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, Plaintiffs, v. MUSCULOSKELETAL INSTITUTE, CHARTERED d/b/a FLORIDA ORTHOPAEDIC INSTITUTE, Defendant.	Case No.: 8:20-cv-01798-CEH (AAS)

PLAINTIFFS' UNOPPOSED MOTION
FOR FEE AWARD AND LITIGATION COSTS

Plaintiffs, Ray Stoll, Heidi Imhof, and Chase Whitman ("Plaintiffs" or "Settlement Class Representatives"), respectfully move for approval of their request for attorneys' fees of of one-third of the $4 million Settlement Fund, totaling $1,333,333.00, and litigation costs of $17,307.21 (less than the $25,000.00 authorized under the Settlement Agreement) in this preliminarily approved class action settlement with Defendant Musculoskeletal Institute, Chartered d/b/a Florida Orthopaedic Institute. ("Defendant" or "FOI").

I. INTRODUCTION

On or about June 18, 2020, Defendant disclosed that on or about April 9, 2020, it experienced a ransomware attack resulting in potential exposure of sensitive and

private Personal Information of certain of its current and former patients (the "Data Security Incident"). On June 30, 2020, Plaintiffs filed a proposed class action lawsuit in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, relating to a Data Security Incident. On or about August 3, 2020, Defendant removed this matter to the U.S. District Court for the Middle District of Florida.

Thereafter, the parties engaged in extensive motion practice, including Defendant's Motion to Strike Plaintiffs' Amended Initial Disclosures (Doc's 29, 34, 38), Plaintiffs' Motion to Compel Full and Complete Discovery Responses and for Determination of Waiver (Doc's 46, 51, 78), Defendant's Motion to Stay (Doc's 55, 60, 79), Defendant's Motion to Quash (Doc. 58), Plaintiffs' Motion to file Amended Complaint (Doc's 59, 75), and Defendant's Motion to Dismiss (Docs. 89, 91).

On November 6, 2020, the parties engaged in mediation with an experienced mediator, Rodney A. Max. The parties also exchanged detailed mediation briefs with their respective positions on the merits of the claims and class certification. On February 18, 2021, the Court entered a stay of this matter pending a decision from the United States Supreme Court in *Transunion v. Ramirez*, as well as a decision from the Eleventh Circuit in *Tsao v. Captiva MVP Rest. Partners, LLC*, (Doc. 79). On July 14, 2021, Plaintiffs moved to lift that stay, following entry of the Supreme Court's decision in *Transunion* and the Eleventh Circuit's decision in *Tsao*, (Doc. 80), which was granted, (Doc. 82). Following lifting of the stay, the parties resumed mediation discussions with Mr. Max. After extensive arm's length settlement negotiations, the parties reached an agreement of the terms of a settlement of the claims of Plaintiffs and

the class.

On May 16, 2022, the Court issued an order preliminarily approving the proposed nationwide class action settlement with FOI. (Doc. 98). Plaintiffs now respectfully request an award of attorneys' fees of 33% of the Settlement Fund, totaling $1,333,333.00, and litigation costs of $17,307.21 consistent with the Settlement Agreement. (Doc. 93-1, ¶¶ 14, 88, 89) ("Settlement Agreement" or "S.A.").

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties agreement." Fed. R. Civ. P. 23(h). "It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d at 1358 (citing *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir.1991); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Fee awards totalling one third of the common fund are routinely approved in the Eleventh Circuit. *See, e.g.*, *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1255 (S.D. Fla. 2016) (recognizing that "a fee award of 33% . . . is consistent with attorneys' fees awards in federal class actions in [the Eleventh] Circuit"); *Waters v. Intern. Precious Metals Corp.*, 190 F. 3d 1291, 1292–98 (11th Cir. 1999) (same).

III. ARGUMENT

Pursuant to the Settlement Agreement (S.A. ¶¶ 88, 89) and the notice of class action settlement (*see* Doc. 93-1, at 34), and consistent with recognized class action practice and procedure, Plaintiffs respectfully request an attorneys' fee award of $1,333,333.00 or one-third (33.33%) of the $4,000,000.00 Settlement Fund created by the Settlement (SA ¶¶ 45, 88; *see generally*, Declaration of John A. Yanchunis, filed concurrently herewith ("Yanchunis Decl.")). Plaintiffs and Defendant negotiated and reached agreement regarding attorneys' fees, costs and expenses only after reaching agreement on all other material Settlement terms. Yanchunis Decl. ¶ 17. The requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). For the reasons detailed herein, Plaintiffs submit that the requested fee is appropriate, fair, and reasonable and respectfully request that it be approved by the Court.

A. The Law Awards Class Counsel Fees Based Upon the Fund Established for the Benefit of the Class.

It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989) (citation omitted). The

common benefit doctrine stems from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched" at the expense of the successful litigant. *Van Gemert*, 444 U.S. at 478. As a result, the Supreme Court, the Eleventh Circuit, and district courts in this Circuit have all recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as whole." *In re Sunbeam Sec's. Litig.*, 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001).

In the Eleventh Circuit, and as this Court has ruled, class counsel are awarded a percentage of the funds made available through a settlement. *Hanley v. Tampa Bay Sports & Entm't Ltd. Liab. Co.*, No. 8:19-cv-00550-CEH-CPT, 2020 WL 2517766, at *5 (M.D. Fla. Apr. 23, 2020) (noting that the percentage of the fund analysis applies to claims made settlements and that the "percentage applies to the total fund created, even where the actual payout following the claims process is lower") (quoting *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007)); *see also Marty v. Anheuser-Busch Cos., LLC*, No. 13-cv-23656-JJO, 2015 WL 6391185 (S.D. Fla. Oct. 22, 2015) (same); *Montoya v. PNC Bank*, N.A., No. 14-20474, 2016 WL 1529902, *23 (S.D. Fla. Apr. 14, 2016) ("the valuation of counsel's fee should be based on the opportunity created for the Settlement Class … [a]nd counsel should not be penalized for class members' failure to take advantage of such a settlement").

In *Camden I*—the controlling authority regarding attorneys' fees—the Eleventh Circuit held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth 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*, 946 F.2d at 774; *see also, Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 WL 5419507 (S.D. Fla. Oct. 24, 2014) (finding that attorneys representing a class action are entitled to an attorneys' fee based solely upon the total benefits obtained in or provided by a class settlement); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014) (noting that in a claims made situation, the attorneys' fees in a class action are determined based upon the total fund, not just the actual payout to the class); *Carter v. Forjas*, 701 F. App'x 759, 766-67 (11th Cir. 2017) (same).

The Court has discretion in determining the appropriate fee percentage. "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." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 774).

The Eleventh Circuit has provided a set of factors the Court should use to determine a reasonable percentage to award as an attorney's fee to class counsel in class actions: (1) the time and labor required; (2) the novelty and difficulty of the relevant questions; (3) the skill required to properly carry out the legal services; (4) the preclusion of other employment by the attorney as a result of his acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the clients or the circumstances; (8) the results obtained, including the amount recovered for the Clients; (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 clients; (12) fee awards in similar cases. *Camden I*, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These 12 factors are guidelines and are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F.2d at 775). The Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. The *Camden I* factors support the requested fee.

1. The Claims Against Defendant Required Substantial Time and Labor.

Prosecuting and settling these claims demanded considerable time and labor on a contingency fee basis, making this fee request reasonable. Yanchunis Decl. ¶¶ 11–21. Class Counsel devoted substantial time to investigating the claims against Defendant. *Id.* at ¶¶ 11, 17, 23. Class Counsel also expended resources researching and developing the legal claims at issue. *Id.* Substantial time and resources were dedicated to developing, serving, and reviewing Defendant's discovery responses, as well as pursuing additional discovery through motions practice with this Court. *Id*. at ¶ 23.

The first mediation session was held before Rodney A. Max (performed remotely due to COVID) required substantial preparation and review of Defendant's discovery responses. Yanchunis Decl. ¶¶ 13–14. Following that unsuccessful mediation session, Plaintiffs engaged in additional discovery, took depositions, and developed additional legal theories. *Id.* ¶¶ 15, 23. Thereafter, subsequent settlement negotiations consumed time and resources. *Id.* ¶¶ 16–17, 23. Finally, significant time was devoted to negotiating and drafting the Settlement Agreement, the preliminary approval process, and to all actions required thereafter pursuant to the preliminary approval order. *Id.* ¶¶ 20, 23. All of this time was spent without any assurance that the extraordinary commitment of time and effort to this case would result in the payment of any fees. Class Counsel should be amply compensated for the substantial time and labor invested to obtain this outstanding settlement on behalf of the Class and should not be punished for its persistence and efficiency in achieving the positive result for the Class.

2. The Novelty and Difficulty of the Questions Involved in this Litigation Required the Skill of Highly Talented Attorneys.

"[P]rosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). This is particularly true for data breach litigation. *See e.g.*, *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("The realm of data breach litigation is complex and largely undeveloped."); *Fulton-Green v. Accolade, Inc.*, 2019 U.S. Dist. LEXIS 164375, at *21

(E.D. Pa. Sep. 23, 2019) ("This is a complex case in a risky field of litigation because data breach class actions are uncertain and class certification is rare."). The Court in *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA, 2011 U.S. Dist. LEXIS 103222, at *36 (N.D. Cal. Sep. 12, 2011) has noted that "many [data breach class actions] have been dismissed at the pleading stage."

While the protracted litigation history evidence the complex issues as outlined above, so to does the caliber of lawyers representing the parties. *Walco Inv., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3 (in assessing the quality of representation by Class Counsel, the court should also consider the quality of their opposing counsel); *see also Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) (same). "[T]hat this level of legal talent was available to the Settlement Class is another compelling reason in support of the fee requested . . . . In the private marketplace, as pointed out by several of Plaintiffs' experts, counsel of exceptional skill commands a significant premium." *In re Checking*, 830 F. Supp. 2d at 1363.

Here, Class Counsel have a strong reputation in the area of complex, and in particular privacy and data breach class action litigation. Yanchunis Decl. ¶¶ 3–10; Howard Decl. ¶¶ 3–18. Class Counsel have successfully litigated and settled similar cases across the country and, in this case, have been challenged by highly experienced

and skilled counsel who deployed very substantial resources on Defendant's behalf. Yanchunis Decl. ¶¶ 3–10, 17, 19, 23; Howard Decl. ¶¶ 3–18, 25, 27, 32.

3. Class Counsel Achieved a Successful Result.

Given the significant litigation risks Class Counsel faced, the Settlement represents a successful result. Rather than facing years of costly and uncertain litigation, each Settlement Class Member (approximately 650,000) is eligible to receive identity theft protection services and identity restoration services. SA §§ 56–57. Also, all minors in the Settlement Class are eligible to receive monitoring services. SA § 58. For Settlement Class Members with documented losses, the Settlement provides up to $15,000 for out-of-pocket expenses and time spent dealing with the Data Security Incident, which could include up to five hours of time spent investigating and remedying losses (calculated at a rate of $25.00 per hour). SA § 53.

With regard to the monetary benefits provided to Settlement Class Members alone, this settlement compares favorably to other data breach class action settlements. *See e.g.*, *Pfeiffer v. RadNet, Inc.*, No. 2:20-cv-09553 (RGK)(SK) (C.D. Cal. Feb. 22, 2022) (Doc. 70) (finally approving healthcare data breach with additional credit monitoring and $15,000 monetary individual aggregate cap); *In re: 21st Century Oncology Cust. Data Sec. Breach Litig.*, No. 8:16-md-2737-MSS-AEP (M.D. Fla. June 25, 2021) (Doc. 269) (finally approving healthcare data breach with two years of credit monitoring and $10,000 per claim monetary cap); *Kuss v. American HomePatient, Inc.*, No. 8:18-cv-02348-EAK-TGW (M.D. Fla. Aug. 13, 2020) (Doc. 70) (finally approving healthcare data breach with monetary benefits up to $1,400 per class member); *Parsons v. Kimpton*

Hotel & Restaurant Group, LLC, No. 3:16-cv-05387-VC (N.D. Cal. July 11, 2019) (finally approving claims made settlement that would reimburse up to $250 per claim including, *inter alia*, expenses for lost time, payment for each card on which fraudulent charges incurred, costs of obtaining credit report, costs of credit monitoring and identity theft protection, as well as up to $10,000 per claim for extraordinary expenses).[1]

4. The Claims Entailed Serious Risk.

Given the context of this case—a data breach class action—the risks incurred in pursuing it were significant. "The simple fact is that there were a larger than usual number of ways that Plaintiffs could have lost this case, and they still managed to achieve a successful settlement. A significant amount of the credit for this must be given to Class Counsel's strategy choices, effort and legal acumen." *In re Checking*, 830 F. Supp. 2d at 1364. "A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk." *In re Sunbeam*, 176 F. Supp. 2d at 1336. Further, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. General Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988).

[1] *See also, In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, 851 F. Supp. 2d 1040, 1048 1069 (S.D. Tex. 2012) (approving settlement that provided up to $2.4 million to pay for out-of-pocket losses); *In re Countrywide Financial Corp. Customer Data Security Breach Litig.*, No. 3:08-MD-01998, 2009 WL 5184352, at *1-4 (W.D. Ky. Dec. 22, 2009) (approving settlement that provided up to $1.5 million to pay out-of-pocket costs, up to $5 million to pay identity theft losses, and 2 years of free credit monitoring services).

The Settlement is particularly noteworthy given the combined litigation risks. Defendant would likely raise substantial and potentially meritorious defenses. Indeed, prosecuting this matter was risky from the outset. *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *6 (W.D. Ky. Aug. 23, 2010) (approving data breach settlement, in part, because "proceeding through the litigation process in this case is unlikely to produce the plaintiffs' desired results"). Few cases in this area have gone though the certification stage, and none have yet been tried.

Through this Settlement, however, Plaintiffs and Class Members gain significant benefits without having to face further risk. The benefits obtained here are substantial, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. Any of these risks could easily have impeded, if not prevented, Plaintiffs' and the Settlement Class' successful prosecution of these claims.

As explained in Plaintiffs' motion for preliminary approval, data breach cases are especially risky, expensive, and complex. *See, e.g.*, *In re Sonic*, 2019 WL 3773737, at *7 ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."). Although data breach law is continuously developing, data breach cases are still relatively new, and courts around the country are still grappling with what legal principles apply to the claims. *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in [] data-breach case[s] are novel"). Since the "legal issues involved [in data breach litigation] are

cutting-edge and unsettled . . . many resources would necessarily be spent litigating substantive law as well as other issues." *In re Target Corp. Customer Data Security Breach Litig.*, No. 14-2522 (PAM/JJK), 2015 WL 7253765, at *2 (D. Minn. Nov. 17, 2015).

The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiffs and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiffs were able to certify a class; (ii) Plaintiffs were able to defeat summary judgment; (iii) Plaintiffs were able to establish liability and damages at trial; and (iv) the final judgment was affirmed on appeal. The Settlement here is a fair and reasonable recovery for the Settlement Class in light of Defendant's defenses, and the challenging and unpredictable path of likely protracted litigation Plaintiffs and the certified class would have faced absent the Settlement. Yanchunis Decl. ¶ 17.

5. Class Counsel Assumed Considerable Risk to Pursue This Matter on a Pure Contingency Basis.

In undertaking to prosecute this case on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Yanchunis Decl. ¶ 19. That risk warrants an appropriate fee. Indeed, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 548 (1988)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656

("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award"); *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir. 1986); *York v. Alabama Senate Bd. of Ed.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986). As Judge King observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer... A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, 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 of recovering nothing.

Behrens, 118 F.R.D. at 548.

The progress of this case to date shows the inherent risk faced by Class Counsel in accepting and prosecuting this matter on a contingency fee basis. Despite Class Counsel's effort in litigating this case, Class Counsel remain uncompensated for the time invested, in addition to the expenses they advanced. Yanchunis Decl. ¶¶ 19–22; Howard Decl. ¶ 28–31. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel. As of July 1, 2022, Class Counsel have devoted approximately $$753,741.90 in attorney time and incurred litigation costs of at least $17,307.21 without the assurance that they would recover those expenses. Yanchunis Decl. ¶¶ 18–22; Howard Decl. ¶ 27–31.

6. The Requested Fee Comports with Fees Awarded in Similar Cases.

An award of one third of the Settlement Fund is within the benchmark and growing trend in this Circuit.[2] Numerous decisions within Florida District Courts and the Eleventh Circuit have found that a 33.33% fee is well within the range of reason under the factors listed by the court in *Camden I*. *See Wolff v. Cash 4 Titles*, No. 03-22778- CIV, 2012 WL 5290155, at *5–6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third.") (collecting case law from the Middle and Southern District of Florida awarding attorneys' fees comprising one third of common fund).

Class Counsel's fee request falls below the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. *See Continental*, 962 F.2d at 572 ("The object in awarding a reasonable

[2] *Waters v. Intern. Precious Metals Corp., supra* at 1292–98 (11th Circ. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million); *Seghroughni v. Advantus Rest, Inc.*, No. 12-2000, 2015 WL 2255278, at *1 (M.D. Fla. May 13, 2015) ("An attorney's fee . . . which is one-third of the settlement fund . . . is fair and reasonable in light of the results obtained by the Lead Counsel, the risks associated with this action, the Lead Counsel's ability and experience in class action litigation, and fee awards in comparable cases."); *Wolff v. Cash 4 Titles*, No. 03-22778, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement."); *Morefield v. NoteWorld, LLC*, No. 10-117, 2012 WL 1355573 (S.D. Ga. April 18, 2012) (awarding fees of 33 1/3% of the $1,040,000 settlement fund in addition to expenses); *Atkinson v. Wal-Mart Stores, Inc.*, No. 08-691, 2011 WL 6846747, at *6 (M.D. Fla. Dec. 29, 2011) (approving class settlement with one-third of the maximum $2,020,000 common fund); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-1317, (Doc. 1557 at 8–10) (S.D. Fla. Apr. 19, 2005) (awarding class counsel 33.3% of settlement fund in part because they prosecuted the action on a wholly contingent basis); *In re: Managed Care Litig. v. Aetna*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding fees and costs of 35.5% of settlement of $100 million); *Gutter v. E.I. DuPont De Nemours & Co.*, No. 95-2152, (Doc. 626 at 7) (S.D. Fla. May 30, 2003) (awarding class counsel 33.3% of the Settlement Fund as attorneys' fees ($1,201,728.42) after expending significant time and resources on a purely contingent basis under the common fund theory).

attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig*., Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is . . . what the market pays in similar cases"). And, "[i]n tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring).

Consequently, the attorneys' fees of $1,333,333.00 and litigation costs of $17,307.21 is appropriate and should be awarded.

7. The Remaining *Camden I* and Other Factors Favor Approval.

The remaining *Camden I* factors also support Class Counsels' fee request. The burdens of this litigation and the results obtained on behalf of Plaintiffs and the Class weigh in favor of the fee requested. The fee request is firmly rooted in "the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F.Supp.2d at 1333. "[P]roper incentives must be maintained to insure that attorneys of this caliber are available to take on cases of significant public importance like this one." *In re Checking*, 830 F. Supp. 2d at 1368.

In addition, the fact that the parties negotiated arduously and at length during mediation and numerous subsequent settlement sessions to finalize the Settlement, and that no class member has objected[3] to the Settlement or its provision on attorneys' fees, weighs in favor of the fee requested. *See, e.g.*, *Allapattah Services, Inc. v. Exxon Corp.*,

[3] The objection deadline is July 26, 2022. (Doc. 98 at 10).

454 F. Supp. 2d 1185, 1204 (S.D. Fla. 2006) ("The lack of significant objection from the Class supports the reasonableness of the fee request.") (collecting cases); *Gevaerts v. TD Bank*, No. 14-20744, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015).

B. An Analysis of Lodestar Confirms the Reasonableness of the Requested Attorneys' Fees

Under *Camden I*, use of the lodestar analysis is improper in common fund cases. *See In re Checking*, 830 F. Supp. 2d at 1362–63 (declining to perform lodestar cross-check because *Camden I* "mandated the exclusive use of the percentage approach in common fund cases" and noting that "courts in this Circuit regularly award fees . . . without discussing lodestar at all") (internal marks omitted). Still, other courts have used lodestar as a "cross-check" to the percentage-of-the-fund analysis. *Waters*, 190 F.3d at 1289 ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison."); *Pinto*, 513 F. Supp. 2d at 1343 (nothing that "[s]ome courts use the lodestar method as a cross-check of the percentage of the fund approach") (citing *Sunbeam*, 176 F. Supp. 2d at 1336).

To determine the lodestar amount, the "court must multiply the number of hours reasonably expended by a reasonable hourly rate." *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996). "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). "After the lodestar is

determined…the court must next consider the necessity of an adjustment for results obtained." *Id*. at 1302. "If the results obtained were exceptional, then some enhancement of the lodestar might be called for." *Id*. (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986), *supplemented*, 483 U.S. 711 (1987)). "Even if the results obtained are exceptional, no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed." *Id*. (citing *Blum*, 465 U.S. at 899). "This is because the reasonable hourly rate already should reflect the skill demonstrated by the advocate." *Id*. "[E]nhancement may be appropriate if there is a risk of non-recovery of a fee in the case," such as in a contingent fee arrangement. *Id*.

The following chart summarizes the time and hour rates entered by attorneys and the professional staff of the firms in this matter up through July 1, 2022:

MORGAN & MORGAN COMPLEX LITIGATION GROUP			
Name	**Hourly Rate**	**Hours Billed**	**Total**
John A. Yanchunis (Attorney)	$1,300	148.6	$193,180.00
Ryan J. McGee (Attorney)	$800	366	$292,800.00
Patrick A. Barthle II (Attorney)	$800	78.8	$63,040.00
Jean Sutton Martin (Attorney)	$1,000	9.4	$9,400.00
Kenya Reddy (Attorney)	$950	3.0	$2,850.00
Marcio Valladares (Attorney)	$900	18.8	$16,920.00
Ra Amen (Attorney)	$475	15.0	$7,125.00
Linda Klama (Doc. Reviewer)	$250	105.6	$26,400.00
Audrey Sidell (Doc. Reviewer)	$250	124.4	$31,100.00
David Reign (Investigator)	$300	13.4	$4,020.00
Lee Walters (Investigator)	$300	1.0	$300.00
Andrea Carbone (Paralegal)	$202	22.2	$4,484.40
Jennifer Cabezas (Paralegal)	$225	20.1	$4,522.50
Total		926.3	$656,141.90

THE CONSUMER PROTECTION FIRM			
Name	**Hourly Rate**	**Hours Billed**	**Total**
Billy Howard	$800	122	$97,600.00
Total		122	$97,600.00

COMBINED FIRM TOTALS			
		1048.30	$753,741.90

Here, for the duration of this litigation, Class Counsel have expended over 1048 hours. Yanchunis Decl. ¶ 19; Howard Decl. ¶ 28. At their firms' respective hourly rates, the lodestar is at least $753,741.90. Yanchunis Decl. ¶ 20; Howard Decl. ¶ 29. Of course, as this Court is aware, Class Counsel will continue to invest significant time in this matter through the settlement administration process, to prepare for and attend the final hearing to obtain final approval, and to defend the Court's final judgment against appeals (if any). Yanchunis Decl. ¶ 22; Howard Decl. ¶ 31. That additional time will certainly bring the lodestar to an even higher amount. Yanchunis Decl. ¶ 22; Howard Decl. ¶ 31.

Had there been no common fund in the proposed Settlement and attorneys' fees were determined based solely on the lodestar method, Class Counsel would have sought a "substantial multiplier" to apply to their lodestar for reasons earlier discussed, in particular, the result achieved for the Class, the complexity of the dispute and issues Class Counsel had to skillfully address, and the contingent nature of Class Counsel's fee arrangement. *See Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-3066, 2012 WL 12540344, at *5 (N.D. Ga. Oct. 26, 2012) (applying a multiplier of four times lodestar to "reflect such considerations as (1) the contingent nature of the fee; (2) the

risk of the case (*i.e.*, the likelihood of success viewed at the tune of the filing); (3) the quality of representation; and (4) the result achieved," and surveying cases applying multipliers of approximately 4 to 9 times lodestar)). This would further dwarf the fees requested under the percentage-of-the-fund approach and the Settlement.

Therefore, although not required in this Circuit, it is clear from a lodestar cross-check that the requested attorneys' fees in this case are reasonable.

C. The Litigation Costs Are Reasonable

Class Counsel seeks reimbursement of litigation costs totalling $17,307.21. As detailed above, these litigation costs were advanced without guarantee of repayment and benefited the Settlement Class: filing fees, mediation fees, deposition fees, and other typical litigation costs that a litigant would ordinarily incur in pursuit of a favorable recovery. The following chart summarizes the expenses incurred in this matter up through July 1, 2022:

Description	**Subtotals**	**Totals Per Category**
Court Fees		**$426.42**
Filing Fee	$426.42	
Professional Services		**$16,042.12**
PACER	$79.30	
Epiq Discovery Solutions	$2,230.02	
Huseby Global Litigation	$4,033.60	
Tampa Process, LLC	$349.20	
Mitnick Security Consulting, LLC	$4,462.50	
Upchurch, Watson, White & Max Mediation Group, Inc.	$4,887.50	

Shipping, Long Distance & Printing		**$280.67**
In-House Printing	$268.07	
FedEx	$12.60	
Travel & Expenses		**$558.00**
John A. Yanchunis	$558.00	
	Total	**$17,307.21**

Plaintiffs respectfully submit that the expenses are reasonable and the Court should approve reimbursement of their litigation costs totalling $17,307.21.

D. Application for Service Awards

Plaintiffs are aware of the Eleventh Circuit's decision in *Johnson v. NPAS Sol'ns., LLC*, No. 18-12344, 2020 WL 5553312, at *11 (11th Cir. Sept. 17, 2020). There is currently pending a petition for rehearing *en banc*. In the event that the rehearing remains pending and the issue unresolved as to whether service awards are acceptable in the Eleventh Circuit, Plaintiffs respectfully request that the Court defer resolution of this issue pending a final decision in *Johnson*, as other courts in this District have done.[4]

[4] *See, e.g.*, *In re: 21st Century Oncology Cust. Data Sec. Breach Litig.*, No. 8:16-md-2737-MSS-AEP (M.D. Fla. June 25, 2021) (Doc. 269) (deferring ruling for service award and directing the parties "to deposit proposed amounts into the registry of the Court, pending the Court's determination of the service award issue."); *Mosley v. Lozano Insurance Adjusters, Inc.*, No. 3:19-CV-379-J-32JRK, 2021 WL 293243, at *5 (M.D. Fla. Jan. 11, 2021), report and recommendation adopted, No. 3:19-CV-379-J-32JRK, 2021 WL 289031 (M.D. Fla. Jan. 28, 2021) (retaining jurisdiction to decide the question of service awards "pending a final decision in *Johnson*" and directing the parties "to deposit the $5,000 into the registry of the Court pending the Court's determination of the service award issue"); *Harvey v. Hammel & Kaplan Co., LLC*, No. 3:19-CV-640-J-32JRK, 2020 WL 7138568, at *3–4 (M.D. Fla. Dec. 7, 2020) ("[T]he Court will defer the issue of a service award due to a recent Eleventh Circuit case that bars such awards to plaintiffs in class action settlements," directing the defendant "to deposit $1,500 in the registry of the Court, to be held pending the Eleventh Circuit's issuance of a mandate in *Johnson*," and retaining jurisdiction to "determine whether and how the funds will be distributed once Johnson is

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the requested award of attorneys' fees one-third of the Settlemetn Fund, $1,333,333.00 and litigation costs of $17,307.21.

RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), the undersigned has conferred with counsel for the Defendant and is authorized to represent that the Defendant does not oppose this motion.

Dated: July 5, 2022

Respectfully submitted,

/s/ John A. Yanchunis
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final."); *see also Metzler v. Med. Mgmt. Int'l, Inc.*, No. 8:19-CV-2289-T-33CPT, 2020 WL 5994537, at *3 (M.D. Fla. Oct. 9, 2020).

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Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2022, I electronically filed a true and correct copy of the foregoing unopposed motion with the Clerk of the Court using the CM/ECF system, which will send notification to all attorneys of record in this matter.

/s/ John A. Yanchunis
John A. Yanchunis