UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO: 1:22-cv-22962-AHS

GRACE ANGELO and KERSTIN THOMPSON,
on behalf of the NCLC 401(k) Plan,
themselves and all others similarly situated,

Plaintiffs,

v.

NCL CORPORATION LTD, and
NCL (BAHAMAS) LTD., A BERMUDA
COMPANY,

Defendants.
_____________________________________/

PLAINTIFF'S UNOPPOSED MOTION FOR ATTORNEYS' FEES AND COSTS

Class Representative, Kristin Thompson ("Plaintiff"),[1] individually and on behalf of all others similarly situated ("Settlement Class"), files this Unopposed Motion, and incorporated Memorandum of Law, seeking approval of attorneys' fees and costs in accordance with the Parties' class action settlement. A proposed Order is attached as Exhibit A. In further support thereof, Plaintiff respectfully submits the following:

Brief Summary

On September 19, 2023, this Court issued an Order preliminarily approving the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") between Plaintiff, on behalf of the Settlement Class, and Defendant. (ECF No. 50). The Settlement Class Administrator sent the Court-approved Notice of Settlement to all Settlement Class Members on December 17, 2023. (*See* Exhibit B, Declaration from Settlement Administrator). The objection deadline is

[1] This Motion is being filed Plaintiff Thompson and the Class only, not Ms. Angelo who is represented by separate counsel.

January 16, 2024, and the claims deadline is February 5, 2024. Plaintiff now files this Motion for Attorneys' Fees and Costs seeking approval of one-third of the Settlement amount, as well as reimbursement of litigation costs and settlement administration expenses.

As explained below, Class Counsel undertook this class action without guarantee of payment and, despite significant hurdles, achieved an excellent result on behalf of Plaintiff and the Class by securing a gross common fund totaling $615,000.00. The proposed Settlement provides an immediate benefit to the Settlement Class in the form of a large cash payment. The Settlement is the product of hard-fought litigation, which included substantial motion practice, a robust pre-suit administrative remedies process that involved the exchange of nearly 3,800 pages of substantive documents, the retention of knowledgeable and qualified experts who performed damage analyses, and arm's-length negotiations directed by a seasoned and respected mediator between experienced ERISA counsel.

Not only that, the benefits of the Settlement must be considered in the context of the risk that further protracted litigation might lead to no recovery, or to a smaller recovery for Plaintiff and the proposed Settlement Class. The Defendants mounted a vigorous defense at all stages of the litigation, and, but for the Settlement, would have continued to do so through all future stages of the litigation.

Moreover, the proposed Settlement Agreement required the parties to retain an independent fiduciary, who acted on behalf of the Plans in reviewing the Settlement for purposes of determining whether to authorize Plaintiff's Released Claims on behalf of the Plans and the Settlement Class. (Settlement Agreement § 3.1.) *See* Prohibited Transaction Exemption 2003-39, 68 FR 75632 (Dec. 31, 2003). The Plan's sponsor, NCL (Bahamas) Ltd. ("NCL"), engaged Gallagher Fiduciary Advisors, LLC ("Gallagher"), to serve in this capacity, a nationally-respected independent fiduciary. Following a thorough and objective review to ensure the Settlement's fairness to the

proposed Settlement Class, Gallagher made the following determination: "[a]fter a thorough review of the pleadings and interviews with the parties' counsel and the mediator, Gallagher has concluded that an arm's-length Settlement was achieved after hard-fought negotiations between the parties and is reasonable given the uncertainties of a larger recovery for the Class at trial and the value of claims foregone." (*See* Exhibit C, p. 3, Gallagher Letter Approving Settlement). Gallagher also concluded that the attorneys' fees sought by Plaintiff's counsel is "reasonable in light of the effort expended by Plaintiff's counsel in the litigation." *Id*.

Besides being approved by Gallagher, Plaintiff's attorneys' fee request comports with the Eleventh Circuit's decision in *Camden*, holding that "[h]enceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class"). *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

In sum, and in light of the result achieved, coupled with the risks undertaken by Class Counsel, lack of any objections whatsoever thus far (although notice just went out), and the public policy need to provide adequate incentive for attorneys to enforce the critical protection ERISA offers retirement plan participants, Class Counsel's request for attorneys' fees and costs in the amount of one-third of the Settlement Fund, plus litigation costs, is reasonable and should be awarded. In further support of this Motion, Plaintiff states the following:

I. **LITIGATION AND SETTLEMENT HISTORY**.

A. **Pre-Suit Investigation**.

Before filing this case, Class Counsel conducted a significant, in-depth analysis into Plaintiff's claims and Defendants' Plan. By way of specific example, on July 19, 2022, Class Counsel (on behalf of Ms. Angelo) sent a letter addressed to NCL "Plan Administrator" which requested certain Plan documents and submitted an administrative claim pursuant to the Plan's

mandatory administrative claims review process. On August 25, 2022, NCL acknowledged receipt of the claim notice, notified Class Counsel that the claim notice had been forwarded to the NCL Investment Committee ("Committee") for review, and produced documents in response to Plaintiff's document requests. On October 14, 2022, the Committee notified Ms. Angelo of its decision to deny the administrative claim, and the reasons for its decision. Ms. Angelo submitted an appeal on November 7, 2022, and the Committee denied the appeal on December 29, 2022.

During the course of the administrative process, NCL produced over 3,800 pages of documents relevant to Plaintiff's claims, including (1) the Plan's governing documents and trust agreements, (2) the Plan's mandatory fee-related disclosures, (3) a full set of the Committee's minutes dating back to 2016, along with presentations and reports shared with the Committee at those meetings, (4) the Plan's contracts with Prudential, (5) all versions of the Plan's Investment Policy Statement during the putative class period, (6) documents relating to the Plan's recordkeeper requests for proposal in 2018 and 2022, and (7) Ms. Angelo's quarterly account statements. On August 25, 2022, Defendants' Plan Administrator responded to Class Counsel's 29 U.S.C. § 1024(b)(4) request for information by providing approximately 3,800 pages of Plan-related documents. Those documents, in turn, assisted Class Counsel with their analysis of the claims in this case, and the ERISA violations that formed the basis of this lawsuit.

On September 16, 2022, the Original Named Plaintiff, Grace Angelo, filed a Complaint in the United States District Court for the Southern District of Florida, Case No. 1:22-cv-22962-AHS. (ECF No. 1.) She brought this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), alleging that Defendants breached their fiduciary duties relating to the management, operation, and administration of the Plans, and seeking to recover all alleged losses resulting from each breach of duty under 29 U.S.C. § 1109(a), and other equitable relief. (*See* ECF No. 1.)

On January 9, 2023, Defendants moved to dismiss the Complaint for failure to state a claim under Rule 12(b)(6) and for lack of standing pursuant Rule 12(b)(1). (ECF No. 9.) Defendants argued, among other things, that the Complaint failed to allege plausibly that Defendants breached their duty of loyalty, that the Plan paid excessive administrative/recordkeeping fees, or that the Defendants' process for evaluating investment options was deficient. (*Id.*) Ms. Angelo filed her Opposition on January 23, 2023 (ECF No. 17), along with supporting documentation. Additionally, she filed a Motion to Strike Extrinsic Evidence Attached to Defendants' Motion to Dismiss. (ECF No. 18). The Defendants filed a Reply in support of its Motion to Dismiss (ECF No. 19) on January 30, 2023. (ECF No. 19).

Next, on February 7, 2023, Ms. Angelo and Defendants Filed a Joint Motion to Stay All Deadlines and Proceedings Pending Completion of Class-Wide Mediation. (ECF No. 22). That Motion was granted by Order dated February 7, 2023. (ECF No. 23). At that point, the case was stayed to allow the parties sufficient time to mediate this case on a class basis.

C. Mediation / Settlement Negotiations.

On April 3, 2023, Ms. Angelo and Defendants and their respective counsel engaged in a full-day videoconference mediation with Robert Meyer, Esq. of JAMS, who has extensive experience handling ERISA fiduciary-breach lawsuits similar to this one. After extensive arms-length negotiations—which lasted into evening—they reached an agreement in principle, which led to the Settlement Agreement attached hereto for the Court's review.

In advance of the mediation, the participants submitted mediation briefs—which included damage analyses conducted by Plaintiff's expert—along with settlement proposals. The participants also held a pre-mediation telephone conference with Bob Meyer of JAMS, during which they exchanged additional information that helped ensure mediation would be productive. The mediation was successful, resulting in an agreement on the principal terms of the settlement,

memorialized in a fully-executed term sheet, which was finalized during the evening April 3, 2023. During the months that followed, the parties negotiated the detailed terms of the Settlement Agreement and exhibits thereto.

D. <u>The Settlement Agreement</u>.

1. <u>Benefits to Class Members</u>.

The Settlement provides for a monetary payment of $615,000.00 as compensation to the Settlement Class. (Settlement Agreement § 4.2.) This "Gross Settlement Amount" will cover the independent fiduciary fees; settlement administration fees and costs; and any Class Counsel fees and costs approved by the Court. (*Id.* § 4.2.) The remaining "Net Settlement Amount" will be distributed to Settlement Class Members pursuant to the proposed Plan of Allocation. (*See id.* §§ 4.7.1, 4.7.2.)

For those Settlement Class Members with an active account in one or more of the Plans as of March 31, 2023, automatic settlement payments will be made directly to their Plan accounts. Settlement Class Members who do not have an active account in any of the Plans as of March 31, 2023, will submit—either electronically or by mail—a simple claim form to become eligible to receive a cash payment via check.

Under the terms of the Settlement Agreement, within thirty (30) days of the entry of the Preliminary Approval Order, Defendants were required to pay $50,000 into the Qualified Settlement Fund to allow for payment of initial Administrative Expenses and Independent Fiduciary Expenses that may arise before the Court's entry of the Final Approval Order and Judgment. (Settlement Agreement § 4.2.) Within thirty (30) calendar days of the Effective Date of the Settlement Agreement, Defendants shall pay an additional $565,000 into the Qualified Settlement Fund. (A, Settlement Agreement § 4.2.) The sum of these two payments, $615,000, shall constitute the "Gross Settlement Amount." (Settlement Agreement § 4.2.)

The Settlement Fund is being administered by the Settlement Administrator, American Legal Claims Services, LLC. (*Id.* § 2.43.) The Net Settlement Amount shall be distributed to Settlement Class Members in accordance with the proposed Plan of Allocation (or as modified by the Court and agreed by the Parties). Any Net Settlement Amount remaining after the settlement distributions are made and all Administrative Costs or applicable taxes have been paid, if any, shall be returned to the Plans to defray administrative fees and expenses of the Plans; there will be no *cy pres* payment or reversion to Defendants.

2. Retention of an Independent Fiduciary.

As required by Prohibited Transaction Class Exemption 2003-39, 68 FR 75632 (Dec. 31, 2003), as amended 75 FR 33830 (June 15, 2010), the Settlement Agreement required NCL to select an Independent Fiduciary, Gallagher, to review the Settlement and provide, if the Independent Fiduciary concludes that it is appropriate, the authorization required by that Exemption on behalf of the Plans. On December 8, 2023, Gallagher provided the parties with a letter approving the settlement. A copy of that letter is attached as Exhibit C. It states, in pertinent part, as follows:

> After a thorough review of the pleadings and interviews with the parties' counsel and the mediator, Gallagher has concluded that an arm's-length Settlement was achieved after hard-fought negotiations between the parties and is reasonable given the uncertainties of a larger recovery for the Class at trial and the value of claims foregone. The fee request is also reasonable in light of the effort expended by Plaintiffs' counsel in the Litigation.[2]

Gallagher went on to find that, "[t]he Settlement is at least as favorable as an arms-length transaction agreed to by unrelated parties would likely have been. Counsel for both sides and the mediator confirmed that the Settlement was the product of hard fought, extensive negotiations." (*See* Exhibit C, Gallagher Letter, p. 3). Plaintiff respectfully submits that this Honorable Court should reach the same conclusion and grant this Motion.

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[2] *See* Exhibit C, Gallagher Letter, p. 3.

3. Attorneys' Fees and Costs.

Any Attorneys' Fees and Costs the Court may award will be paid from the Gross Settlement Fund. (*See generally* Article III of the Stip.) Under the Settlement Agreement, Class Counsel is entitled to petition the Court for an award of attorneys' fees not to exceed one-third (33.3%) of the Gross Settlement Amount, plus reasonable expenses. (*Id.*) The Settlement is not contingent on any such fees, costs, or compensation being awarded.

4. Release of Claims.

Under the terms of the Settlement Agreement, Plaintiff and the Settlement Class Members, on their own behalf and on behalf of their current and former beneficiaries, their representatives, and their successors-in-interest, and the Plan absolutely and unconditionally release and forever discharge Defendants and the other Released Parties from all Released Claims, as set forth in more detail in Section 8 of the Settlement Agreement. (*Id.* §§ 2.41, 2.42.)

5. Notice and Objections.

Pursuant to Federal Rule of Civil Procedure 23(e)(1) and (e)(5), the Settlement Agreement provides for notice to the Class and an opportunity for Settlement Class Members to object to approval of the Settlement. The proposed form and method of notice of the proposed Settlement satisfy all due process considerations and meet the requirements under Rule 23(e)(1). The Court approved the Parties' notice and notice has since been mailed out to the Settlement Class by the Settlement Administrator.

5. The Class Members' Reactions to the Settlement.

The Settlement Claims Administrator, American Legal Claims, sent the Court-approved Class Notice to the Settlement Class Members on December 15, 2023. Notices were provided to the Settlement Class in accordance with the Court's Preliminary Approval Order. (*See* Exhibit A, Settlement Administrator Declaration). Although notice was just sent out, thus far no objections

have been received. *Id.*

II. THE COURT SHOULD AWARD THE FEES AND COSTS SOUGHT.

A. The Requested Attorneys' Fees and Costs Are Reasonable And Should Be Awarded.

In accordance with binding precedent from *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir. 1991), in the Eleventh Circuit "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class". *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

Both the Eleventh Circuit and recent courts in this District have ruled that the common fund should be valued at the amount available, not the amount claimed. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–96 (11th Cir. 1999) (affirming fee award of 33-1/3% of total amount made available to class, and determining that attorney's fees may be determined based on the total benefits available, even where the actual payments to the class following a claims process are lower); *Santiago v. Univ. of Miami,* 1:20-CV-21784 (ECF No. 66) (S.D. Fla. April 7, 2022 (granting class counsel's request for attorney fee consisting of one-third of common fund, plus litigation costs, in ERISA retirement plan case nearly identical to this case); *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 15-22782-CIV, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017) ("Courts within this Circuit have routinely awarded attorneys' fees of 33 percent or more of the gross settlement fund."); *Wolff v. Cash 4 Titles*, No. 03-cv-22778, 2012 WL 5290155, at *6 (S.D. Fla. Sept. 26, 2012) (collecting cases and concluding that 33% is consistent with the market rate in class actions); *Hanley v. Tampa Bay Sports & Entm't LLC*, No. 8:19-cv-00550-CEH-CPT, 2020 WL 2517766, (M.D. Fla. Apr. 23, 2020) ("Indeed, district courts in the Eleventh Circuit routinely approve fee awards of one-third of the common settlement fund.").

Camden I is the preeminent case and binding case in this Circuit dealing with the issue of attorneys' fees in common-fund class-action cases like this one. "There is no hard and fast rule

mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Camden*, 946 F.2d at 774. As a general proposition, "the majority of common fund fee awards fall between 20% to 30% of the fund," although "an upper limit of 50% of the fund may be stated as a general rule." *Id.* at 774–75.

Although the total value recovered for the Class Members is an excellent result at $615,000.00, as discussed in *Hamilton v. SunTrust Mortgage, Inc.*, any concerns as to the value of the claims actually paid when considering Class Counsels request for attorney's fees and expenses are "contrary to the law in the Eleventh Circuit…." 2014 WL 5419507, at *7 (S.D. Fla., Oct. 24, 2014). Rather, attorneys in a class action "are entitled to an attorney's fee based upon the total benefits obtained in or provided by a class settlement, regardless of the amounts eventually collected by the Class." *Id.* (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 676 (1980); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-96 (11th Cir. 1999)); *David v. Am. Suzuki Motor Corp.*, No. 08-CV-22278, 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010) (treating settlement with ascertainable benefits as a common fund to which a percentage fee may be awarded, even if the fee is separately paid by the defendant).

Here, Plaintiff's counsel seeks fees totaling one-third of the gross common fund, totaling $615,000.00 in attorneys' fees, plus litigation costs. Such a request is in keeping with the Eleventh Circuit's pronouncements above, as well as the well-recognized precept that percentage-of-the-fund fee awards should be calculated based on the entirety of the fund available for Settlement Class Members. *See Camden*, 946 F.2d at 774; *see also Baja v. Costco*, 0:21-cv-61210-AHS (S.D. Fla. Oct. 25, 2022)(ECF. No. 56)(Judge Singhal awarded the undersigned attorney fees consisting of one-third of common fund, plus litigation expenses, in ERISA class action COBRA case); *Sawyer v. Intermex Wire Transfer, LLC*, No. 19-cv-22212, 2020 WL 5259094, at *1 (S.D. Fla. Sept. 3, 2020) (awarding one-third of the common fund); *Guarisma v. ADCAHB Medical*

Coverages, Inc., No. 13-CV-21016, [ECF No. 95] (S.D. Fla. June 24, 2015) (awarding one-third plus costs); *Reyes v. AT&T Mobility Servs., LLC*, No. 10-CV-20837, [ECF No. 196] at 6 (S.D. Fla. June 21, 2013)(awarding one-third plus costs and explaining that, "[c]ommon-fund attorney fee awards of one-third are "consistent with the trend in this Circuit.").

B. Application of the *Johnson* Factors Supports Awarding the Requested Fee.

Case law has clarified the factors to which a district court is to look in determining a reasonable percentage to award class-action counsel. These factors are: (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 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*, 946 F.2d at 772, n.3 (citing factors from *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). As set forth below, application of the *Johnson* factors used by courts in the Eleventh Circuit when awarding fees from a common fund to the Settlement achieved in this case by Class Counsel, as well as those factors unique to this case, demonstrate that an award of fees totaling one-third of Settlement Fund is appropriate.

1. Time and labor required.

As to the first *Johnson* factor, and as detailed in the attached declaration (*see* Hill Decl., ¶¶13-27), Class Counsel expended time on, among other work done on this case, each of the following: conducing an exhaustive pre-suit investigation that included a lengthy administrative exhaustion process that resulted in the production of approximately 3,800 pages of documents which assisted Plaintiff's counsel with their analysis of the claims in this case; drafting and filing

the complaint; conducting extensive research and briefing related to Defendant's Motion to Dismiss; preparing for and attending mediation; drafting, editing, and finalizing the motion seeking preliminary approval of the class settlement; reviewing and analyzing the proposed Settlement Agreement and supporting attachments, including the proposed class notification documents; participating in discussions with the Gallagher during its analysis of and investigation into the Parties' settlement; handling questions from the Settlement Administrator; and, of course, drafting this Motion. Additionally, the Motion for Final Approval still must be drafted and heard, requiring significant preparation time. Not only that, because notice just went out, the undersigned will expend significant resources and time handling inquiries from Settlement Class members.

If the Court grants final approval of the Settlement, Class Counsel will continue to represent the Class and monitor the completion of the Settlement. Class Counsel will also defend the Settlement against appeals by objectors, if any, will oversee the Settlement to ensure that Class Members receive their Settlement benefits, and will continue to respond to inquiries from Class Members. Therefore, Class Counsel will have significantly more time in this matter to bring it to full and final resolution once the case is complete.

For these reasons, and based upon the facts and authority cited herein, Class Counsel respectfully submits that this Court should find that the fees sought by Class Counsel in this action are reasonable and warranted.

2 / 3. This case presented novel and difficult questions requiring a high level of skill to perform the legal services properly.

The second *Johnson* factor recognizes that attorneys should be appropriately compensated for accepting novel and difficult cases. *Johnson*, 488 F.2d at 718. The third *Johnson* factor is the "[t]he skill requisite to perform the legal service properly." *Johnson*, 488 F.2d 718. This third factor ties directly to the second *Johnson* factor and requires the Court to "closely observe the

attorney's work product, his preparation, and general ability before the court." *Id.* Because the second and third *Johnson* factors are tied together, Plaintiff analyzes them together.

Courts in this Circuit recognize that class actions involving various legal theories are, by their nature, very difficult. *See Yates v. Mobile Cty. Personnel Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) (noting that extremely complicated litigation requires thorough and detailed research of almost every question involved); *Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 547 (S.D. Fla. 1988). One Court in this Circuit referred to ERISA 403(b) claims as "complex." *Henderson v. Emory Univ.*, No. 16-2920-CAP, 2018 WL 6332343, at *7 (N.D. Ga. Sept. 13, 2018). To be sure, unlike other common employment law-related claims, such as suits brought under the Fair Labor Standards Act, there are relatively few ERISA 401(k) class action cases in this. In fact, this is the first employer 401(k) class action settlement that has ever occurred in the State of Florida (at least of which the undersigned is aware). While such settlements have certainly occurred in other states, there are no employer 401(k) class action settlements.[3]

Not only that, but similar cases have also been dismissed and upheld on appeal, another university obtained summary judgment on most claims, and a recent trial in an excessive fee case involving a university's retirement plan resulted in a judgment for the defendant. *See Sacerdote v. New York Univ.*, 328 F.Supp.3d 273 (S.D.N.Y. 2018). As such, not only did this lawsuit present novel and complex issues of law, Plaintiff also faced recent adverse precedent. *See, e.g., Huang v. TriNet HR III, Inc.,* 8:20-CV-2293-VMC-TGW, 2023 WL 3092626 (M.D. Fla. Apr. 26, 2023)(granting summary judgment); *Cunningham v. Cornell Univ.*, No. 16-6525, 2019 WL 4735876 (S.D.N.Y. Sep. 27, 2019) (granting summary judgment); *Divane v. Northwestern Univ.*,

[3] The settlement in *Santiago v. Univ. of Miami*, 1:20-CV-21784 (ECF No. 66) (S.D. Fla. April 7, 2022 (granting class counsel's request for attorney fee consisting of one-third of common fund, plus litigation costs, in ERISA retirement plan case nearly identical to this case) is very similar to this case, but involved a 403(b) plan rather than a 401(k) plan.

No. 16-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018) (granting motion to dismiss) (affirmed, 953 F.3d 980 (7th Cir. Mar. 25) (vacated and remanded by *Hughes v. Nw. Univ*., 142 S. Ct. 737, 739 (2022)); *Wilcox v. Georgetown Univ*., No. 18-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019) (same); *Davis v. Wash. Univ. in St. Louis*, No. 17-1641, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018) (same).

Therefore, this case is extremely novel and presented difficult questions of both fact and law. Accordingly, a small subset of the Bar is presently seasoned to handle this type of case, evidenced by the relatively few number of ERISA class action cases filed (or pending) in this Circuit involving ERISA 401(k) cases or claims. Class Counsel had the expertise to bring this case and the expertise to marshal it to a favorable outcome. Few lawyers have the skill and wherewithal to see this case through against a sophisticated and well-funded Defendant and top-notch Defense Counsel, to the conclusion Plaintiff will later present for Final Approval. This factor also weighs heavily in favor of the reasonableness of the requested fee.

The Eleventh Circuit recognizes skill as the "ultimate determinate of compensation level," as "reputation and experience are usually only proxies for skill." *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1300 (11th Cir. 1990). Applying these factors, Class Counsel have shown themselves to be highly skilled. The complexity of this innovative area of class action litigation, the genuine possibility of Defendant's success in having the case dismissed on standing or other grounds, the dearth of case law in this Circuit on 401(k) class, the ability to achieve a favorable outcome despite highly skilled Defense counsel, and the complexity inherent with any class action, all demonstrate that Class Counsel are highly skilled practitioners. This weighs in favor of finding the fee sought of one-third of the common fund to be reasonable.

4. <u>Preclusion of other employment</u>.

The fourth *Johnson* factor is "[t]he preclusion of other employment by the attorney due to acceptance of the case." *Johnson*, 488 F.2d at 718. This factor requires the dual consideration of otherwise available business which is foreclosed because of conflicts of interest arising from the representation, and the fact that once the employment is undertaken, the attorney is not free to use the time spent on the case for other purposes.

Here the hours required to prosecute this action limited the amount of time and resources that Class Counsel was available to devote to other matters over the period of this litigation. A significant amount of Counsel's time was devoted to this case while briefing Defendant's Motion to Dismiss and during the time leading up to and during mediation. Additional work performed is outlined in the attached declaration of the undersigned. Moreover, this case involved two separate law firms on Plaintiff's side, and a total of four different attorneys from those two firms. While the undersigned did much of the day-to-day work, Mr. Cabassa and Amanda Heystek from Wenzel Fenton Cabassa, P.A., also performed work in this case. Additionally, Plaintiff's lead counsel, Mike McKay, from McKay Law, LLC, spent an equal amount of time (if not more) litigating this case. Declarations from each of these attorneys are attached hereto in support of this Motion. Thus, this factor also militates in favor of finding the Requested Fee reasonable.

5. <u>Customary fee</u>.

The customary fee for counsel representing a plaintiff in an employment matter such as this depends on the experience and skill level of the involved attorneys. The fee sought by Plaintiff's Counsel is reasonable and customary in class actions in this Circuit. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–96 (11th Cir. 1999) (affirming fee award of 33-1/3% of total amount made available to class, and determining that attorney's fees may be determined based on the total benefits available, even where the actual payments to the class following a claims process are lower); *Santiago v. Univ. of Miami,* 1:20-CV-21784 (ECF No. 66) (S.D. Fla. April 7,

2022 (granting class counsel's request for attorney fee consisting of one-third of common fund, plus litigation costs, in ERISA retirement plan case nearly identical to this case); *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 15-22782-CIV, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017) ("Courts within this Circuit have routinely awarded attorneys' fees of 33 percent or more of the gross settlement fund."); *Wolff v. Cash 4 Titles*, No. 03-cv-22778, 2012 WL 5290155, at *6 (S.D. Fla. Sept. 26, 2012) (collecting cases and concluding that 33% is consistent with the market rate in class actions); *Hanley v. Tampa Bay Sports & Entm't LLC*, No. 8:19-cv-00550-CEH-CPT, 2020 WL 2517766, (M.D. Fla. Apr. 23, 2020) ("Indeed, district courts in the Eleventh Circuit routinely approve fee awards of one-third of the common settlement fund."). This factor also supports granting the Requested Fee.

6. <u>The case was taken on contingency</u>.

The sixth *Johnson* factor concerns the type of fee arrangement (hourly or contingent) entered by the attorney. *Johnson*, 488 F.2d at 718. "A contingency fee arrangement often justifies an increase in the award of attorneys' fees." *Behrens v. Wometco Enters*., 118 F.R.D. 534, 548 (S.D. Fla. 1988); *see also Hall v. Board of School Comm'rs*, 707 F.2d 464, 465 (11th Cir. 1983) (concluding that district court abused its discretion where it failed to award an enhancement of the amount of attorneys' fees where plaintiff's counsel was retained under a contingency fee agreement). Class Counsel undertook significant financial risk in prosecuting this case because it was taken on a contingency basis with no guarantee of recovery. Plaintiff pursued difficult claims against a well-funded Defendant. There were no assurances that Plaintiff would survive early motion practice, summary judgment, or trial, much less achieve a $615,000.00 recovery for the class.

To obtain this result, Plaintiff's Counsel incurred significant fees in prosecuting this action and has received no compensation thus far. Moreover, there was a very real possibility that

Plaintiff's Counsel would not recover anything for their work if Defendant was successful at the pleading stages of litigation with a motion to dismiss, or later at summary judgment, trial or, later still, on appeal. For these reasons, this factor supports the approval of the requested amount of attorneys' fees. *Waters v. Cook's Pest Control, Inc.*, No. 2:07-cv-00394-LSC, 2012 WL 2923542, at *17 (N.D. Ala. July 17, 2012).

7. <u>Time Limitations</u>.

"Priority work that delays the lawyer's other legal work is entitled to some premium. This factor is particularly important when new counsel is called in to prosecute the appeal or handle other matters at a late stage in the proceedings." *Johnson*, 488 F.2d at 718. This case involved significant hours of work and demanded much of Plaintiff's Counsel's time. Thus, this factor also cuts in favor of finding the fee sought reasonable.

8. <u>Amount involved and the results obtained</u>.

Class Counsel secured from Defendant a gross common fund totaling $615,000.00 on behalf of the Settlement Class. In doing so, Class Counsel effectively and quickly achieved a high-dollar Settlement that provides meaningful monetary relief for all Class Members, despite significant litigation risks which could have resulted in the Class achieving a significantly worse recovery, or even no recovery at all. Accordingly, given the excellent results achieved, this factor weighs heavily in favor of awarding the Requested Fee.

9. <u>Experience, Reputation, and Ability of the Attorneys</u>.

This case has, at all stages, been handled on both sides by very experienced lawyers whose reputations for effective handling of complex litigation are known throughout Florida, and even throughout the country. Plaintiff's Counsel have set forth their qualifications and prior experience in the Declarations attached to this Motion. This factor also weighs in favor of awarding the Requested Fee.

10. <u>Undesirability of the case</u>.

In the above sections Plaintiff highlighted the complexity and skill required to prosecute this action. The expense and time involved in prosecuting such litigation on a contingent basis, with no guarantee or high likelihood of recovery would make this case highly undesirable for many attorneys. The requested fee of one-third of the monetary recovery is reasonable and appropriate given the significant risk of nonpayment in these types of cases due to the novel nature of this case and adverse precedents. *Columbus Drywall & Insulation, Inc. v. Masco Corp*., No. 04-3066-JEC, 2008 WL 11234103, at *3 (N.D. Ga. Mar. 4, 2008). For this case, the risk of nonpayment was tremendous, especially since a very recent ERISA excessive fee case that went to trial resulted in judgment for the defendant. *Sacerdote v. New York Univ*., 328 F. Supp. 3d 273 (S.D.N.Y. 2018). The risk of nonpayment is further illustrated by courts granting summary judgment in defendant's favor in similar cases very recently, including in this Circuit. *See, e.g., Huang v. TriNet HR III, Inc.,* 8:20-CV-2293-VMC-TGW, 2023 WL 3092626 (M.D. Fla. Apr. 26, 2023); *see also Cunningham v. Cornell Univ*., No. 16-6525, 2019 WL 4735876 (S.D.N.Y. Sep. 27, 2019).

Moreover, even if the class obtains a trial judgment, recovery is far from certain, and years of appeals may follow. The Settlement is even more impressive when considering the substantial risks of non-recovery in this case. ERISA retirement plan class action cases are not "sure things" or "slam dunks." Unlike other employment law statutes, attorneys' fees are discretionary. Therefore, this factor, too, supports the requested amount of attorneys' fees sought in this Motion.

11. <u>Nature and length of the professional relationship with the client</u>.

Plaintiff's Counsel was not representing a long-term client in this matter. This factor is neutral.

12. <u>Awards in similar cases</u>.

"The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court's circuit." *Johnson*, 488 F.2d at 719. In similar ERISA excessive fee cases, district courts have consistently recognized that a one-third fee is the market rate. *See Santiago v. Univ. of Miami*, 1:20-CV-21784 (ECF No. 66) (S.D. Fla. April 7, 2022) (granting class counsel's request for attorney fee consisting of one-third of common fund, plus litigation costs, in ERISA retirement plan case nearly identical to this case); *Clark v. Duke Univ.*, No. 16-1044, 2019 WL 2579201, at *3 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, No. 15-1705, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019); *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016), *Abbott v Lockheed Martin Corp*., No. 06-701, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015)., In each of those cases, the district courts awarded one-third of the settlement to cover attorney's fees. This great weight of authority more than demonstrates that a one-third fee is justified in this case.

This is a highly complex case with numerous issues that were vigorously contested. *Smith v. Krispy Kreme Doughnut Corp*., No. 05-187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) (noting "ERISA law is highly complex"); *see Goldenberg v. Marriott PLP Corp*., 33 F.Supp.2d 434, 439 (D. Md. 1998) (finding the case was complex based on a "regulatory climate in flux."). The "rapidly evolving" area of law places demands on counsel and the Court that are "complex and require the devotion of significant resources." *In re Wachovia Corp. ERISA Litig*., No. 09-262, 2011 WL 5037183, at *4 (W.D.N.C. Oct. 24, 2011). Excessive fee litigation "entails complicated ERISA claims that are not only dependent on the statute but also on various regulations that implement ERISA." *Martin v. Caterpillar, Inc*., No. 07-CV-1009, 2010 WL 3210448, at *2 (C.D. Ill. Aug. 12, 2010). It also involves "novel questions of law." *Tussey v. ABB, Inc*., No. 06-4305, 2012 WL 5386033, at *3 (W.D. Mo. Nov. 2, 2012). The size and complexity of the issues before the Court, and the novelty of the litigated claims involving a 401(k)

plan, support the one-third fee sought. In sum, the amount of fees and costs sought here total one third of the Settlement common fund. One-third of a common fund is well in line with fees generally awarded in class action cases, and for settlements of this amount and, pursuant to the factors discussed above, should be deemed reasonable.

III. <u>THE COSTS SOUGHT SHOULD BE AWARDED</u>.

Pursuant to the Parties' settlement agreement, Plaintiff is are entitled to recover her costs. Class Counsel seek $22,174.50 in reimbursable costs. "Courts typically allow counsel to recover their reasonable out-of-pocket expenses. Indeed, courts normally grant expense requests in common fund as a matter of course." *Id.* at *6; *see also Dowdell v. City of Apopka*, 698 F.2d 1181, 1191-92 (11th Cir. 1983). The requested award of costs and expenses here consists of mediation and case-related travel costs, and the Court should find these expenses to be in line with normal expenditure amounts. Those costs include the following:

- For the Wenzel Firm a total of $10,365.00 is sought in costs, specifically: $402 in filing fees; $25.50 in postage; $200 paid for McKay pro hac vice motion; $4,737.50 WFC firm portion of mediation invoice; and $5,000 for expert witness fees;

- For the McKay firm a total of $11,809.50 in costs is sought, specifically: $6,250.00 in expert costs; $4,737.50 for the McKay firm portion of mediation invoice; and, finally, $822.00 for travel costs for upcoming final hearing.

The costs sought herein by Class Counsel are reasonable and should be awarded from the common fund. *See James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-T-23JSS, 2017 WL 2472499, at *2 (M.D. Fla. June 5, 2017).

WHEREFORE, Plaintiff respectfully moves this Court to grant this Motion and award them attorneys' fees in the amount of one-third of the total common fund ($205,000.00), plus litigation costs in the amount of $22,174.50, for a total fee and cost award to Plaintiff's counsel consisting of $227,174.50. A proposed Order is attached as Exhibit A.

Certificate of Compliance with Local Rule 7.1

Pursuant to Local Rule 7.1 of the District Court for the Southern District of Florida, counsel for Plaintiff certifies that Defendant does not oppose this Motion.

Dated this 18th day of December, 2023.

Respectfully submitted,

/s/ *Brandon J. Hill*
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2023, I caused a true and correct copy of the foregoing to be filed using the Clerk of Court's CM/ECF system, which then caused a notice of electronic filing on all Counsel of Record.

/s/ *Brandon J. Hill*
BRANDO N J. HILL