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

GREGORY AHRENS, *et al.*, Plaintiffs, v. UCB HOLDINGS, INC., *et al.*, Defendants.	Case No. 1:15-cv-00348-TWT

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and this Court's February 9, 2017 Order (ECF No. 66), Class Counsel respectfully submits this Memorandum to support their Motion for an Award of Attorneys' Fees and Reimbursement of Expenses.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Nature of the Action

This is an action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq*., on behalf of a class of participants in the UCB, Inc. Defined Benefit Pension Plan (the "UCB Plan" or the "Plan") who had at one time been employees of Northampton Medical, Inc. ("Northampton"), or Whitby Pharmaceuticals, Inc. or Whitby, Inc. (collectively "Whitby") immediately before UCB acquired the companies in 1994. The Complaint alleges, among others, that, in violation of various provisions of ERISA, UCB failed to credit those participants with their years of pre-acquisition service when calculating their retirement benefits under the UCB Plan. Compl. (ECF No. 1) ¶¶ 149-168.

B. Factual And Procedural Background, And Efforts of Class Counsel

In 1994, UCB, Inc. acquired two companies, Northampton and Whitby. The Complaint alleged that UCB consistently told employees, both before and after the acquisitions, that, when calculating their retirement benefits under the UCB Plan, Whitby and Northampton employees would provide UCB pension

service credit for their years of pre-acquisition service. *Id*. ¶¶ 50-55. Subsequently, in 2011 and 2012, UCB sent letters to Plaintiffs claiming that their pension benefits had previously been overstated. *Id.* ¶¶ 113, 115. These letters claimed that under the terms of the Plan, the years Plaintiffs spent working for Northampton and Whitby should not have been included when calculating their pension benefits. *Id*. ¶¶ 114, 116-119. Two Plaintiffs, Mary Ann Geiger and Timothy Walker, had already begun receiving pension benefits: Geiger in the form of an annuity and Walker in the form of a lump sum. *Id*. ¶¶ 129-30. After UCB informed Plaintiffs Geiger and Walker that their benefits were allegedly overpaid, UCB requested that Plaintiffs Geiger and Walker refund UCB for its purported overpayment, plus interest. *Id*.

When counsel got involved, they had to do substantial work to prepare the case for litigation. Because the Eleventh Circuit requires administrative exhaustion of ERISA fiduciary breach claims as well as ERISA benefits claims, working with counsel each of the Plaintiffs submitted written claims for benefits seeking to have the years they worked at Northampton and Whitby included in the calculation of their pension benefits. *Id*. ¶¶ 135-36; Creitz. Decl. ¶ 11. UCB denied Plaintiffs' claims and counsel prepared administrative appeals of the denials, which UCB also denied. *Compl*. ¶¶ 137-43; Creitz. Decl. ¶ 11. After exhausting their administrative remedies, Plaintiffs brought this suit. *Id*. ¶ 144.

Before, during and after the process of administrative exhaustion, counsel performed substantial work investigating the claims, and corroborating the Plaintiffs' statements about what UCB had told them. Creitz. Decl. ¶ 11. Although Plaintiffs ultimately lost the statute of limitations issue raised in Defendants' Motion to Dismiss, plaintiffs' counsel had performed a thorough pre-litigation analysis of the facts, evidence, and controlling law relating to that issue. *Id.* Additionally, the work of interviewing the Plaintiffs and other witnesses, of preparing claims and administrative appeals, and reviewing the arguments and documents produced by UCB during the administrative appeal process, significantly increased Class counsel's understanding of the issues, and the basis of Defendants' arguments and positions on those issues. *Id*.

Working with that acquired knowledge, Plaintiffs filed their Complaint on February 3, 2015. ECF No. 1. Defendants filed the above-mentioned motion to dismiss counts IV through VIII on May 15, 2015. ECF No. 25. On January 6, 2016, the Court granted Defendants' motion. ECF No. 37. While the motion to dismiss was pending, Counsel had some discussions about settlement and the Parties agreed to a mediation; on February 2, 2016, the Court ordered the case be stayed pending settlement discussions. ECF No. 43.

While the case was stayed, Class Counsel engaged in informal discovery related to both the numerosity of the Class and amount of the potential relief. Creitz Decl. ¶ 12. As part of this discovery, Defendants provided Plaintiffs'

counsel with data on Class Members, including each of their years of Pre-Acquisition Service. *Id*. Using this data, Class Counsel retained a consulting actuary to calculate each Class Member's benefit under the Plan if credited with their years of Pre-Acquisition Service. *Id*. The aggregate total was approximately $9.1 million before interest. *Id*. Acquiring the necessary information and processing the data involved a considerable investment of time and resources by Class Counsel. After the calculations were performed, the Parties mediated before Retired United States Magistrate Judge Morton Denlow in Chicago on July 26, 2016. *Id*. After mediating for almost ten hours, the Parties reached agreement on the essential terms of a settlement. *Id*.

C. Negotiation And Terms of the Settlement Agreement

The negotiation of the final settlement terms continued for weeks following the successful mediation, and required a substantial investment of time, effort, and the ongoing services of an actuarial consultant to calculate and generate a plan of allocation that would determine how the settlement amount would be paid among the members of the class. *Id.* at ¶ 13. After months of negotiations, on January 17, 2017, the parties executed a formal settlement agreement. ECF No. 63 ("Agmt").

The terms of the Settlement Agreement provide both a monetary and a non-monetary consideration. *Id*. § IV.A-E. As to the monetary consideration, Defendants agree to pay $5.5 million (plus interest at an agreed-upon rate from

July 26, 2016) ("the Settlement Amount") to resolve the claims of Class Members whom Plaintiffs contend were not paid the correct amounts of benefits under the Plan. *Id*. § IV.A-C. The Settlement Amount minus the attorneys' fees and expenses to be approved by the Court ("the Net Settlement Amount") will be allocated to Class Members pursuant to the Plan of Allocation proposed by Class Counsel. *Id*. & Ex. A ("Plan of Allocation"). For the purpose of determining each Class Member's pro rata shares of the Net Settlement Amount, each Class Member will be assigned a pro rata percentage of the Net Settlement Amount based on, among others, whether he or she received a letter in 2011 or 2012 stating that his or her Pre-Acquisition Service Credit would not be included to calculate pension benefits and whether some amount of a prior payment of benefits reflecting his or her Pre-Acquisition Credit was returned to UCB or the Plan. *Id*. Ex. A ¶¶ 2-4.

As to the non-monetary consideration of the Settlements, Defendants agreed to cease efforts to recoup any alleged overpayments from Class Members who had already received pension benefits that included their Pre-Acquisition Service Credit. *Id*. § IV.E. As there are six Class Members who fall under that category, Creitz Decl. ¶ 12, the Settlement Amount does not capture the significant value to those Class Members of this aspect of the Settlement. Defendants also agree to amend the Plan to recognize the amount of benefits as provided under the Plan of Allocation. ECF 63 § IV.D. Further, to ensure that

none of Defendants' costs to implement and administer the Settlement and the Plan of Allocation will result in a charge or an expense to Class Members, Class Counsel negotiated Settlement terms requiring Defendants to bear all such costs (other than those incurred by Plaintiffs or Class Counsel and costs of posting notice on a website provided by Class Counsel, which will be paid out of the Settlement Amount to the extent approved by the Court). *Id*. III.D, IV.G, VII.C.

In exchange for the benefits conferred by the Settlement Agreement, the Settlement Class will release Defendants and certain other Releasees from all claims that were or could have been asserted arising out of the events alleged in the Complaint or alleged in the administrative claims brought by Plaintiffs. *Id*. ¶ XIII.A. In short, both sides are releasing claims relating to Pre-Acquisition Service Credits at Northampton or Whitby.

II. CLASS COUNSEL'S FEE MOTION SHOULD BE GRANTED

A. In Common Fund Cases, Courts in the Eleventh Circuit Award Attorneys' Fees Based on the Percentage-of-the-Fund Approach

It is well-established that a lawyer who recovers a common fund for the benefit 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); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991). In a class action where a common fund has been created due to class counsel's legal services, the Eleventh Circuit has held that the preferred method of awarding attorneys' fees is the

percentage-of-the-fund method, according to which "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Id.* at 774; *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) (quoting *Camden I*). Here, as the Settlement Agreement establishes a common fund in the amount of $5.5 million (plus interest at an agreed-upon rate from July 26, 2016), ECF No. 63 ("Agmt") § IV.A, the percentage-of-the-fund method should be used to determine the attorneys' fees to be awarded. *Camden I*, 946 F.2d at 774; *Faught* 668 F.3d at 1242.

B. The *Johnson* Factors And Additional *Camden I* Factors Support the Reasonableness of the Percentage of the Common Fund Requested by Class Counsel

Recognizing that "[t]he majority of common fund fee awards fall between 20% to 30% of the fund," the Eleventh Circuit has adopted 25% as a "bench mark" for determining the reasonableness of the percentage of the common fund requested by counsel. *Camden I*, 946 F.2d at 774-75; *Waters v. Int'l. Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999). The benchmark, however, is not a ceiling as "there is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded," although "an upper limit of 50% of the fund" is the "general rule." *Camden I*, 946 F.2d at 774; *Waters*, 190 F.3d at 1298 (approving award of 33 1/3% of common fund). District courts may adjust the 25% benchmark "in accordance with the individual circumstances of

each case" using factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Camden I*, 946 F.2d at 775. Those factors include

> (1) time and labor, (2) novelty and difficulty of the questions, (3) requisite skill, (4) preclusion of other employment, (5) customary fee, (6) fixed or contingent fee, (7) time limitations, (8) amount involved and results obtained, (9) experience, reputation and ability of attorneys, (10) "undesirability" of the case, (11) nature and length of professional relationship with client, and (12) award in similar cases.

Waters, 190 F.3d at 1294 n.5; *Camden I*, 946 F.2d at 775 & 772 n.3. "Other pertinent factors are (a) "the time required to reach a settlement," (b) "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel," (c) "any non-monetary benefits conferred upon the class by the settlement," and (d) "the economics involved in prosecuting a class action." *Id*. at 775.

Here, Class Counsel requests an award of attorneys' fees in the amount of 27% of the Settlement Fund. Both the *Johnson* factors adopted by the Eleventh Circuit and the additional *Camden I* factors support this request.

1. The Amount Involved Is Substantial And the Results Obtained Were Excellent

When the "recovery compares favorably to other settlements approved in [similar] class actions" that supports a higher fee award. *Columbus Drywall & Insulation, Inc. v. Masco Corp*., 1:04-CV-3066-JEC, 2012 WL 12540344, at *5 (N.D. Ga. Oct. 26, 2012) (finding results supported one-third fee award). The monetary relief obtained in this Settlement is excellent. Defendants have agreed to pay $5.5

million plus interest at an agreed-upon rate to resolve the claims of Plaintiffs and the Settlement Class. Agmt. § IV.A. The monetary component of the Settlement alone represents more than 60% of what members of the Settlement Class whom Plaintiffs contend were not paid the correct amount of benefits under the UCB Plan or had their benefits reduced could have recovered in this litigation before interest. Creitz Decl. ¶ 14. In addition, the Settlement provides significant non-monetary relief to the Class, including in particular to members of the Settlement Class who received and retained lump sum pension payments that included their years of pre-acquisition service. Agmt. XIII.B. The Agreement requires that the benefits paid will be recognized by a formal plan amendment. *Id*. IV.D. And Defendants have agreed to bear all notice and administration costs, which adds significantly to the net benefits received by the Class. *Id*. III.D, IV.G, VII.C.

Most ERISA class actions settle for far less than 60% of the monetary amount sought. *E.g. Boyd v. Coventry Health Care Inc*., 299 F.R.D. 451, 463 (D. Md. 2014) (approving settlement that recovered 3.2% of maximum losses); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (settlement recovered 24.3% of maximum recovery); *Mehling v. New York Life Ins. Co*., 248 F.R.D. 455, 462 (E.D. Pa. 2008) (20% recovery); *In re WorldCom, Inc. ERISA Litig*., No. 02-civ-4816 (DLC), 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (recovered 7% of maximum recovery); *compare Am. Med. Ass'n v. United Healthcare Corp*., No. 00-2800, 2009 WL 1437819, at *2 (S.D.N.Y. May 19, 2009) with *id*., 2009 WL 4403185,

at *1 (S.D.N.Y. Dec. 1, 2009) (7.4% recovery). Had the instant case not resolved in mediation, there was a substantial likelihood that the litigation could last years (including appeals), and no guaranty that there would ever be any recovery.

In light of the risk of facing many more years of uncertain and costly litigation, the monetary relief obtained through the Settlement (which, based on Defendants' data, will provide more than 200 participants with amounts representing a significant portion of their most probable monetary relief recovered against Defendants) is significant. Creitz Decl. ¶ 14.

2. The Time And Labor Required

In considering the time and labor required to litigate a class action, courts have taken into account the time and labor in "[i]nvestigating, prosecuting, and settling [class] claims." *In re: Checking Account Overdraft Litig.*, 1:09-MD-02036-JLK, 2013 WL 11319243, at *14 (S.D. Fla. Aug. 2, 2013). Class Counsel have devoted a substantial amount of time to investigate, administratively exhaust, file, litigate, settle, and administer this class action.

Prior to filing the Complaint, a number of the Plaintiffs, with the assistance of Counsel, made requests for documents relating to the Plan, including any historical documents dating as far back as 1994. Creitz Decl. ¶ 11. The Eleventh Circuit , unlike most Circuits, requires that Plaintiffs exhaust their administrative remedies for *all* ERISA claims, not just ERISA § 502(a)(1)(B) claims. *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) ("This exhaustion

requirement applies equally to claims for benefits and claims for violation of ERISA itself."). As a result, each of the eight Plaintiffs were required to and did file claims as to each of the claims by submitting claims to the Plan Administrator. Creitz Decl. ¶ 11. After their claims were denied, pursuant to 29 C.F.R. § 2560.503-1, Plaintiffs made requests for documents considered as part of the claims process. Creitz Decl. ¶ 11. As a result, Plaintiffs obtained additional documents to aid in the drafting of their complaint. *Id.*

As of March 25, 2017, Class Counsel have spent over 1,900 combined hours in this action. Anderson Decl. ¶ 4 (20.2 hours); Barton Decl. at ¶¶ 10, 11 (138.75 hours); Handorf Decl. ¶ 3 (1,626.5 hours); Creitz Decl. ¶ 9 (115.8 hours). In the declarations submitted in support of this motion, Class Counsel describe the types of work that they performed, and report the amount of time that they and their paralegals at their respective firms expended. *Id*. In addition to these hours already expended, Class Counsel anticipate expending additional hours to (1) move for final approval, (2) communicate with members of the Settlement Class who have questions about their claims and settlement rights, and (3) attend the fairness hearing.

3. The Novelty And Difficulty of the Questions

ERISA is an "enormously complex" statute, many matters brought under which involve facts that are "exceedingly complicated." *Conkright v. Frommert*, 559 U.S. 506, 509 (2010). The statute concerns "a highly specialized field that

judges encounter only intermittently." *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 350 (7th Cir. 2012). Courts within this Circuit have recognized the complexity of ERISA cases. *E.g., Griffin v. Habitat for Humanity Int'l, Inc.*, 157 F. Supp. 3d 1301, 1306 (N.D. Ga. 2015) ("[T]he law governing ERISA claims is complex and, at times, virtually incomprehensible to all but the most studied and skilled."); *Elliott v. Am. Int'l Life Assur. Co. of New York*, 394 F. Supp. 2d 1357, 1363 (N.D. Ga. 2005) ("Review of a claim administrator's interpretation of an ERISA plan entails the completion of a highly complex series of inquiries."). Additionally, "class actions involving various legal theories are, by their nature, very difficult." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1206 (S.D. Fla. 2006).

Here, the Complaint sets forth ten counts against Defendants pursuant to different legal theories alleging (1) denial of benefits under the terms of the UCB Plan in violation of ERISA § 502(a)(1)(B) (Count I), (2) violation of ERISA's anti-cutback provision § 204(g) (Count II), (3) violation of the disclosure requirements set forth in ERISA § 102 (Count III), (4) breaches of various fiduciary duties under ERISA §404(a)(1)(A), (B), and (D) (Counts IV through IX), and (5) a claim for declaratory and injunctive relief under ERISA § 502(a)(3) to prevent recoupment. Compl. ¶¶149-239. ERISA cases involving benefits claims and claims for equitable relief and injunctive relief to prevent recoupment are extremely difficult. *See, e.g., Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 949

(9th Cir. 2014) (affirming dismissal of pension benefits claim and determination that plaintiff was not entitled to "appropriate equitable relief" under ERISA § 502(a)(3) "in the form of equitable estoppel or reformation"); *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 952 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016) (affirming dismissal of benefits claims for past service credit and claim for failure to disclose relevant information in SPD); *Northcutt v. Gen. Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031, 1032 (7th Cir. 2006) (affirming dismissal of claim for pension benefits withheld by employer to recoup alleged overpayments).[1] Post-*Amara* case law governing claims pursuant to ERISA § 102's disclosure requirements and ERISA § 404 claims for misrepresentations and omissions are relatively recent. *See Frommert v. Becker*, 153 F. Supp. 3d 599, 615-16 (W.D.N.Y. 2016) (finding pursuant to *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) that violation of ERISA § 102's notice

[1] *But see Hannington v. Sun Life and Health Ins. Co.*, 711 F.3d 226, 234 (1st Cir. 2013) (affirming ruling in favor of plaintiff on ERISA § 502(a)(1)(B) claim for improper reduction of disability benefits); *Wells v. U.S. Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1251 & n.3 (6th Cir. 1991) (remanding to district court to consider Restatement (Second) of Trusts § 254, Comment e and whether it would be inequitable to compel restitution of overpayment); *Hendrian v. AstraZeneca Pharm. LP*, 3:13- CV-00775, 2015 WL 404533, at *14 (M.D. Pa. Jan. 29, 2015) (denying summary judgment motion on claim seeking injunction against recoupment of alleged overpayment); *Mull v. Mot. Picture Indus. Health Plan*, 937 F. Supp. 2d 1161, 1177-81 (C.D. Cal. 2012) (rejecting reliance on *Northcutt* in denying motion to dismiss claim for equitable invalidation of plan's reimbursement provision); *Dandurand v. Unum Life Ins. Co. of Am.*, 150 F. Supp. 2d 178, 184, 186-88 (D. Me. 2001) (order after bench trial that defendant cease withholding benefits and refund payment previously withheld).

requirements justified plan reformation and directing defendant to recalculate retirement benefits); *Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517, 560 (S.D.N.Y. 2015) (finding pursuant to *Amara* plan reformation to be appropriate remedy for fiduciary's misrepresentations and violation of ERISA § 102). Also, case law concerning the legal standards for cutback claims under ERISA § 204(g) is uncertain. *Compare McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1121 (9th Cir. 2000) ("Section 204(g) of ERISA applies only to formal plan amendments.") *with Cottillion v. United Refining Co.*, 781 F.3d 47, 58 (3d Cir. 2015) ("incorrect interpretation" of plan provision, despite absence of formal plan amendment, constitutes plan amendments for purpose of ERISA § 204(g)). And, when this case was filed in February 2015, and before *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), was decided, there was a conflict amoung the courts of appeals concerning the enforceability of an equitable lien against a participant's general assets. *Compare Cusson v. Liberty Life Assurance Co. of Boston*, 592 F.3d 215, 231 (1st Cir.2010) (determining that insurer need not identify "specific account in which the funds are kept or prove[ ] that they are still in [the beneficiary's] possession"), *with Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1093–95 (9th Cir. 2012) (holding that "fiduciar[ies] must recover from specifically identified funds in the beneficiary's possession ").

Further, this Court recognized that the case involved factual complexities, including statements and representations dating back to the mid 1990s. Order On

Motion to Dismiss (ECF 37) at 5. The Court also recognized the complex interplay of the statute and the regulations promulgated thereunder, as well as Article III Constitutional standing questions. *Id*. at 7-8. Not only did this case require experienced ERISA attorneys, but also the retention of actuaries to perform complex mathematical calculations. Creitz Decl. ¶ 12.

4. The Requisite Skill And Experience, Reputation, And Ability of the Attorneys

"[T]he prosecution and management of a complex national class action requires unique legal skills and abilities." *Columbus Drywall*, 2012 WL 12540344, at *4. Class Counsel are highly skilled and specialized and have extensive experience in the prosecution of class actions generally and ERISA class action litigation in particular. Barton Decl. ¶¶ 3, 4; Creitz Decl. ¶¶ 2-8. Joseph Barton of Block & Leviton LLP has more than 15 years of experience successfully handling a wide variety of ERISA class actions, including the trials of several ERISA cases, including *Severstal Wheeling, Inc., Ret. Comm. v. WPN Corp.*, 119 F. Supp. 3d 240 (S.D.N.Y. 2015) in which he obtained a $15 million judgment for the fiduciaries of two pension plans and *Chesemore v. All. Holdings, Inc.*, 09-CV-413-WMC, 2014 WL 8388670 (W.D. Wis. 2014) in which he obtained more than 17 million (plus pre-judgement interest) for class at trial. Barton Decl. ¶ 2. Mr. Barton has been invited to speak and has spoken on a variety of issues related to class actions and employee benefits including pension overpayment issues at various conferences

including ABA conferences, and has been the Plaintiffs' Co-Chair of the Civil Procedure Subcommittee for the ABA Employee Benefits Committee. *Id.* ¶ 5. Joseph Creitz has more than 20 years of experience successfully handling a wide variety of complex ERISA cases, at both the District Court and Court of Appeal levels, including ERISA class actions such as *Spinedex Physical Therapy USA, Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282 (9th Cir. 2014) and *Cyr v. Reliance Standard Life Ins. Co.*, NO. CV 06-01585DDPRCX, 2008 WL 7095148(C.D. Cal. January 16, 2008), *aff'd* 642 F.3d 1202 (en banc), and 448 Fed. Appx. 749 (9th Cir. 2011), as well as serving as a Trial Attorney in the San Francisco Regional Office of the Solicitor of Labor, U.S. Department of Labor, primarily litigating ERISA disputes on behalf of the U.S. Secretary of Labor. Creitz Decl. ¶ 3.

5. Preclusion of Other Employment

"[A] fee award should be higher if the attorney was precluded from accepting other employment because of the case at issue," and "priority work that delays the lawyer's other legal work is entitled to some premium." *Columbus Drywall,* 2012 WL 12540344, at *4; *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *17 ("It is uncontroverted that the attorney time spent on the Action was time that could not be spent on other matters."). Here, Class Counsel accepted representation of Plaintiffs with the understanding that it would have to expend many hours of work and advance out-of-pocket litigation expenses without any guarantee of payment. Barton Decl. ¶ 14; Creitz Decl. ¶ 9. Given the

expensive and time-consuming nature of complex ERISA cases involving numerous clients and multiple theories of liability, Class Counsel only accepts a limited number of them at a time; as such, counsel's acceptance of this case meant that they could not take on certain other potential cases. Barton Decl. ¶ 15; Creitz Decl. ¶ 9. Class Counsel's commitment to this litigation precluded them from other employment.

6. The Customary Fee And the Contingency of the Fee

The customary fee in a class action is contingent because "it is not practical to find any individual that will pay attorneys on an hourly basis to prosecute the claims of numerous strangers and take on the significant additional expenses of fighting with the defendants over class certification." *Columbus Drywall,* 2012 WL 12540344, at *4. Courts in the Eleventh Circuit have held that prosecution of a class action under a contingency fee arrangement "should be given substantial weight in assessing the requested fee award." *In re Friedman's, Inc. Secs. Litig.*, 1:03-CV-3475-WSD, 2009 WL 1456698, at *3 (N.D. Ga. May 22, 2009) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."). This is not only to account for the fact that "class counsel took a considerable financial risk in pursuing the case," *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D. Fla. 2014), but also to "ensur[e] the

continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims." *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *17; *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) ("Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer."), *aff'd*, 899 F.2d 21 (11th Cir. 1990). "A contingency fee arrangement often justifies an increase in the award of attorneys' fees." *Behrens*, 118 F.R.D. at 548 (citing *Jones v. Cent. Soya Co., Inc.*, 748 F.2d 586, 591 (11th Cir. 1986)); *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *1; *In re Friedman's, Inc. Secs. Litig.*, 2009 WL 1456698, at *3 (approving fee request for 30% of settlement fund).

Here, Class Counsel agreed to accept this litigation with the understanding that they would need to advance all expenses and the entirety of its fees on a contingency basis. Barton Decl. ¶ 13; Creitz Decl. ¶ 9. Both Plaintiffs and Class Counsel understood and agreed that Class Counsel would accept representation on a contingency basis. Barton Decl. ¶ 13; Creitz Decl. ¶ 9. By undertaking to prosecute this complex action on that basis, Class Counsel assumed a significant risk of nonpayment or underpayment. This substantial contingency risk favors the requested fee.

7. The "Undesirability" of the Case

The "undesirability" of a case "must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with

the benefit of hindsight." *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *16. The "undesirability" of a case favors the requested fee when there are positive societal benefits to be gained from attorneys' willingness to undertake this kind of difficult and risky, yet important, work; such decisions must be properly incentivized. Several issues related to the subject matter and relevant risks involved made this case "undesirable." Among other things, the outside limit of the Defendants' liability was slightly over $9 million, which is a relatively small potential upside. Creitz Decl. ¶ 12. ERISA class actions involving multiple theories of liability are complicated, time consuming, and expensive to litigate. *Supra.* For ERISA § 502(a)(1)(B) claims, the claim decision of a plan administrator that is given discretion to interpret terms of the plan is reviewed under the abuse of discretion standard. *Torres v. Pittston Co.*, 346 F.3d 1324, 1328 (11th Cir. 2003). The riskiness of enforcing disclosure requirements about service credits is illustrated by *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 964 (9th Cir. 2016), which concluded that plaintiffs failed to demonstrate harm about the failure to disclose information about past service credits.

8. Time Limitations And the Nature And Length of the Professional Relationship

In assessing the time limitations imposed by the client or the circumstances of the case, a court may take into account the speedy resolution of the case through settlement where cases of the type usually takes additional years to

resolve. *Ressler v. Jacobson*, 149 F.R.D. 651, 655 (M.D. Fla. 1992). Class Counsel reached the Settlement with Defendants within eighteen months of the February 2015 filing of the Complaint while complex ERISA class actions of this type can often take many years longer. Creitz Decl. ¶ 13.

Other factors that favor the reasonableness of the fee are (1) where the named plaintiffs did not have a "track record" with the law firms that agreed to prosecute this action on their behalf, *Ressler*, 149 F.R.D. at 655, or (2) there is not "any likelihood that the named plaintiffs or class members were in a position to promise future business," *Columbus Drywall,* 2012 WL 12540344, at *6. Here, Class Counsel had not previously represented these Plaintiffs. Barton Decl. ¶ 16; Creitz Decl. ¶ 15. Nor are Class counsel representing Plaintiffs in other matters. Barton Decl. ¶ 16; Creitz Decl. ¶ 15.

9. Awards in Similar Cases

The requested fee of 27% of the common fund is comparable to or less than those that have been awarded in similar cases. In assessing whether a requested percentage of a common fund comports with awards in similar cases, courts in the Eleventh Circuit look at the percentages awarded in other common fund cases both within and outside this circuit. *Columbus Drywall,* 2012 WL 12540344, at *6; *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *17. Many courts in this circuit have awarded fees equal to or greater than 30% of the common fund created as a result of counsel's efforts. *E.g.*, *Columbus Drywall,* 2012 WL 12540344,

at *8 (awarding fees equal to one-third of common fund); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 1:12-CV-2524-JFK, 2014 WL 11860700, at *2 (N.D. Ga. Oct. 16, 2014) (awarding 33 1/3% of common fund); *Morefield v. NoteWorld, LLC*, 1:10-CV-00117, 2012 WL 1355573, at *5 (S.D. Ga. Apr. 18, 2012) (approving fees of 33 1/3% of common fund); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1342 (S.D. Fla. 2007) ("The 30% fee requested in this case is thus well in line with the bulk of the fee awards in class action litigation."); *Checking Account Overdraft Litig.*, 2013 WL 11319243, at *18 (awarding 30% of total settlement value); *Allapattah Servs.*, 454 F. Supp. 2d at 1241 (awarding 31 1/3% of common fund); *Waters*, 190 F.3d at 1298 (affirming fee award of 33 1/3% of common fund).[2]

While a lodestar cross-check analysis is not required in the Eleventh Circuit after *Camden I*, Class Counsel's lodestar incurred up to March 26, 2017 in

[2] Many courts have awarded fees of 30% or more of the common fund in ERISA class actions. *E.g., Krueger v. Ameriprise Fin., Inc.*, 11-CV-02781 SRN/JSM, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) (awarding one-third of common fund); *Spano v. Boeing Co.*, 06-CV-743-NJR-DGW, 2016 WL 3791123, at *1, 4 (S.D. Ill. Mar. 31, 2016) (33 1/3%); *Kruger v. Novant Health, Inc.*, 1:14CV208, 2016 WL 6769066, at *1, 6 (M.D.N.C. Sept. 29, 2016) (33 1/3%); *In re Marsh ERISA Litig.*, 265 F.R.D. at 146-47 (33 1/3%); *Downes v. Wisconsin Energy Corp. Ret. Account Plan*, No. 09-0637, 2012 WL 1410023, at *4 (E.D. Wis. Apr. 20, 2012) (30%); *Stephens v. US Airways Grp., Inc.*, 102 F. Supp. 3d 222, 230 (D.D.C. Apr. 30, 2015) (38%); *Levinson v. About.Com Inc.*, No. 02-2222, 2010 WL 4159490, at *3 (S.D.N.Y. Oct. 7, 2010) (30%); *Mehling*, 248 F.R.D. at 464, 468 (30%); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at *1, 4 (S.D. Ill. Nov. 22, 2010) (33 1/3%); *In re Textron, Inc. ERISA Litig.*, No. 09-383, 2014 WL 576139, at *1 (D.R.I. Feb. 12, 2014) (30%); *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432, 2012 WL 1964451, at *6, 8 (D.N.J. May 31, 2012) (33 1/3%).

this case confirms that the requested percentage is fair and reasonable. Without including the interest to be paid on the $5.5 million monetary component of the Settlement, a fee of 27% of the common fund would result in a multiplier of 1.77 times Class Counsel's combined total lodestar of $841,108.50. This multiplier will fall due to the additional work that Class Counsel will perform to finalize and administer the Settlement and obtain final approval. Creitz Decl. ¶ 14. Also, a multiplier of 1.77 is well within the range of multipliers approved in class actions in general and ERISA class actions in particular. *See Columbus Drywall,* 2012 WL 12540344, at *5 (finding fee representing a multiplier of approximately four times lodestar was "well within the range of approved fees"); *Kruger*, 2016 WL 6769066, at *5 (finding 3.69 times the lodestar reasonable in ERISA class action); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 09 CIV. 686(SAS), 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (multiplier of 2.86 in ERISA class action); *In re Xcel Energy, Inc., Secs., Derivative & "ERISA"' Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (multiplier of 4.7 times in ERISA class action); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (multiplier of 5.2 in ERISA class action). "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013).

10. The Additional *Camden I* Factors Support the Fee Request

"[The] non-monetary benefits conferred upon the class by the settlement" favors the reasonableness of Class Counsel's fee request. *Camden I*, 946 F.2d at 775; *Pinto*, 513 F. Supp. 2d at 1343 (the value of injunctive relief obtained should be considered in determining percentage of common fund to be awarded). The Settlement provides significant injunctive relief to members of the Settlement Class who received and retained pension benefit payments that included theirs years of pre-acquisition service. Pursuant to the Settlement, Defendants have agreed not to recoup any alleged "overpayments" from those members of the Settlement Class. Agmt. XIII.B.

The Supreme Court has observed that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Undertaking the risk of vindicating their rights by prosecuting class actions favors the reasonableness of the fee request. *Allapattah Servs.*, 454 F. Supp. 2d at 1217; *see In re Whirlpool Corp. Frontloading Washer Prods. Liab. Litig.*, No. 1:08-WP-6500, 2016 WL 5338012, at *23 (N.D. Ohio Sept. 23, 2016) ("Ultimately, the public has an interest in compensating Class Counsel here, because recoveries in this case are far too small if pursued on an individual basis, leaving only contingent-fee class actions as a mechanism to pursue viable claims.").

Additionally, a lack of objections to the fees supports the request. *E.g. Columbus Drywall,* 2012 WL 12540344, at *7; *In re Friedman's, Inc. Secs. Litig.*, 2009 WL 1456698, at *3. The Class Notice, which was sent out to members of the Settlement Class on or about March 13, 2017 stated that Class Counsel would seek an award of attorneys' fees in an amount not to exceed 30% of the settlement fund. ECF No. 65-1 at 9. While class members have until April 12, 2017 to object, Class Counsel are not aware of any objections by the Class to the Settlement or the fees requested by Class Counsel. Barton Decl. ¶ 19; Creitz Decl. ¶ 16. Because all of the *Johnson* factors and the additional *Camden I* factors favor the reasonableness of the fee request, Class Counsel's motion for attorneys' fees should be granted.

III. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED

"It is appropriate to reimburse the out-of-pocket expenses of counsel whose efforts created substantial benefit for the class." *Columbus Drywall,* 2012 WL 12540344, at *7 (granting request for reimbursement of expenses). Expenses such as "court and court reporter fees; legal research; document and database reproduction and analysis; expert witnesses; travel for meetings, mediations, and depositions; trial consultants; and other customary expenditures" are typically recoverable. *Id.*; *In re Friedman's, Inc. Secs. Litig.*, 2009 WL 1456698, at *4 (finding "amounts incurred for travel, experts, copying, court fees, claims administration and other customary expenditures" reasonable and necessary); *Checking Account*

Overdraft Litig., 2013 WL 11319243, at *18 (finding fees and expenses for experts, court reporter fees and transcripts, and mediator's fees "necessarily incurred in furtherance of the litigation of the Action and the Settlement").

Class Counsel requests reimbursement of a total of $36,925.44 in costs, which includes expenditures incurred for the following: legal research, postage, filing fees and other court fees, travel, experts, and other related and necessary expenses. Anderson Decl. ¶ 7 ($47.55); Barton Decl. ¶ 17 ($579.64); Handorf Decl. ¶ 4 ($32,665.47); Creitz Decl. ¶ 10 ($3,632.78). As detailed in the declarations of Class Counsel, these expenses were reasonable and necessary to prosecute the case and obtain the Settlement, and lawyers routinely bill these types of expenses to their fee paying clients. Barton Decl. ¶ 17; Creitz Decl. ¶ 10; Handorf Decl. ¶ 4. A significant portion of these expenses was incurred for employing an actuary to calculate the benefits that members of the Settlement Class would have had if credited with their years of pre-acquisition service, and to assist Class Counsel in preparing the Plan of Allocation. Creitz Decl. ¶ 13. As Class Counsel's expenses are reasonable and necessary, their request for reimbursement of such expenses in addition to attorneys' fees should be granted.

IV. CONCLUSION

For the reasons stated above, Class Counsel respectfully request that the Court grant its Motion for an award of attorneys' fees and reimbursement of expenses in the amounts requested in the Motion, filed and served herewith.

Date: March 27, 2017

Respectfully submitted,

/s/ Stephen Anderson
Stephen Anderson
Georgia Bar No. 018325
ANDERSON DAILEY LLP
2002 Summit Blvd.
Suite 1250
Atlanta, GA 30319
Tel: 404/442-1800
Fax: 404/442-1820
Anderson@andersondailey.com

Joseph A. Creitz
CREITZ & SEREBIN LLP
250 Montgomery St.
Suite 1410
San Francisco, CA 94104
Tel: (415) 446-3090
Joseph.creitz@gmail.com

R. Joseph Barton
BLOCK & LEVITON LLP
1735 20th St NW,
Washington DC 20009
Tel: (202) 734-7046
Fax: (617) 507-6020
jbarton@blockesq.com

Attorneys for Plaintiffs & the Class

LOCAL RULE 7.1(D) CERTIFICATION

The undersigned counsel certifies that the foregoing document has been prepared with one of the font and point selections approved by the Court in LR 5.1(B).

/s/ Stephen Anderson
Stephen Anderson

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be filed electronically via CM/ECF a true copy of the foregoing in the United States District Court for the Northern District of Georgia, with notice of same being electronically served by the CM/ECF system, addressed to the following:

Michael S. French
Georgia Bar No. 276680
Daniel H. Gaynor
Georgia Bar No. 351612
WARGO & FRENCH LLP
999 Peachtree Street NE, 26th Floor
Atlanta, GA 30309

Anne E. Rea
Chris K. Meyer
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603

Counsel for Defendants

This 27th day of March, 2017.

/s/ Stephen Anderson
Stephen Anderson