UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Thaddius Intravaia, *et al*., Plaintiffs, v. National Rural Electric Cooperative Association, *et al*., Defendants.	Case No. 1:19-cv-00973-LO-IDD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

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INTRODUCTION

In light of the Class Action Settlement that has been reached in this matter and the successful outcome it represents for the participants and beneficiaries of the NRECA 401(k) Pension Plan ("Plan"), Plaintiffs and their counsel, Nichols Kaster, PLLP, and local counsel Zipin, Amster, & Greenberg (collectively, "Class Counsel"), respectfully petition the Court to award: (1) attorneys' fees in the amount of $3,333,333.33 (one-third of the $10,000,000 Settlement Fund); (2) reimbursement of $294,087.10 in litigation expenses; (3) settlement administration expenses in the amount of $183,640.00 and (4) service awards in the amount of $10,000 to each of the named Plaintiffs (Thaddius Intravaia and Steven Marvik).

As discussed below, Class Counsel have diligently pursued this complicated ERISA class action involving a unique breed of 401(k) plan—a "multiple-employer plan" or MEP—and have invested significant time and financial resources on behalf of the Settlement Class. As a result of their efforts, Class Counsel have achieved a Settlement that provides $10 million in monetary relief to Class Members—an impressive recovery as a percentage of estimated losses (22-38% of the excess administrative expenses).[1] In addition, Defendants have agreed to significant non-monetary prospective relief, including the ongoing appointment of an independent fiduciary for the Plan that will (1) review and approve any administrative service agreements between NRECA and the Plan,

[1] This recovery compares favorably to other ERISA class action settlements. *Sims v. BB&T Corp.*, Nos. 1:15–cv–732, 1:15–cv–841, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (settlement represented 19% of estimated damages); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, 2018 WL 8334858 (C.D. Cal. July 30, 2018) (settlement represented 26% of estimated damages); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, No. 5:16-cv-03698-NC, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (settlement represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *accord In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

(2) approve direct expense methods and monitor direct expenses charged by NRECA to the Plan, and (3) periodically undertake a consultant study that will analyze the Plan's administrative expenses and provide recommendations to the Committee regarding whether to continue to engage NRECA to provide administrative services to the Plan. *See ECF No. 99-2, Settlement Agreement (Amended) ("Settlement Agreement")* ¶¶ *7.2.1–7.2.3*. In addition, NRECA has agreed to retain a separate independent third party to conduct a periodic review and approval of the methods by which expenses are shared between the Plan and NRECA or other NRECA benefit plans. *Id.* ¶ *7.3.* These are important prospective benefits to the Class that will continue to yield value to the Class Members.

To date, Class Counsel have received no payment for their efforts, nor have they received any reimbursement for the out-of-pocket expenses that they have advanced. All compensation to Class Counsel is contingent upon the Court's award of fees and expenses as provided in the Settlement Agreement. Likewise, the named Class Representatives have not received any compensation for the time they have invested in the litigation, the benefits they have provided to the Settlement Class, or the risks they undertook in bringing this action.

In similar 401(k) fee cases, "courts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this[.]" *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (citing cases); *see also Larson v. Allina Health System*, No. 0:17-cv-03835, ECF No. 132 at ¶¶ 4–5 (D. Minn. May 22, 2020); *Stevens v. SEI Invs. Co.*, No. 18-4205, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020); *Clark v. Duke Univ.*, Nos. 1:16-CV-1044, 1:18-CV-722, 2019 WL 2579201, at *5 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, ECF No. 23 ¶ 1 (S.D. Fla. Dec. 20, 2018); *Andrus v.*

New York Life Ins. Co., No. 16-05698, ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, No. 06–cv–701–MJR–DGW, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015); *Krueger v. Ameriprise Fin., Inc.*, No. 11–CV–02781 (SRN/JSM), 2015 WL 4246879, at *2 (D. Minn. July 13, 2015); *Beesley v. Int'l Paper Co.*, No: 3:06–cv–703–DRH–CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (all awarding one-third attorney fee).

Likewise, the proposed $10,000 service awards are well within the bounds of amounts approved in other ERISA 401(k) cases, *see Kruger*, 2016 WL 6769066, at *6 (approving $25,000 service award to each of the named plaintiffs); *Krueger*, 2015 WL 4246879, at *3 (same), and are justified by the named Plaintiffs' service to the Class in this case. Finally, the requested out-of-pocket expenses and settlement administration expenses are reasonable and typical for a case such as this. *See Duke Univ.*, 2019 WL 2579201, at *4 (awarding expenses inclusive of the types of expenses requested by Class Counsel); *Sims*, 2019 WL 1993519, at *4 (same). Accordingly, Plaintiffs and Class Counsel respectfully request that the Court grant the present motion and approve the requested distributions.

BACKGROUND

I. PROCEDURAL HISTORY[2]

A. The Complaint

On July 25, 2019 Plaintiffs filed a Class Action Complaint Against NRECA and its Insurance and Financial Services Committee ("I&FS Committee"), asserting claims for breach of fiduciary duty, prohibited transactions, and equitable restitution under ERISA. *See ECF No. 1.* In

[2] The procedural history of the litigation was previously recounted in Plaintiffs' briefing in support of their motion for preliminary approval of the Settlement (*ECF No. 94*). For ease of reference, Plaintiffs have recounted that history here.

summary, Plaintiffs alleged that Defendants caused the Plan to pay NRECA, as in-house service provider, excessive administrative fees for recordkeeping and other administrative services. *Id*. ¶¶ 6-8. Plaintiffs also alleged that NRECA improperly used revenue from the Plan to subsidize other aspects of NRECA's business, including its obligations to its pension and health and welfare plans. *Id*. ¶¶ 9-10.

B. Defendants' Motion to Dismiss and Plaintiffs' Amended Complaint

On September 20, 2019, Defendants moved to dismiss the Complaint for failure to state a claim. *ECF No. 32.* Specifically, Defendants argued that comparing the Plan, a multiple-employer plan, to other single-employer plans was insufficient to allege violations of ERISA. *See ECF No. 37 at 1-2.* Defendants also argued that because they had been subject to "monitoring and approval" by an independent fiduciary during much of the statutory period (until 2017), the Complaint's allegations of imprudent and disloyal conduct were implausible. *Id. at 4.* In response, Plaintiffs amended the Complaint to incorporate additional allegations (including allegations comparing the Plan's fees to another multiple-employer plan). *See ECF No. 41.* Defendants then filed a renewed motion to dismiss the Amended Complaint, *ECF No. 42*, and on January 2, 2020, the Court denied Defendants' Motion to Dismiss the Amended Complaint, *ECF No. 69.*

C. Discovery

The Parties promptly proceeded with formal discovery. As part of the discovery process, Defendants produced extensive class data and more than 124,000 pages of documents, including (among others things) minutes and meeting materials from the I&FS Committee; I&FS Committee materials presented to the NRECA Board; all reports by the independent fiduciary and other third parties regarding the Plan's administrative expenses; third-party consultant studies regarding the Plan; documents related to NRECA's budget process; service provider contracts and invoices for service providers to the Plan; and I&FS Committee financial summary reports. *ECF No. 95-1,*

Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("First Specht Decl.") ¶ 13. In addition, Plaintiffs subpoenaed five third parties (including the independent fiduciary who was appointed following NRECA's settlement with the Department of Labor) and received more than 1,000 pages of documents from these third parties. *Id.* Further, Plaintiffs engaged two fiduciary experts, David Donaldson (the CEO of ERISASmart and a former investigator for the Department of Labor), and James Scheinberg (a nationally recognized expert on retirement-plan recordkeeping and administrative services). *Id.* Plaintiffs served their expert reports on Defendants on June 11, 2020. *Id. ¶ 14.* Shortly thereafter, the parties began engaging in arms-length negotiations and reached the instant Settlement. *Id.*

II. SETTLEMENT AND PRELIMINARY APPROVAL

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $10,000,000 to a Qualified Settlement Fund (the "Settlement Fund"). *Settlement Agreement ¶¶ 2.31, 2.39, 5.4, 5.5.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members[3] in accordance with the Plan of Allocation in the Settlement Agreement. *Id. ¶ 5.9.* Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Id. ¶ 6.5.* Former Participants (*i.e.* Class Members who no longer have an active Plan account) will be required to submit a claim

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[3] The certified Settlement Class is defined as follows:

> All participants and beneficiaries of the NRECA 401(k) Pension Plan at any time from July 25, 2013 through July 31, 2020 excluding members of the Insurance and Financial Services Committee, NRECA's Board of Directors, and the Plan Administrator.

ECF No. 97 at 3.

form that will allow them to elect to have their distribution rolled over into an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.* ¶ *6.6.*

The Settlement also provides for significant non-monetary relief. For a period of at least six years following the Settlement Effective Date, NRECA will retain an independent fiduciary that will do the following:

- Approve any administrative services agreements between NRECA and the Plan, including any amendments;
- Approve the expense methodology for direct expenses charged to the Plan by NRECA and monitor NRECA's compliance with that methodology; and determine whether such direct expenses comply with ERISA Section 408(c)(2);
- Undertake a periodic, comprehensive independent consultant study to analyze the Plan's administrative expenses for use in providing a recommendation to the I&FS Committee as to whether to continue to engage NRECA to provide administrative services to the Plan.

Id. ¶¶¶ *7.2.1–7.2.3.* In addition, NRECA will retain a separate qualified independent party to conduct a periodic review and approval of the methods by which third-party provider costs are shared between the Plan and NRECA or any other benefit plan of NRECA, with a report to the I&FS Committee including analysis as to whether such methods are reasonable and proper under applicable law. *Id.* ¶ *7.4.* Also, with respect to expenses that will be allocated among the plans to which NRECA provides services, NRECA will retain a separate qualified independent fiduciary to review and approve the methodology for such allocation. *Id.* ¶ *7.3.* Further, the Committee will adopt a process of reviewing and approving a detailed annual budget for the provision of services by NRECA to the Plan and will closely monitor the budgeted and actual costs. *Id.* ¶ *7.5.*

Plaintiffs filed a motion seeking preliminary approval of the Settlement on July 31, 2020. *ECF No. 94.* The Court granted that motion on August 6, 2020. *ECF No. 97*. Plaintiffs are filing the present motion 30 days in advance of the deadline for objections, pursuant to Paragraph 8.1 of the Settlement.

III. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. To date, the total amount of time invested by Class Counsel is over 2,086.6 hours, and additional work will be required going forward to implement the Settlement. *Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, and Class Representative Service Awards, ("Second Specht Decl.")* ¶¶ *12, 17; Declaration of Gregg C. Greenberg in Support of Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, and Class Representative Service Awards ("Greenberg Decl.")* ¶ *16.* This work is detailed in the accompanying declarations from Class Counsel, and is briefly summarized below.

A. Work Conducted to Date

Prior to filing this action, Class Counsel conducted an in-depth investigation of the Plan, the Plan's payments to service providers, and the Plan's expenses compared to peers. *First Specht Decl.* ¶ *12.* Thereafter, Class Counsel vigorously prosecuted the action on behalf of the class. Among other things, Class Counsel (1) drafted the initial class action Complaint and the Amended Complaint; (2) successfully opposed Defendants' motion to dismiss, including appearing before the Court for the motion to dismiss hearing; (3) propounded numerous discovery requests and repeatedly met and conferred with Defendants to ensure the production of critical information regarding the Plan and its expenses; (4) analyzed over 124,000 pages of documents and extensive class data produced by Defendants; (5) produced over 30,000 pages of documents; (6) diligently pursued relevant discovery from five non-parties[4] and reviewed more than 1,000 pages of

[4] These non-parties included AonHewitt, Calibre, Evercore, Newport Trust Company, and Johnson Lambert, each of whom provided services to the Plan and possessed relevant information regarding the Plan's administrative expenses.

documents produced by those non-parties; (7) worked with two well-credentialed experts to conduct detailed analyses of Defendants' oversight of the Plan's expenses; (8) negotiated the Settlement on terms favorable to the Settlement Class; and (9) consulted with the Class Representatives to ensure their participation throughout the course of the case. *Second Specht Decl. ¶ 11.*

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) drafting the Settlement Agreement and exhibits thereto (including the Settlement Notices, Former Participant Claim Form, and the proposed preliminary and final approval orders); (2) preparing Plaintiffs' Preliminary Approval Motion papers; (3) evaluating potential settlement administrators and working with opposing counsel to engage Analytics Consulting LLC ("Analytics") to serve as Settlement Administrator; (4) reviewing the final drafts of the Settlement Notices prepared by Analytics and ensuring that they were timely mailed; (5) working with Analytics to create a settlement website and telephone line for Class Members who would like additional information about the Settlement; (6) communicating with Class Members; and (7) preparing the present motion. *Second Specht Decl. ¶ 11.*

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiffs' motion for final approval of the Settlement and respond to any objections. *Id. ¶ 17.* Class Counsel also will communicate with the Independent Fiduciary (Jim Carroll of Carroll Services LLC) and provide all necessary information in connection with the

Independent Fiduciary's review of the proposed release on behalf of the Plan.[5] *Id.* Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to eligible Class Members. *Id.* In addition, Class Counsel will continue to respond to questions from Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

IV. WORK OF CLASS REPRESENTATIVES

The Class Representatives also have worked to advance the interests of Class Members. Specifically, the Class Representatives (1) assisted Class Counsel with their investigation by providing documents and other information regarding their participation in the Plan; (2) reviewed the initial Complaint and the Amended Complaint and consulted with Class Counsel regarding the matters asserted therein; (3) produced documents (including personal financial information) during discovery; (4) communicated with Class Counsel throughout the course of the action; and (5) discussed the Settlement with Class Counsel and reviewed and approved the Settlement Agreement. *Second Specht Decl. ¶ 31; see also ECF Nos. 95-05, 95-06.*

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

In order to be administered and effectuated, the Settlement also requires time, resources, and expertise from several non-parties. *See Settlement Agreement ¶¶ 2.25, 2.33, 2.43.*

Analytics, as the approved Settlement Administrator, disseminated the Settlement Notices to the more than 93,000 Class Members and established the settlement website and telephone message line. *Id. ¶¶ 2.43, 12.1, 12.2; Second Specht Decl. ¶ 27.* Analytics also will review the

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[5] A release on behalf of a plan is subject to independent fiduciary review under Prohibited Transaction Class Exemption 2003-39, 68 Fed. Reg. 75,632, as amended (Dec. 31, 2003). Independent fiduciary review is also a condition of settlement under Paragraph 3.1 of the Settlement Agreement.

Claim Forms submitted by Former Participants,[6] and coordinate distribution of payments to all Class Members in the event that the Settlement receives final approval. *Settlement Agreement* ¶¶ *2.43, 3.3.2, 5.9*.

The Escrow Agent, Alerus, will hold the monies in the Qualified Settlement Fund while approval of the Settlement and distributions to Class Members are pending. *Settlement Agreement,* ¶¶ *2.25, 5.4, 5.5*. Upon final approval of the Settlement, Alerus will release these funds and also execute the investment and tax qualification mandates in the Settlement Agreement. *Id.* ¶¶ *5.9-5.11*.

Finally, Jim Carroll of Carroll Services LLC, acting as Independent Fiduciary for the Plan, will review the Settlement and independently determine whether it is in the best interest of the Plan to release its claims against Defendants in exchange for the relief provided. *Id.* ¶ *3.1*. This independent fiduciary review is required by DOL regulations. *See supra* at n. 5.

VI. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT

In consideration of the work summarized above and associated expenses, Article 8 of the Settlement Agreement provides that Plaintiffs and Class Counsel may seek (1) attorneys' fees equal to one-third of the Settlement Fund; (2) litigation costs; (3) payment of Administrative Expenses, including the expenses of the Settlement Administrator, Escrow Agent, and Settlement Fiduciary; and (4) payment of a $10,000 service award for each Class Representative. *Id.* ¶¶ *8.1-8.2*. Consistent with the above, Plaintiffs Class Counsel seek the following amounts in connection with this motion:

[6] Current participants are not required to submit a claim form because their share of the Settlement proceeds can be automatically deposited in their 401(k) account. *Settlement Agreement* ¶ *6.5*.

- Attorneys' fees: $3,333,333.33
- Litigation Expenses: $294,087.10
- Class Representative service awards: $20,000.00 ($10,000 each)
- Settlement Administrator expense: $141,140.00
- Escrow Agent expense: $2,500.00
- Independent Fiduciary expense: $40,000.00

See Second Specht Decl., ¶¶ 18-20, 26, 28, 29.

ARGUMENT

Courts "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement" when counsel obtain a settlement for a class. Fed. R. Civ. P. 23(h). Here, the requested distributions are authorized both under Article 8 of the Settlement Agreement (*see supra*) and by applicable law.

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund" on behalf of a class "is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Recognizing that a class benefits from a common fund without contributing to its costs, "[c]ourts remedy this inequity by shifting a proportional share of reasonable attorneys' fees onto" the Class. *Brundle ex rel. Constellis Employee Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 785 (4th Cir. 2019), *as amended* (Mar. 22, 2019). *Id.* Likewise, "reasonable expenses of litigation" may be recovered from a common fund, *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970); *see also In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) (awarding reasonable costs to be paid from common fund); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 690 (D. Md. 2013) (awarding claims administration expenses). Finally, class representative service awards are a

"fairly typical practice" and intended to compensate class representatives for their efforts, burden, and risks taken on behalf of the class. *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238(DJN), 2016 WL 1070819, at *6 (E.D. Va. Mar. 15, 2016). In summary, the requested distributions are customary in a class action suit such as this, and should be approved for the reasons set forth below.

I. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES.

"While the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *In re The Mills Corp.*, 265 F.R.D. at 260 (citing cases); *see also Thomas v. FTS USA, LLC*, No. 3:13cv825 (REP), 2017 WL 1148283, at *4 (E.D. Va. Jan. 9, 2017) (same). This method asks the court to award "attorneys' fees as a percentage of the common fund used to pay class members' damages and claims." *Gagliastre v. Capt. George's Seafood Rest., LP*, No. 2:17CV379, 2019 WL 2288441, at *5 (E.D. Va. May 29, 2019); *see also Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984).

By contrast, the lodestar method multiplies the hours expended by class counsel by a reasonable hourly rate. Although the percentage method is "overwhelmingly" preferred to the lodestar method, courts have used the lodestar method to "cross-check" the percentage method. *Jones v. Dominion Resources Servs, Inc.*, 601 F. Supp. 2d 756, 758–60 (S.D. W.Va. 2009); *see also Thomas*, 2017 WL 1148283, at *4 (observing cross-check use of lodestar approach); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) (noting that the percentage method is "more efficient[,] less burdensome[, and] ... a more reasonable measure of compensation" than the lodestar method, and citing cases); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 787 (E.D. Va. 2001) (noting the virtue of the percentage method in disincentivizing plaintiffs' attorneys from over-litigating).

A. One-Third of the Common Fund is a Reasonable Fee in this Case.

In evaluating the reasonableness of recovery under a percentage method, this Court considers the following seven factors:

> (1) the results obtained for the Class; (2) objections by members of the Class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases.

In re The Mills Corp., 265 F.R.D. at 261. Consideration of these factors need not be "'formulaic'" but should be tailored to the case, allowing for even "'one factor [to] outweigh the rest.'" *Gagliastre*, 2019 WL 2288441, at *5 (quoting *In re AT & T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006)). The Fourth Circuit has noted that **a one-third fee award is typical in ERISA class actions**, *Brundle,* 919 F.3d at 788 n.14 (citing cases), and several district courts within the Fourth Circuit have approved a one-third fee award in ERISA class action settlements, *see Duke Univ.*, 2019 WL 2579201, at *5 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, No. 1:15cv-732, 1:15-cv-841, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019); *Kruger*, 2016 WL 6769066, at *2 (citing additional cases). Here, the factors strongly support the reasonableness of the one-third recovery.

1. The Results Obtained for the Class

"[T]he most critical factor in calculating a reasonable award is the degree of success obtained." *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (internal quotation marks omitted). Here, Class Counsel recovered a sizable settlement of $10,000,000 to be paid to the Plan, which amounts to 22-38% of the estimated excess fees calculated by Plaintiffs' expert. *See First Specht Decl. ¶ 8*. This recovery is in line with other settlements in 401(k) fee cases where courts have awarded one-third of the settlement amount. *See, e.g.*, *Sims v. BB&T Corp.*, Nos. 1:15–cv–732, 1:15–cv–841, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (approving one-third fee

award where settlement represented 19% of estimated damages, *see* 2019 WL 1995314); *Stevens*, 2020 WL 996418, at *14 (approving one-third fee award where settlement represented 31% of estimated damages, *see* ECF No. 39-1 at 13); *Duke Univ.*, ECF No. 23 ¶ 1 (approving one-third fee award where settlement represented 18-46% of estimated damages, see ECF No. 5-1 at 12).

In addition, the Settlement provides for significant non-monetary relief that will continue to yield remunerative value to the Class in the form of independent oversight of administrative fees charged to the Plan. *Settlement Agreement* ¶¶ *7.2-7.5*. In such circumstances, one-third of the cash fund is more than reasonable, particularly where class counsel seeks no additional recovery based on the non-monetary relief. *Cf.*, *Hooker v. Sirius XM Radio, Inc.*, No. 4:13-CV-003, 2017 WL 4484258, at *5 (E.D. Va. May 11, 2017) (awarding a fee "based on 35 percent of the ... cash fund[, which] includes a 10 percent 'bonus' to compensate counsel for the nonmonetary benefits in this case."). The substantial recovery achieved on behalf of the class favors the requested fee.

2. The Quality, Skill, and Efficiency of the Attorneys Involved, and the Complexity and Duration of the Case

This case was difficult and required significant expertise on the part of Class Counsel. ERISA 401(k) cases are "particularly complex." *See Abbott*, 2015 WL 4398475, at *2. This area has been repeatedly noted by courts to present difficult legal issues. *See Krueger*, 2015 WL 4246879, at *1 ("ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty…claims."). Moreover, successful prosecution of ERISA 401(k) cases requires "expertise regarding industry practices" and knowledge of how to obtain and analyze pertinent records. *See Kruger*, 2016 WL 6769066, at *3.

These obstacles were present, and pronounced, in this case involving a unique breed of 401(k) plan, a MEP with more than 93,000 current and former participants. *See* GAO, *Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans* (Sept. 2012), at 6, 22-23 (MEPs are a "small portion" of the retirement market, and "[l]ittle is known" about their characteristics), *available at* https://www.gao.gov/assets/650/648285.pdf. Class Counsel is one of a small handful of law firms that have successfully challenged the management of a MEP. Class Counsel had to ascertain the relevant marketplace and peer plans to attempt to demonstrate that Defendants' management of the Plan did not satisfy fiduciary standards and caused substantial losses to the Plan. *See Second Specht Decl. ¶ 10; ECF No. 41 ¶¶ 38-50.*

Meeting these challenges required counsel with specialized skills, and Class Counsel were well-suited to the challenge. Courts have recognized Nichols Kaster's expertise in this area. *See Sims*, 2019 WL 1993519, at *2 (noting Nichols Kaster's strong work on behalf of retirement beneficiaries and skillful litigation); *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017) ("Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]"). The firm has a demonstrated record of success in ERISA litigation, *see First Specht Decl. ¶¶ 15-19*, and is one of the very few firms to have ever successfully prosecuted a case such as this. *See Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101-Rosenberg/Reinhart, ECF No. 24 (S.D. Fla. Dec. 20, 2018) (approving settlement of ERISA claim brought on behalf of a MEP with Nichols Kaster as Class Counsel). Class Counsel's specialized expertise was beneficial to the Class and instrumental in achieving the fair and efficient result that was obtained. *See Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) (achieving a "true benefit" while making "efficient use of the court's resources" in a complex case is evidence that class counsel is "very

experienced and able"), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Moreover, Class Counsel exhibited skill throughout the duration of the case, prevailing on a motion to dismiss, undertaking extensive discovery, and collaborating with well-credentialed experts.

3. The Risk of Nonpayment and Public Policy

Counsel brought this action on a contingency basis with "a substantial risk of nonpayment." *In re The Mills Corp.*, 265 F.R.D. at 263; *see also Sanchez v. Lasership, Inc.*, No. 112CV246GBLTRJ, 2014 WL 12780145, at *1 (E.D. Va. Aug. 8, 2014). In the absence of a Settlement, Class Counsel would have faced significant litigation risks. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 148 ("[T]he risk for Plaintiffs' Counsel in this ERISA company stock case was significant. Moreover, in addition to the risks discussed above, Plaintiffs' Counsel had to contend with the traditional risks inherent in any contingent litigation."). These risks are highlighted by two recent trial judgments in favor of the defendants in ERISA cases. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 16-cv-6284 (KBF), 2018 WL 3629598 (S.D.N.Y. July 31, 2018). The heightened risks associated with prosecuting ERISA claims on behalf of a complicated MEP further justifies the requested fee in light of the contingent nature of the representation.

The risk of nonpayment relates closely with the public policy factor. *In re The Mills Corp.*, 265 F.R.D. at 263. As with securities litigation, "the public benefits when capable and seasoned counsel undertake private action" to enforce ERISA. *Id.* The risks and complexity of ERISA class action litigation, particularly concerning MEPs, are a significant deterrent from bringing actions such as this one. "One object of an award of attorneys' fees should be to counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *Id.* This is especially important in the ERISA context because "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers." *In re Marsh ERISA*

Litig., 265 F.R.D. at 149–50. As courts have noted, "the protection of retirement funds is a great public interest" and "private attorneys general have a major role to play in ERISA litigation." *Fastener Dimensions, Inc. v. Mass. Mut. Life Ins. Co.*, Nos. 12cv8918 (DLC), 13cv4782 (DLC), 2014 WL 5455473, at *9 (S.D.N.Y. Oct. 28, 2014).[7] Indeed, suits like this are one of the reasons why fees in 401(k) plans have dropped in recent years. *See 401(k) Fees Continue to Drop*, FORBES (Aug. 20, 2015) ("In part in response to 401(k) fee litigation, employers have been aggressively negotiating fees…").[8]

4. Objections by Members of the Class to Settlement Terms and/or Fees Requested by Counsel

To date, of the more than 93,000 Class Members who were sent notice, only three have objected to the settlement. Only one concerns Class Counsel's request for fees, while another is supportive of Class Counsel's work in this case. This relatively miniscule number of objections generally indicates that the terms of the Settlement and Class Counsel's fee request are viewed favorably by members of the Settlement Class. *See In re The Mills Corp.*, 265 F.R.D. at 261 (noting favorable class reaction indicative of desirable settlement).

Two of the three objections are easily resolved. The first objection states only that the objector "wish[es] to object to any part of the settlement" but does not explain why. *See Second Specht Decl. Ex. 2.* This unsupported objection should be overruled. *In re Neustar, Inc. Sec. Litig.*, No. 1:14cv885 (JCC/TRJ), 2015 WL 8484438, at *4 (E.D. Va. Dec. 8, 2015) ("giving no weight at all" to objection that "is devoid of actual argument"). The second objection was based on the misplaced concern that claims against NRECA's *defined benefit* plan would be included within

[7] *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009) (noting that Secretary of Labor "depends in part on private litigation to ensure compliance with the statute").
[8] Available at https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop/#6b8caf21164f (last visited October 12, 2020).

the scope of the release included in the Settlement Agreement. *See Second Specht Decl. Ex. 3 at 1*. The Class Member was otherwise supportive of Class Counsel's work, noting "I appreciate your action against NRECA.... I feel you've done the right thing." *Id.* Class Counsel has advised that class member that the release would not include claims against the defined benefit plan. *See id. Ex. 3 at 2*.

The third objection does concern Class Counsel's fees and costs. *See Second Specht Decl. Ex. 4*. The objector believes that a fee award of one-third of the Settlement amount would be "excessive" and that such an award, in addition to litigation costs, would be "patently unfair." *Id.*[9] The objector's concerns with fairness are understandable, but he does not appear to consider the substantial amount of work performed by Class Counsel on this case or the risks assumed in undertaking this matter on a contingency basis. It is well-established and customary for attorneys to recover fees for their services through an award from a common fund—there would be no fund to distribute but for the efforts of Class Counsel. *See Boeing*, 444 U.S. at 478; *see also supra* at 11-12. As the Fourth Circuit acknowledged in a similar case, "[s]cores of unnamed [plan] participants benefited substantially from this lawsuit, while [Class Counsel] bore the entirety of the costs and risks. Equity thus demands that the enriched participants pay a proportional share of reasonable attorneys' fees." *Brundle*, 919 F.3d at 785. The same is true in this case. Class Counsel has achieved a significant recovery on behalf of 93,000 class members, the overwhelming majority of whom (including the objector) will automatically receive a distribution of the settlement proceeds in their retirement plan accounts without having to take any action. For this success, Class Counsel should be awarded a fee commensurate with the level of success achieved on behalf

[9] To be clear, although the objector estimated that litigation costs could be as much as $1.5 million, Class Counsel incurred only a fraction of that amount. *See supra* at 1.

of the class and consistent with awards approved in other similar cases. *See supra* at 13-14; *see also In re The Mills Corp.*, 265 F.R.D. at 261–62 (overruling two objections to attorneys' fees, observing that the average lodestar multiplier identified in a study cited by one objector was 4.5, which was "substantially higher than the applicable multiplier in this case"). The objector provides no analysis under the relevant factors showing the requested amount to be unreasonable under the circumstances. Accordingly, Class Counsel respectfully submits that this objection should be overruled.

5. Awards in Similar Cases

The requested fee award of one-third of the Settlement Fund is consistent with awards in similar ERISA class actions involving 401(k) plans. *See supra* at 13. As the court stated in *Krueger*:

> [I]n comparing the requested fee with fee awards in similar cases, the relevant comparators are ERISA class actions asserting breaches of fiduciary duties in the selection and retention of plan investment options and the reasonableness of defined contribution plan fees. *In such cases, courts have consistently awarded one-third contingent fees.*

2015 WL 4246879, at *2 (emphasis added) (citing cases); *see also Larson*, ECF No. 132 at ¶¶ 4-5; *Stevens*, 2020 WL 996418, at *14; *Duke Univ.*, 2019 WL 2579201, at *5; *Sims*, 2019 WL 1993519, at *2; *Oasis Outsourcing*, ECF No. 23 ¶ 1; *Andrus*, ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017); *Spano*, 2016 WL 3791123, at *2; *Abbott*, 2015 WL 4398475; *Beesley*, 2014 WL 375432, at *2 (all awarding one-third attorneys' fee).

Consistent with this established benchmark, Nichols Kaster previously received a one-third fee award in another ERISA case in this Circuit. *See Sims*, 2019 WL 1993519, at *2. In addition, Class Counsel have received one-third fee awards in several other ERISA cases. *See In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375-FPG-JJM, ECF No. 190 (W.D.N.Y. Sept. 3, 2020) *Andrus*, ECF No. 83 (approving one-third fee to Nichols Kaster in ERISA case); *Stevens*, 2020

WL 996418, at *14 (same); *Oasis Outsourcing*, ECF No. 23 ¶ 1 (same); *Larson*, ECF No. 132 at ¶¶ 4-5 (approving one-third fee to Nichols Kaster and co-counsel in ERISA case).

B. A Lodestar Cross-Check Confirms the Reasonableness of Class Counsel's Request.

Using the lodestar "cross-check" method confirms the requested fees are reasonable.[10] Here, Plaintiffs' counsel dedicated more than 2,000 hours to prosecuting this case. *Second Specht Decl. ¶ 12.* Multiplying that by the reasonable hourly billing rates[11] of Class Counsel's attorneys yields a lodestar of $1,069,300.00. *Id. ¶ 15.* While the requested fee exceeds the reported lodestar, Class Counsel are entitled to a reasonable multiplier because they took this case on a contingent fee basis and assumed a significant risk of loss. *See, e.g., Brundle*, 919 F.3d at 786 ("courts routinely impose enhanced common fund awards to compensate counsel for litigation risk"). Here, the requested fee represents a multiplier of approximately 3 and falls within a reasonable range. Courts in this Circuit have generally agreed that a lodestar multiple between 2 and 4.5 is reasonable. *In re The Mills Corp.*, 265 F.R.D. at 265; *see also Jones*, 601 F. Supp. 2d at 766; *Kruger*, 2016 WL 6769066, at *5 (citing numerous cases in this Circuit and across the country).

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[10] To calculate the lodestar, the court multiplies the reasonable number of hours worked "by multiplying the number of hours reasonably worked by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Id.* In using the lodestar method in this manner "the Court need[] not apply the 'exhaustive scrutiny' typically mandated, and the Court may accept the hours estimates provided by Lead Counsel." *In re The Mills Corp.*, 265 F.R.D. at 265 (citing *Jones,* 601 F.Supp.2d at 765–66).

[11] The hourly rates used to calculate Class Counsel's lodestar are "reasonable and are comparable to fees that have been recently approved in [other] ERISA class action[s]." *Sims*, 2019 WL 1993519, at *3 (addressing and approving Nichols Kaster's billing rates). Class Counsel's billing rates for ERISA actions range from $625 to $875 per hour for attorneys with more than 10 years of experience, $425 to $575 per hour for attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks. *Second Specht Decl. ¶ 13.* These rates are consistent with (and slightly less than) the rates approved for other experienced ERISA litigators. *See, e.g.*, *Kruger*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience); *Spano*, 2016 WL 3791123, *3 (same); *Abbott*, 2015 WL 4398475, *3 (adopting rates of $447 to $974 per hour based on years of experience).

The multiplier here falls squarely in the middle of this range, and is appropriate given the risks and difficulties of proving complex ERISA claims on a contingent basis. Indeed, higher multipliers have been approved in several ERISA cases. *See, e.g.*, *Stevens*, 2020 WL 996418, at *13 (noting that approved one-third fee represented a multiplier of approximately 6.16); *Andrus v. New York Life Ins. Co.*, No. 16-05698, ECF No. 74 at 12 (S.D.N.Y. April 14, 2017) (awarding one-third fee award that represented a multiplier of 5); *Kruger*, 2016 WL 6769066, at *5 (awarding 3.69 multiplier in an ERISA case); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (affirming 3.65 multiplier, noting complexity of case and risk of non-payment in ERISA case).

II. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES

A. Litigation Expenses

In addition to fees, courts may award reasonable litigation costs and expenses. *In re The Mills Corp.*, 265 F.R.D. at 265; *see also In re Microstrategy.*, 172 F. Supp. 2d at 791. Here, Class Counsel seeks reimbursement of $294,087.10 in litigation expenses (2.9% of the common fund), which includes expert fees, reproduction costs, court costs, and research costs. Expert fees make up a large portion of the requested costs, and justifiably so. This case rested heavily on fiduciary and recordkeeping experts who carefully evaluated the Plan's administrative expenses and fiduciary processes. "These expenses are reasonable in light of the reliance other district courts in similar ERISA excessive fee litigation have placed on expert testimony and the complex nature of ERISA litigation." *Duke Univ.*, 2019 WL 2579201, at *4 (citing cases and awarding expenses that were 7.7% of the common fund). In light of the technical and complex nature of this action, Class Counsel's litigation expenses are reasonable and justified. *See, e.g.*, *In re Microstrategy*, 172 F.Supp.2d at 791 (awarding total of $2.5 million for litigation costs associated with two settlements, which amounted to 4.5% of the common funds); *Sims*, 2019 WL 1993519, at *4 (approving $1.1 million in expenses, which was 4.5% of the common fund, that "included the costs

of hiring experts and consultants, taking depositions, travel, lodging, and parking, copies and communication costs, and mediation and settlement costs, and professional fees, among others").

B. Settlement Administration Expenses

The requested settlement administration expenses are also reasonable. The Settlement Notice, claims review, and payment distribution services provided by Analytics are essential to carry out the Settlement. The cost of providing those services ($141,140) is reasonable in light of the size of the Class (more than 93,000) and comes to roughly $1.50 per class member. The Escrow Agent expense of $2,500 is also reasonable in light of the responsibility of handling a $10 million settlement fund. Finally, review of the Settlement by the Independent Fiduciary is required by DOL regulations, and is deemed to be a "critically important" benefit to plan participants. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 139. Accordingly, the requested settlement administration expenses in the amount of $183,640.00 should be approved. Both the total amount of these expenses and the underlying components are reasonable and customary in ERISA cases such as this. *See, e.g., Oasis Outsourcing*, ECF No. 23 ¶ 2 (approving $157,050 in administrative expenses for same services related to the settlement); *Andrus*, ECF No. 83 at ¶ 3 (approving administrative expenses for same types of services); *see also Singleton*, 976 F. Supp. 2d at 690 (approving reasonable claims administration costs that had been approved in comparable cases).

III. THE COURT SHOULD GRANT THE REQUESTED SERVICE AWARDS.

Finally, courts in this circuit routinely award service awards to class representatives "'to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'" *Manuel*, 2016 WL 1070819, at *6 (quoting *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015)). Here, Mr. Intravaia and Mr. Marvik assisted Class Counsel in their investigation of the claims, produced personal financial information to

Defendants, reviewed the complaint, the amended complaint, and the settlement agreement, and were prepared to take personal time away from family and off from work to prepare for and attend a deposition and, if necessary, trial. They also risked their reputation and alienation from employers in bringing an action against a large association of electrical cooperatives, which includes hundreds of member employers across the country. *See Kruger*, 2016 WL 6769066 at 6; *Abbott*, 2015 WL 4398475, at *4 (noting that bringing a lawsuit against an employer relating to management of a 401(k) plan entails risk that the plaintiff will be viewed unfavorably by the employer or future employers). A case contribution award of $10,000 for each Class Representative, which represents one-tenth of one percent of the Settlement Fund, is reasonable and appropriate given their contributions to the case. *See, e.g.*, *Manuel*, 2016 WL 1070819, at *6 (approving service award of $10,000); *Decohen v. Abassi, LLC*, 299 F.R.D. 469, 483 (D. Md. 2014) (same). Indeed, this amount is significantly below service awards approved by other courts in similar excessive 401(k) fee settlements. *See Kruger*, 2016 WL 6769066 at 6; *Abbott*, 2015 WL 4398475 at 4; *Krueger*, 2015 WL 4246879 at 4; *Beesley*, 2014 WL 375432 at 4; *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174 at 4, (S.D. Ill. Nov. 22, 2010) (all awarding $25,000 to each named plaintiff).

CONCLUSION

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

Dated: October 20, 2020

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

/s/ Gregg C. Greenberg
Gregg C. Greenberg