

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**RAY STOLL, HEIDI IMHOF,  
and CHASE WHITMAN,  
on behalf of B.W., a minor child,  
individually and on behalf of  
all others similarly situated,**

**Plaintiff,**

v.

**Case No.: 8:20-cv-1798-CEH-AAS**

**MUSCULOSKELETAL INSTITUTE,  
CHARTERED d/b/a  
FLORIDA ORTHOPAEDIC INSTITUTE.**

**Defendant.**

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**REPORT AND RECOMMENDATION**

Plaintiffs Ray Stoll, Heidi Imhof, Chase Whitman, and class counsel request an award of attorney's fees, costs, expenses, and a class representative service award pursuant to the parties' class settlement agreement. (Doc. 100). Defendant Musculoskeletal Institute Chartered d/b/a Florida Orthopaedic Institute (Florida Orthopaedic) does not oppose this request. (*Id.* at p. 22).

**I. BACKGROUND**

The plaintiffs filed a state court putative class action on June 30, 2020, arising from a data breach due to a ransomware attack against Florida Orthopaedic. (Doc. 1, Ex. 1). The plaintiffs alleged common law and Florida

state law claims against Florida Orthopaedic. (*Id.* at ¶¶ 91–217). Florida Orthopaedic removed the case to federal court on August 3, 2020. (Doc. 1).

The parties executed a class action settlement agreement on March 11, 2022. (Doc. 93, Ex. 1). The parties filed a joint motion for preliminary class settlement approval, on March 16, 2022. (Doc. 93). On April 22, 2022, the court granted the motion and approved the class settlement agreement subject to a final approval hearing, which is currently scheduled for September 29, 2018. (Docs. 97, 98).

On July 5, 2022, Plaintiffs and class counsel filed the instant motion requesting a service award, as well as attorney’s fees and expenses, to be paid from the settlement funds. (Doc. 100). Florida Orthopaedic does not oppose the motion. (*Id.* at 22).

## **II. ANALYSIS**

Plaintiffs and class counsel seek an award of the following amounts, to be paid from the settlement fund: (1) attorney’s fees in the amount of \$1,333,333.00—33% of the settlement fund; (2) litigation costs and expenses in the amount of \$17,307.21; and (3) a service award to each class representative in the amount of \$1,000.00. (Doc. 93, Ex. A, p. 18; Doc. 100). The undersigned will separately address each request.

### A. Attorney's Fees

“Attorneys who represent a class, and achieve a benefit for the class members, are entitled to be compensated for their services.” *Ressler v. Jacobson*, 149 F.R.D. 651, 653 (M.D. Fla. 1992) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). When the parties to a class action reach a settlement agreement whereby a “common fund” is created for the benefit of the class, an award of attorney’s fees are governed by the common fund doctrine. *See Id.*; *Stahl v. MasTec, Inc.*, No. 8:05-cv-1265-JDW-TGW, 2008 WL 2267469, at \*1 (M.D. Fla. May 20, 2008). Under this doctrine, class counsel is entitled to a reasonable percentage of the class settlement fund, subject to court approval. *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 773–74 (11th Cir. 1991).

“The majority of common fund fee awards fall between 20% and 30% of the fund.” *Id.* at 774. Thus, the “bench mark” percentage fee award is 25%, which “may be adjusted in accordance with the individual circumstances of each case.” *Id.* at 775. In considering an adjustment, the court should consider the following “*Camden I* factors”:

(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; and (12) awards in similar cases.

*Id.* at 772 n. 2 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). Additionally, the court should consider “whether there are any substantial objections . . . to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class . . . and the economics involved in prosecuting a class action,” along with any factors unique to the case that would be relevant to the court’s consideration. *Id.* at 775.

Here, pursuant to the class settlement agreement, class counsel requests an award of attorney’s fees in the amount of \$1,333,333.00, representing 33% of the settlement fund, as well as litigation costs of \$17,307.21. (Doc. 100, p. 1). The undersigned will consider the *Camden I* factors to determine whether counsel’s fee request is reasonable.

**1. The Contingent Nature of the Fee, the Financial Burden Carried by Class Counsel, and the Economics of Prosecuting a Class Action**

It is a significant risk to prosecuting an action entirely on a contingent fee basis. Indeed, “[n]umerous cases recognize that the attorney’s contingent fee risk is an important factor in determining the fee award.” *Ressler*, 149 F.R.D. at 656. Without the “bonus” from a contingency fee arrangement, “very few lawyers could take on the representation of a class client given the

investment of substantial time, effort, and money, especially in light of the risks involved in recovering nothing.” *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365 (S.D. Fla. 2011).

Here, class counsel received no compensation in this matter during the nearly two years of litigation. During this time, the parties engaged in discovery, motions practice, and mediation. In doing so, class counsel surely put off other matters and declined cases they could otherwise have pursued but for the efforts toward this case. Thus, the undersigned recommends the court find the financial risks borne by class counsel support the appropriateness of the fee requested.

## **2. The Requested Fee Mirrors the Market Rate in Other Complex, Contingent Litigation**

“The percentage method of awarding fees in class actions is consistent with, and is intended to mirror, practice in the private marketplace where attorneys typically negotiate percentage fee arrangements with their clients.” *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1340 (S.D. Fla. 2007). In private litigation, “attorneys regularly contract for contingent fees between 30% and 40% directly with their clients.” *Id.* at 1341.

“Courts often apply the percentage method and *Camden I* factors resulting in fee awards totaling one-third or more of the common fund recovered for the class.” *Belin v. Health Ins. Innovations, Inc.*, No. 0:19-cv-

61430-AHS, 2022 WL 1126006, at \*3 (S.D. Fla. Mar. 10, 2022) (collecting cases). Here, a fee of 33% is reasonable when considering what the customary fee would be for similar services in the community. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1300 (11th Cir. 1999) (affirming a district court award of 33.5% of the settlement fund); *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1267 (S.D. Fla. 2016) (approving an attorney's fees request of 33% of the settlement fund); *Waters v. Cook's Pest Control, Inc.*, No. 2:07-cv-394-MMH, 2012 WL 2923542, at \*16 (N.D. Ala. July 17, 2012) (finding that the customary fee factor weighed in favor of a 35% fee award). Thus, the undersigned recommends the court find the requested fees mirror the market rate in other similar litigation and this factor supports the reasonableness of the requested fee.

### **3. The Novelty and Difficulty of the Questions at Issue**

Courts have recognized that the novelty and difficulty of the issues in a case are significant factors to be considered in making a fee award. *See, e.g., Johnson*, 488 F.2d at 718. The instant action is complex in that it involves difficult issues of law under the Health Insurance Portability and Accountability Act (HIPAA), including duties of reasonable care in securing information technology (IT) protocols against ransomware attacks. In addition, class actions are inherently complex to prosecute because the legal and factual issues are complicated and uncertain in outcome. *Francisco v. Numismatic*

*Guar. Corp. of Am.*, No. 0:06-cv-61677-JEM, 2008 WL 649124, at \*15 (S.D. Fla. Jan. 31, 2008). Therefore, the undersigned recommends the court find that this factor also supports the reasonableness of the fee.

#### **4. The Skill, Experience, and Reputation of Class Counsel**

The court considers the “experience, reputation, and ability of the attorneys” in determining a fee award. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1359; *see also Gevaerts v. TD Bank*, No. 1:14-cv-20744-RLR, 2015 WL 6751061, at \*12 (S.D. Fla. Nov. 5, 2015) (“In the private marketplace, counsel of exceptional skill commands a significant premium. So too should it here”). In addition, in assessing the quality of representation by the class counsel, the court also should consider the quality of the opposition. *See, e.g., Camden I*, 946 F.2d at 772 n. 3; *Johnson*, 488 F.2d at 718; *Ressler*, 149 F.R.D. at 654.

The background summaries provided for each of the lawyers who litigated for the class indicate class counsel has extensive experience and knowledge in complex litigation. (*See* Doc. 100, Ex. 1, 2). In addition, Florida Orthopaedic was also well represented, making prosecution of this action more difficult. Accordingly, the undersigned recommends the court find the quality of the representation supports the requested fee.

## 5. The Results Achieved for the Class

“The result achieved is a major factor to consider in making a fee award.” *Pinto*, 513 F. Supp. 2d at 1342. Here, class counsel achieved a settlement of \$4,000,000.00, guaranteeing a measure of relief to each class member with documented losses. (Doc. 93, Ex. 1, p. 10). Additionally, each settlement class member is eligible for three years of identity restoration and theft protection services. (*Id.*). The undersigned thus recommends the court find the results achieved here support the requested fee.

## 6. The Time and Labor of Class Counsel

Despite the risk and costs of pursuing this action, class counsel expended considerable time and effort over the course of nearly two years in providing representation to the class and prosecuting and settling the claims. Specifically, class counsel expended 1048.30 hours of work, at a total billable cost of \$753,741.90. (Doc. 100, pp. 18–19). The hours worked by class counsel demonstrate the effort made to prosecute and settle this action. Class counsel’s requested contingency fee is approximately 1.77 times class counsel’s total billable cost, “well within the range of reasonableness for a contingent fee complex class action case.” *Poertner v. Gillette Co.*, No. 6:12-cv-803-GAP-DAB, 2014 WL 4162771, at \*5 (M.D. Fla. Aug. 21, 2014). Thus, the undersigned recommends the court find the documented time and labor of counsel supports the fee requested.

In light of the foregoing *Camden I* factors, the undersigned recommends the court find the requested attorney's fees in the amount of \$1,333,333.00, representing approximately 33% of the settlement fund, are reasonable given class counsels' contingent fee risk, their financial contribution to the case, fees paid in similar cases, the difficult questions at issue, the work in obtaining this result for the class, and the time and labor of counsel.

**B. Litigation Expenses**

“Upon submission of adequate documentation, plaintiffs’ attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class.” *Int’l Precious Metals Corp.*, 190 F.3d at 1298 (internal quotation and citation omitted). As previously noted by the court, the class settlement agreement in this action provides for expenses and costs up to \$25,000. (Doc. 93, Ex. 1, p. 18).

Class counsel provided adequate documentation supporting their claim for \$17,307.21 in recoverable costs and expenses. (Doc. 102, Exs. 1–2). These costs and expenses were necessary for the prosecution of this action. *See Gevaerts*, 2015 WL 6751061, at \*14 (awarding costs and expenses for, inter alia, “fees for experts, photocopies, travel, online research, translation services, mediator fees, and document review and coding expenses”). Moreover, the class settlement agreement, including the negotiation of the attorney’s fees and

expenses, was reached with the help of a skilled mediator. Thus, there is a presumption that the agreement is fair, negotiated at arm's length and without collusion. *See Cooper*, 2015 WL 4623700, at \*2. Importantly, there were no objections to the agreement or the fees and expenses requested. *Id.*

Accordingly, the undersigned recommends the court find class counsel are entitled to reimbursement of the full amount of \$17,307.21, in litigation costs and expenses.

### **C. Class Representative Incentive Award**

Class counsel requests, and the settlement agreement directs, that class representatives in this matter be awarded \$1,000.00 as a “service award.” (*See* Doc. 93, Ex. 1, p. 18). “[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218–19 (S.D. Fla. 2006). The requested incentive award is consistent with amounts awarded in this district. *See James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-2424-SDM-JSS, 2017 WL 2472499, at \*2 (M.D. Fla. June 5, 2017) (incentive award of \$5,000); *N. Star Capital Acquisitions, LLC v. Krig*, No. 3:07-cv-264-TJC-MCR, 2011 WL 65662, at \*6 (M.D. Fla. Jan. 10, 2011) (incentive award of \$5,000).

However, an Eleventh Circuit panel recently concluded existing Supreme Court precedent “prohibit[s] the type of incentive award . . . that

compensates a class representative for his time and rewards him for bringing a lawsuit.” *Johnson v. NPAS Solutions*, 975 F.3d 1244, 1260 (11th Cir. 2020). A petition for rehearing *en banc* in *Johnson* is currently pending. See *Johnson v. NPAS Sols., LLC*, No. 18-12344 (11th Cir. 2020). The parties agree that any conclusion on permitting an incentive award to Mr. Stoll should be deferred until the *Johnson* matter is fully resolved. Thus, the undersigned recommends deferring concluding whether an incentive award should be permitted in this matter until the *Johnson* matter is fully resolved.

### III. CONCLUSION

For the foregoing reasons, it is respectfully **RECOMMENDED** that:

1. Plaintiff’s Unopposed Motion for Attorney’s Fees and Costs (Doc. 100) be **GRANTED**.
2. Class counsel’s attorney’s fees request of 33% of the settlement fund, or \$1,333,333.00, be approved;
3. Class counsel’s costs and expenses request in the amount of \$17,307.21 be approved;

4. Any determination on granting incentive awards to class representatives in this matter be deferred until *Johnson v. NPAS Sols., LLC* is fully resolved.

**ENTERED** in Tampa, Florida on this July 27, 2022.



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AMANDA ARNOLD SANSONE  
United States Magistrate Judge