognized, “there is a ... public benefit in encouraging the private bar to devote resources” to enforcing remedial statutes in actions that are otherwise undesirable to litigate. *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 696 (N.D. Ga. 2001).¹⁴

¹⁴ These public policy considerations are particularly compelling in the ERISA context because “Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers.” *In re Marsh ERISA Litig.*, 265 F.R.D. at 149–50.

4. Preclusion of other employment (fourth *Camden I* factor)

A complex case such as this requires significant investigation and resources that cannot be spent on other matters. *See Gevaerts*, 2015 WL 6751061, at *13. This also supports the requested fee. “But for the time and effort they spent in this case, and given the demand for their services attributable to their high level of skill and competence, Plaintiffs’ attorneys would have spent significant time on other matters.” *Pledger II*, 2021 WL 2253497, at *7.

5. The customary fee and awards in similar cases (fifth and twelfth *Camden I* factors)

The requested fee of 25% of the settlement is not only reasonable in light of the above factors, but substantially *less* than the one-third fee that is “consistently recognized” as the “market rate” in ERISA cases such as this. *See id.* at *7–8; *see also supra* at n.1 (citing other cases). Consistent with this established benchmark, Class Counsel have received one-third fee awards in several similar ERISA cases.¹⁵ Even where courts do not award the standard one-third fee, the amount of fees

¹⁵ *See, e.g., Reetz v. Lowe’s Cos., Inc.*, No. 5:18-cv-00075, Dkt. 263 (W.D.N.C. Oct. 12, 2021); *Karpik*, 2021 WL 757123, at *1; *Intravaia v. Nat’l Rural Elec. Coop. Assoc.*, No. 1:19-cv-973, Dkt. 114 (E.D. Va. Feb. 25, 2021); *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, Dkt. 232 at ¶¶ 2, 3 (S.D.N.Y. Oct. 7, 2020); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, Dkt. 190 (W.D.N.Y. Sept. 3, 2020); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *2 (M.D.N.C. May 6, 2019) (“*Sims I*”); *Andrus v. New York Life Ins. Co.*, No. 16-05698, Dkt. 83 at ¶ 1 (S.D.N.Y. June 15, 2017) (all approving one-third fee to Nichols Kaster, PLLP).

awarded is consistently at least 25%, and often greater.¹⁶ Accordingly, this factor weighs strongly in favor of the reasonableness of the requested fee.

6. Whether the fee is fixed or contingent (sixth *Camden I* factor)

“In undertaking to prosecute this complex case entirely on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment.” *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1380 (N.D. Ga. 2019). For this reason, “[a] contingency fee often justifies a larger award of attorneys’ fees because, if the case is lost, an attorney realizes no return for investing large amounts of time and resources in the case.” *Pledger II*, 2021 WL 2253497, at *7. This further supports the reasonableness of the requested fee, which is consistent with the contingent fee that Plaintiffs and Class Counsel agreed upon at the start of the case. *See Second Richter Decl.* ¶ 32 n.2.

7. The amount involved and the results obtained (eighth *Camden I* factor)

Finally, Class Counsel obtained an excellent result for the Settlement Class. The \$4 million Gross Settlement Amount represents approximately 25% to 40% of

¹⁶ *See, e.g., Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-cv-09936, Dkt. 348 (S.D.N.Y. Mar. 7, 2019) (“*Moreno II*”) (30%); *Main v. Am. Airlines, Inc.*, No. 4:16-00473, Dkt. 138 (N.D. Tex. Feb. 21, 2018) (30%); *Toomey v. Demoulas Super Markets, Inc.*, No. 19-cv-11633, Dkt. 99 (D. Mass. Apr. 7, 2021) (25%); *Velazquez v. Mass. Fin. Services Co.*, No. 17-cv-11249, Dkt. 109 (D. Mass. Dec. 5, 2019) (25%); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858 (C.D. Cal. July 30, 2018) (25%); *Fujitsu*, 2018 WL 2183253 (25%).

the alleged excess charges paid by the Class for recordkeeping services, depending on the benchmark used for purposes of calculating a reasonable recordkeeping rate. *See First Richter Decl.* ¶ 4. This compares favorably with recoveries in other ERISA class actions.¹⁷ “Furthermore, most Class Members will not have to file a claim form but will automatically receive their distributions into their tax-deferred retirement accounts.” *Pledger II*, 2021 WL 2253497, at *8.¹⁸ Finally, in addition to this monetary relief, Defendants have agreed to meaningful prospective relief. *See supra* at 4. This further supports approval of the requested fee. *See In re BellSouth Corp. ERISA Litig.*, 2006 WL 8431178, at *8; *accord Moreno II*, No. 1:15-cv-09936, Dkt. 348 at 4 (“In light of the substantial non-monetary benefits achieved by the settlement, an upward adjustment to the baseline fee is warranted.”).

III. THE COURT SHOULD APPROVE THE REQUESTED COSTS AND EXPENSES

The requested litigation costs and settlement administration expenses also are reasonable and should be approved.

¹⁷ *See, e.g., Karpik*, 2021 WL 757123, at *8 (approving settlement that represented 30% of estimated damages); *Sims I*, 2019 WL 1995314, at *5 (19% of estimated damages); *Urakhchin*, 2018 WL 8334858 (25% of estimated damages); *Fujitsu*, 2018 WL 2183253, at *6–7 (“10% of the Plaintiffs’ most aggressive ‘all in’ measure of damages”); *accord In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that class action settlements have typically “recovered between 5.5% and 6.2% of the class members’ estimated losses”).

¹⁸ Even Former Participants are not required to submit a Rollover Form, and will automatically receive their distribution by check if they elect not to roll it over into another retirement account. *See supra* at n.3.

A. Litigation Costs

“A cost award is authorized by both the parties’ settlement agreement and the common fund doctrine.” *Henderson*, 2020 WL 9848978, at *4. The recoverable costs include all “out-of-pocket costs and expenses that Class Counsel necessarily incurred and paid in connection with the prosecution and settlement of the action.” *George*, 369 F. Supp. 3d at 1383; *see also Settlement ¶¶ 2.5, 8.1* (recoverable “Costs” include “expenses incurred by Class Counsel in connection with the Action”). Here, the total amount of costs (\$17,658.77) is limited in comparison to other ERISA actions, and is reasonable. *See, e.g., Pledger II*, 2021 WL 2253497, at *8 (approving “Expenses of Litigation” in the amount of \$705,172.30); *Henderson*, 2020 WL 9848978, at *4 (approving \$595,249.35 in expenses “associated with prosecuting the case”). Accordingly, this Court should approve the requested costs. *See Amin v. Mercedes-Benz USA, LLC*, 2020 WL 5510730, at *5 (N.D. Ga. Sept. 11, 2020) (approving litigation expenses “as a matter of course”).

B. Settlement Administration Expenses

The requested settlement administration expenses are also authorized under the common fund doctrine and Settlement Agreement, *see supra* at 9-10; *Settlement ¶¶ 2.3, 8.1*, and should be approved. The class notice, telephone and website support, and rollover processing and payment distribution services provided by Analytics are

essential to carry out the Settlement, and the cost of providing those services (\$192,032) comes to less than \$2.00 per class member based on the size of the class (~101,000). *See First Richter Decl.* ¶ 3; *Second Richter Decl.* ¶ 29. The Escrow Agent expense of \$2,500 is also reasonable in light of the responsibility of handling a \$4 million settlement fund. Finally, independent fiduciary review is “critically important” under applicable DOL regulations, *see In re Marsh ERISA Litig.*, 265 F.R.D. at 139; *supra* at n.5, and the cost of this review (\$15,000) represents less than 0.4% of the Settlement Fund. Accordingly, each of these Administrative Expenses is reasonable and appropriate. *See Reetz*, 5:18-cv-00075, Dkt. 263 at *2 (approving similar request for \$203,045 in administrative expenses, including \$160,545 to the Settlement Administrator [\$2.20 per class member], \$2,500 to the Escrow Agent, and \$40,000 to the Independent Fiduciary, finding them “reasonable and appropriate”).

IV. THE COURT SHOULD GRANT THE REQUESTED CLASS REPRESENTATIVE COMPENSATION

Finally, the requested service awards also should be approved. “In their discretion, courts typically award special compensation to class representatives” in recognition of their time and effort.” *Henderson*, 2020 WL 9848978, at *4; *Pledger II*, 2021 WL 2253497, at *9; *see also Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1218–19 (11th Cir. 2018) (recognizing “legitimate justifications” for

service awards, including to make up for financial or reputational risk, and recognize the willingness to act as a private attorney general), *aff'd in relevant part, vacated and superseded on other grounds*, 922 F.3d 1175 (11th Cir. 2019), *on rehearing en banc*, 979 F.3d 917 (11th Cir. 2020). Here, the Settlement authorizes, in the Court's discretion, class representative service awards of up to \$5,000 for each of the named Plaintiffs. For the reasons that follow, these service awards are reasonable and appropriate here.

First, “[a] substantial incentive award is appropriate in [a] complex ERISA case given the benefits accruing to the entire class in part resulting from [the named plaintiffs’] efforts.” *Henderson*, 2020 WL 9848978, at *4 (quoting *Savani*, 121 F. Supp. 3d at 577). “But for their service . . . , the Class would have received nothing.” *Pledger II*, 2021 WL 2253497, at *8–9; *Henderson*, 2020 WL 9848978, at *5.

Second, as current and former employees of Defendants, the Class Representatives faced considerable risks of alienation and reputational harm in pursuing this lawsuit. *See Pledger II*, 2021 WL 2253497, at *9; *Henderson*, 2020 WL 9848978, at *4–5. They also risked the possibility of being responsible for Defendants’ legal fees if they were ultimately unsuccessful. *See* 29 U.S.C. § 1132(g)(1); *Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350, 1356 (N.D. Ga. 2017) (Cohen, J.).

Third, the requested awards do not create a conflict between the class representatives and the class, as they are entirely discretionary with the Court and there is no indication that the class representatives compromised the interests of the class for their own gain. *See Pledger II*, 2021 WL 2253497, at *9; *Henderson*, 2020 WL 9848978, at *4–5. Thus, these awards are not “of the type prohibited” in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). *See Pledger II*, 2021 WL 2253497, at *9 (quoting *Henderson*, 2020 WL 9848978, at *5).¹⁹

Finally, the requested service awards are reasonable. The proposed awards of \$5,000 per representative are in line with awards granted in other ERISA class actions within this Circuit, *see supra* at 2 n.2, and the sum of the requested rewards represents only one half of one percent (0.5%) of the Gross Settlement Amount.

CONCLUSION

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

¹⁹ The class representatives voluntarily chose to represent the interests of the class without any expectation of special treatment. *See Dkts. 67-07–67-14* (Plaintiffs’ declarations and agreements); *accord Pledger II*, 2021 WL 2253497, at *9 (noting “unlike *Greenough* and *Pettus*, the Class Representatives in this case were not promised a ‘bonus’ or ‘salary’”); *Henderson*, 2020 WL 9848978, at *5 (same).

Dated: October 19, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font and point requirements of L.R. 5.1(C) of the United States District Court for the Northern District of Georgia, using 14-point Times New Roman font, as approved by the Court.

Dated: October 19, 2021

s/Kai Richter
Kai Richter

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: October 19, 2021

s/Kai Richter
Kai Richter