UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:20-cv-80102-CANNON/Reinhart

TING PENG and LIN FU, on behalf of themselves individually and all others similarly situated, and derivatively on behalf of HARBOURSIDE FUNDING, LP, a Florida limited partnership,

Plaintiffs,

vs.

NICHOLAS A. MASTROIANNI II; HARBOURSIDE FUNDING GP, LLC, a Florida limited liability company; and HARBOURSIDE PLACE, LLC, a Delaware limited liability company,

Defendants,

and

HARBOURSIDE FUNDING, LP, a Florida limited partnership,

Nominal Defendant.

PLAINTIFFS' MOTION
FOR AWARD OF ATTORNEYS' FEES AND COSTS

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I. INTRODUCTION

After more than two months of investigation and analysis of the potential claims that Plaintiffs Ting Peng and Lin Fu could pursue derivatively, on behalf of a class composed of fellow members of Nominal Defendant Harbourside Funding, LP (the "Funding Partnership") and derivatively, on behalf of the Funding Partnership itself, Plaintiffs filed their initial derivative and class-action complaint in this action on January 27, 2020.

As a result of nearly three years of intensive litigation, two formal mediation sessions with seasoned neutrals, and months of negotiating between the Parties' counsel on their own, this case became ripe for settlement as trial was approaching. Before the parties reached a classwide settlement, however, Defendants offered to settle with individual Class Members, six of whom took Defendants up on their offer. Four of the six Class Members agreed to release their claims in exchange for [REDACTED]; the other two did so in exchange [REDACTED]. On the eve of trial, the Parties then reached a classwide settlement that provided each Class Member with [REDACTED].[1]

As mentioned in the motion for preliminary approval, "[a] settlement can be satisfying ***even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery***." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (emphasis added). Here,

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[1] *See Truman J. Costello, P.A. v. City of Cape Coral*, 693 So. 2d 48, 51 (Fla. App. 1997) ("where there is an ascertainable sum of money which benefits an ascertainable group of individuals, that is sufficient to establish a common fund"); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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 a whole").

the settlements that resulted from this litigation enabled Class Members to recover ***nearly*** [REDACTED] of their losses.

In common fund cases such as this one, controlling Eleventh Circuit authority provides that allocating a percentage of the common fund is the exclusive means of awarding attorneys' fees. Under the percentage method, the average award is 33%. Here, however, Plaintiffs' counsel seek only 25% of the common fund—***including*** the nearly $50,000 in litigation costs incurred since Plaintiffs' counsel began work on this case in November 2019—which would be paid out in the same installments that Settlement Class Members will receive.

As demonstrated by applying the factors the Eleventh Circuit has prescribed for deciding motions such as this one, the amount sought here is eminently reasonable.

II. PROCEDURAL HISTORY

A. PRE-FILING INVESTIGATION AND ANALYSIS

When Plaintiffs' counsel began investigating this case in November 2019, the first issue they discovered was that dozens of individual members of the Funding Partnership ("Limited Partners") had filed an action in Florida state court based on the same operative facts (the "State Action") over a year earlier (in October 2018). *See* Declaration of Jeffrey L. Fazio in Support of Plaintiffs' Motion for Attorneys' Fees and Costs ("Fazio Decl.") ¶¶ 20-22 & Ex. 1. Like Ms. Peng and Ms. Fu, the plaintiffs in the State Action sought the return of the $500,000 they had paid to become Limited Partners in the Funding Partnership, which had been used to fund a construction loan for Defendant Harbourside Place, LLC (the "Developer"). *See* Ex. 1 ¶¶ 1-13.

The plaintiffs in the State Action sought to recover their investments via an array of claims ranging from fraud in the inducement, constructive fraud, and negligent misrepresentation to breaches of fiduciary duty, civil conspiracy, and the appointment of a receiver. *See id.* ¶¶ 192-284.

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After extensive legal research and analysis, Plaintiffs' counsel determined that it would be more prudent to pursue a different approach in the present case. For example, the transaction at the core of the case—which involved the Funding Partnership entering into a construction loan contract with the developer of the Harbourside Place project, Defendant Harbourside Place, LLC (the "Developer"), by which the Funding Partnership agreed to provide the Developer with up to $200 million from the Limited Partners' $500,000 investments—could not be challenged directly in the State Action because the plaintiffs did not include derivative claims on behalf of the Funding Partnership. *See generally id.*[2] Therefore, Plaintiffs in the present case included derivative claims from the outset. *See, e.g.,* ECF No. 1 ¶¶ 97-100, 117-128. And, because the claims in the present action were also brought as a class action on behalf of all the Limited Partners, Plaintiffs did not include claims that would have made it difficult (if not impossible) to certify the proposed Class. *See* Fazio Decl. ¶ 24.

Indeed, Plaintiffs' counsel sought to simplify this case to the extent possible. *Id.* But they knew that prevailing in this case would be far more complex than proving that the Developer had breached the construction loan contract with the Funding Partnership, or that Defendants had fraudulently induced immigrant investors to become members of the Funding Partnership. *Id.* ¶ 25. In addition to breaching the construction loan contract and refusing to return the loan principal to the Funding Partnership on the Maturity Date, Defendants had converted the Developer from a Florida LLC to a Delaware LLC—thereby creating an entirely new entity that was governed by a

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[2] The plaintiffs in the State Action did not include a claim for breach of the construction loan agreement until after the trial court observed in a July 2022 order denying a motion for summary judgment that such a claim "may well be a derivative claim belonging to the [Funding] Partnership." Fazio Decl., Ex. 2 at 4. The plaintiffs in the State Action included a derivative breach-of-contract claim on behalf of the Funding Partnership for the first time in their Fourth Amended Complaint, which was filed in August 2022. *See* Fazio Decl., Ex. 3 ¶¶ 352-375.

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completely different set of laws that, unlike Florida, did ***not*** guarantee that LLC members had voting rights. *Id.* ¶ 26. Thus, Plaintiffs alleged that Defendants Nicholas A. Mastroianni II ("Mastroianni") and Harbourside Funding GP, LLC (the "General Partner") had breached their fiduciary duties to the Limited Partners and the Funding Partnership. *Id.*

But the complaint also had to account for the fact that, after taking the loan principal out of the Florida LLC, Defendants decided to use those funds to buy a single unit of membership in the Delaware LLC on behalf of the Funding Partnership without so much as giving notice to the Limited Partners, even though using Funding Partnership funds to invest in an "Other Investment," as that term is defined by the Partnership Agreement, required a ***unanimous*** vote by the Limited Partners. *See* ECF No. 78 at 64 § 1.1.33.

For these reasons (and others as well), Defendants appeared to have gone well beyond breaching a contract and into knowing and intentional wrongful conduct that violated Florida's civil theft statute. *See Heldenmuth v. Groll*, 128 So. 3d 895, 897 (Fla. App. 2013). Thus, despite the risk posed by the civil theft statute, which provides for an award of attorneys' fees to opposing counsel if the claim was found to be "meritless," F.S.A. § 772.11(1), Plaintiffs' counsel included a civil-theft claim in Plaintiffs' complaint. *See, e.g.,* ECF No. 77 ¶¶ 126-138.[3]

B. PROSECUTING THIS ACTION

Approximately two weeks after filing their initial Complaint, Plaintiffs served Defendants with their first sets of interrogatories and requests for production of documents. ECF No. 246-1 ¶ 2. Over the course of nearly two years, Plaintiffs served Defendants with several more sets of

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[3] Ultimately, the Court disagreed, granting Defendants' motion for attorney fees after the civil-theft claim was dismissed, for which Plaintiffs paid Defendants $47,755.80 (based on "discounted" hourly rates as high as $985.50) pursuant to F.S.A. § 772.11. *See* ECF Nos. 113, 116. More recently, the "discounted" hourly rate charged by Defendants' lead counsel was $1,035.00. *See, e.g.,* ECF No. 227 at 4.

interrogatories and requests for production as well as requests for admissions, and Defendants ultimately produced approximately 116,000 pages of documents before Plaintiffs deposed Mastroianni on September 8 and November 17, 2021, and Ashley Flucas (General Counsel of former Defendant Florida Regional Center, LLC) on November 18, 2021. *Id.* Plaintiffs' counsel spent a considerable amount of time reviewing and analyzing those documents, and conducted additional research for the purpose of understanding the EB-5 Program and the transactions underlying this litigation. *Id.* ¶ 3. They also worked with both Plaintiffs on their responses to Defendants' written discovery, and Class Counsel prepared them for and defended their depositions on March 1 and March 8, 2021. *Id.*

The Parties also engaged in extensive law-and-motion practice, which included, *inter alia*, three motions to dismiss Plaintiffs' initial, First Amended, and Second Amended Complaints (ECF Nos. 19, 30, and 84, respectively); a motion for judgment on the pleadings (ECF No. 22); cross-motions for reconsideration of Order on Motion to Dismiss (ECF Nos. 56 & 58); a motion to dismiss Defendants' Counterclaims (ECF No. 57); a motion for class certification (ECF No. 70); and motions for summary judgment (ECF Nos. 137-138). And on June 25, 2021, the Court certified a Class composed as follows:

> All persons who invested in the Funding Partnership (i.e., all Limited Partners). Excluded from this Class are Defendants, their affiliates, subsidiaries, agents, board members, directors, officers, and/or employees; the Court and its staff; any Limited Partner who has entered into an agreement to settle, waive, or otherwise resolve their claims against Defendants, whether in the State Court Action or through private resolution, arising from the same underlying subject matter in the instant case.

ECF No. 113 at 18.

Following the distribution of Notice to all Class Members, 32 Limited Partners who were plaintiffs in the State Action opted out of the Class. *See* ECF No. 142.

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C. Settlement Negotiations

In July 2020, the Parties proceeded to mediation before Bruce Edwards of JAMS, but were unable to reach a settlement. *See* ECF No. 47. In January 2022, the Parties attempted mediation again before another JAMS mediator, former U.S. Magistrate Judge Elizabeth LaPorte. *See* ECF Nos. 133 & 136. Once again, the Parties were unable to reach a settlement. *See* ECF No. 152; ECF No. 246-1 ¶ 5. The Parties continued to discuss settlement on their own and, although they were unable to reach an agreement on terms that were acceptable to the named Plaintiffs/Class Representatives, Class Counsel decided that Defendants' proposal was substantial enough to present to the Class as a whole for the purpose of allowing Class Members to decide whether they wished to accept the terms on an individual basis. *Id.* ¶ 6.

After working together with Defendants' counsel to ensure that the proposal was accurate, Class Counsel arranged for Settlement Services, Inc. ("SSI"), the service that Plaintiffs had retained to administer Notice to the Class that the Court had certified the action, to distribute a memorandum describing Defendants' settlement proposal to all Class Members. *Id.* ¶ 7. Accordingly, SSI distributed the memorandum to the entire Class, at the DeHeng firm's expense, in early May 2022. *Id.*

Ultimately, six Class Members entered into individual settlements with Defendants: four Class Members settled for [redacted] . Fazio Decl. ¶ 29.[4] On July 11, 2022, the Parties reached agreement on a classwide settlement, which provided for (among other things) each Settlement

[4] Defendants wired these funds to Plaintiffs' counsel with the understanding that 30% would remain in Plaintiffs' counsel's client trust account until the Court decided on the amount of fees to be awarded to Plaintiffs' counsel. *Id.* ¶ 30. Since then, Plaintiffs' counsel has decided to seek only 25% of the common fund, including costs. *Id.*

Class Member to receive [REDACTED]. Fazio Decl. ¶ 31. All told, the settlements with individual Class Members and the classwide Settlement Agreement produced a common fund in the amount of [REDACTED] *Id.*

A disagreement between the Parties prevented Plaintiffs from moving for preliminary approval of the settlement within the time frame ordered by the Court. *Id.* ¶ 32. Thereafter, Defendants moved to disqualify Class Counsel and for an award of sanctions. *See* ECF No. 217. The Court declined to disqualify Class Counsel, but referred the sanctions motion to Magistrate Judge Reinhart to determine the amount of the award. *See* ECF No. 229. Magistrate Reinhart issued a report and recommendation on the matter, *see* ECF No. 236, which the Court adopted, ordering Plaintiffs to pay $30,863.25 in sanctions, *see* ECF No. 244.

The Parties resumed settlement discussions in December 2022. Fazio Decl. ¶ 33. On January 3, 2023, they executed the Settlement Agreement, which was filed with the motion for preliminary approval on January 9, 2023. *See* ECF No. 246. During the hearing of that motion, the Court instructed the Parties to clarify a number of issues by revising certain aspects of the Settlement Agreement and the exhibits attached to it, and to file a renewed motion for preliminary approval once those changes were made. *See* ECF No. 257. The renewed motion was filed on February 15, 2023, *see* ECF No. 258, which the Court granted on February 21, 2023, *see* ECF No. 260.

By then, Plaintiffs' counsel had incurred a total of $47,687.14 in litigation expenses and a total of 3,094.7 hours prosecuting this case, which resulted in a lodestar of $2,154,433. Fazio Decl. ¶¶ 34-36.

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III. ARGUMENT

A. THE AWARD OF ATTORNEYS' FEES PLAINTIFFS PROPOSE IS EMINENTLY REASONABLE, AS DEMONSTRATED BY APPLICABLE LAW

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Thus, "attorneys in a class action (in which a common fund is created for the benefit of the class members) are entitled to compensation for their services from that fund in an amount subject to court approval." *Belin v. Health Ins. Innovations, Inc.*, No. 19-CV-61430, 2022 WL 1126006, at *2 (S.D. Fla. Mar. 10, 2022), *report and recommendation adopted*, No. 19-61530-CIV, 2022 WL 1125788 (S.D. Fla. Apr. 15, 2022).

"It is well-established 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 a whole."' *Ferron v. Kraft Heinz Foods Co.*, No. 20-CV-62136, 2021 WL 2940240, at *18 (S.D. Fla. July 13, 2021) (quoting *Boeing*, 444 U.S. at 478). Accordingly, "[b]oth the United States Supreme Court and the Eleventh Circuit have expressly approved calculating fees by applying the percentage-of-recovery method to the total value of the settlement." *Wilson v. EverBank*, No. 14-CIV-22264, 2016 WL 457011, at *13 (S.D. Fla. Feb. 3, 2016). Under the percentage-of-recovery method, "[f]ees are [awarded] based on a percentage of the total benefits made available, regardless of the actual payout to the class." *Montoya v. PNC Bank, N.A.*, No. 14- 20474-CIV, 2016 WL 1529902, at *16 (S.D. Fla. Apr. 13, 2016). As one court in this District has explained,

> [t]he controlling law in this Circuit on attorney fee awards in class action settlements involving a common fund is set forth in Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991), which held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." At the time Camden I was decided, the median or bench mark fee award in such cases was 25%, with the upper limit generally at 50%. Id. at 774-75.

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Roth v. GEICO Gen. Ins. Co., No. 16-62942-CIV, 2020 WL 10818393, at *1 (S.D. Fla. Oct. 8, 2020).

In *Camden I*, "the court held that the percentage of the fund [otherwise known as the percentage of recovery] approach (versus the lodestar approach) is the better reasoned approach in a common fund case." *Ferron*, 2021 WL 2940240, at *19 (citing *Camden I*, 946 F.2d at 774). In fact, "[t]he Eleventh Circuit made clear in *Camden I* that . . . percentage of . . . fund is the ***exclusive*** method for awarding fees in common fund class actions." *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011) (emphasis added). *See also id.* ("Even before *Camden I,* courts in this Circuit recognized that a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases") (cleaned up); *In re Takata Airbag Products Liability Litig.*, No. 14-CV24009, 2022 WL 1669038, at *8 (S.D. Fla. Apr. 4, 2022) ("Eleventh Circuit precedent . . . uniformly applies the *Camden I* percentage-of-the-fund method to class settlements resolving state-law claims").

The *Camden I* court also explained that the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) "continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases." *Camden I*, 946 F.2d at 775. The *Johnson* factors are as follows:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 772 n.3 (citing *Johnson*, 488 F.2d at 717–19).

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"Courts often apply the percentage method and [the] *Camden I* factors resulting in fee awards totaling one-third or more of the common fund recovered for the class." *Belin*, 2022 WL 1126006, at *3. *See also Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 18-CV-20048, 2019 WL 2249941, at *6 (S.D. Fla. May 24, 2019) ("an award of one-third of the common fund is consistent with the trend in this Circuit") (citation and internal quotation marks omitted); *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").

Here, Plaintiffs have limited their requested award to 25% of the common fund, which, in addition to being well below the 33% average, also includes all the litigation costs Plaintiffs have incurred in this case. As demonstrated by the application of the relevant factors articulated in *Camden I* (*i.e.*, the *Johnson* and non-*Johnson* factors) to the facts of this case, the requested award is eminently reasonable. Each of those factors is discussed below.

- **FACTOR 1: THE TIME AND LABOR REQUIRED.** Plaintiffs' counsel began investigating the factual and legal bases of this action on November 1, 2019, which culminated in a demand letter to Defendants (pursuant to F.S.A. § 772.11(1)) on December 13, 2019, and the filing of Plaintiffs' original Complaint on January 27, 2020. *See* Fazio Decl. ¶ 20 & n.2; ECF No. 1. Over the course of the ensuing three years, Plaintiffs' counsel expended considerable amounts of time prosecuting this case—including extensive and time-consuming written, document, and deposition discovery, which included intensive depositions of both Class Representatives, Defendant Mastroianni, and Ashley Flucas, the General Counsel of U.S. Immigration Fund (a Mastroianni company); further investigation and analyses of Plaintiffs' claims; research and analysis of a constellation of legal issues that arose in connection with discovery and law-and-motion proceedings;

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drafting motions relating to discovery, opposing two motions to dismiss, briefing and supporting cross-motions for summary judgment, and successfully moving for class certification; generally litigating against a zealously defended, well-funded group of entities comprising the Harbourside Group; and engaging in hotly-contested settlement negotiations (with and without the assistance of mediators) until reaching a settlement on the eve of trial—twice. *See* Fazio Decl. ¶ 34.

As a result, from inception through February 24, 2023, Plaintiffs' counsel (including local counsel and their staff) expended 3,094.7 hours prosecuting this case, which resulted in a total lodestar of $2,154,433 and $47,687.14 in costs. *See* Fazio Decl. ¶¶ 34-36.[5]

- **FACTORS 2-6 AND 10: THE NOVELTY AND DIFFICULTY OF THE QUESTIONS; THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY; WHETHER THE FEE IS FIXED OR CONTINGENT; THE CUSTOMARY FEE; THE PRECLUSION OF OTHER EMPLOYMENT; AND THE "UNDESIRABILITY" OF THE CASE.** Plaintiffs' counsel agreed to prosecute this case as a class action and as a derivative action purely on a contingent-fee basis, primarily because Class Counsel has specialized in such litigation for well over two decades, and his hourly rate of $895 is not only customary in cases such as this one, but also $140 less than the "discounted" hourly rate of Defendants' lead counsel. *See* Fazio Decl. ¶ 36; *see also* footnote 3, above.

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[5] Although the total lodestar and total litigation expenses have been included through February 24, 2023, for the purposes of the present motion, Plaintiffs' counsel will continue to expend time and incur expenses on (among other things) the motion for final approval of the Settlement and participation at the Fairness Hearing, which is scheduled to take place on June 30, 2023. *See id*. ¶ 36. Because the requested fee award is based on the percentage-of-the-fund method, the figures included in support of the present motion serve to enable the Court to perform a lodestar cross-check. *See, e.g., Junior v. Infinity Ins. Co.*, No. 6:18-CV-1598-WWB-EJK, 2021 WL 4944307, at *4 (M.D. Fla. Mar. 25, 2021) ("Courts in this District 'use the lodestar method as a cross-check of the percentage of the [class benefit] approach'" (quoting *Ressler v. Jacobson*, 149 F.R.D. 651, 654, n.4 (M.D. Fla. 1992)), *report and recommendation adopted,* No. 6:18-CV-1598-WWB-EJK, 2021 WL 4944311 (M.D. Fla. Apr. 29, 2021). Accordingly, Plaintiffs will not supplement the total amount of fees and costs through the conclusion of this litigation unless the Court instructs them to do so.

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Despite having the skill and experience required to prosecute this case, however, it involved inherent risks from the outset and it necessarily precluded Plaintiffs' counsel from working on other matters. *Id.* ¶ 20.

An example of such risks was the existence of parallel litigation based on the same operative facts had been pending in Florida state court (the "State Case") for over a year before the present action was initiated, and the State Case had gone nowhere at the time Plaintiffs filed their original complaint in January 2020. *See id.* ¶¶ 20-22 & Ex. 1. Indeed, even before that complaint was filed, novel and difficult questions that made the case "undesirable" were readily apparent. Although a breach-of-contract claim was among the derivative claims that Plaintiffs pursued on behalf of the Funding Partnership, the acts in which Defendants engaged ***after*** the five-year term of the Loan Agreement had expired—including converting Harbourside Place from a Florida to a Delaware LLC and transferring the $99.5 million loan principal to the new Delaware entity without providing Class Members with notice, much less an opportunity to vote on the matter—appeared to constitute civil theft in violation of F.S.A. § 772.11. Fazio Decl. ¶ 27.

And although Plaintiffs' counsel were aware that the statute provided for an award of attorney fees if the civil theft claim was deemed "meritless," Plaintiffs' counsel moved forward with the claim based on their understanding of extant case law, which appeared to support it. *See* footnote 3 and accompanying text, above. Also adding to the complexity and risk of non-recovery was Defendants' contention that Defendant Mastroianni was immune from liability due to his assertion of an advice-of-counsel defense. *See, e.g.*, ECF No. 177 at 6-7, 20, 25 (Amended Joint Pretrial Stipulation discussing same).

These and other aspects of this case made Plaintiffs' counsel keenly aware that victory was certainly not guaranteed in this case. And although the same can be said of any lawsuit, the potential

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for a loss in this case created a significant risk of nonpayment due to the contingent-fee basis on which it was prosecuted, which necessarily heightened its undesirability. Fazio Decl. ¶ 27. Nonetheless, Plaintiffs' counsel continued to vigorously prosecute this case, and although they prevailed on a hotly-contested motion for class certification, *see* ECF No. 113, difficult factual and legal issues prevented both sides from prevailing on their cross-motions for summary judgment, *see* ECF No. 163 at 25.

At bottom, the novel and difficult nature of the issues presented in this case made it more risky and undesirable to prosecute on a contingent-fee basis. But that alone is a sufficient basis on which to grant this motion. *See Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218-CIV, 2018 WL 5905415, at *4 (S.D. Fla. Nov. 9, 2018) ("this Court has recognized that the undertaking of [a case on a contingent-fee basis] *alone* 'can support a fee award of over 30% of the settlement fund'") (quoting *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1253 (S.D. Fla. 2016)) (emphasis in original); *see also Belin*, 2022 WL 1126006, at *5 ("undertaking a case on a pure contingency fee basis is risky and often justifies an increase in the award of attorney's fees").

- **Factors 8, 9, and 12: The Amount Involved and the Results Obtained; the Experience, Reputation, and Ability of the Attorneys; and Awards in Similar Cases.** Class Counsel possesses the experience, reputation, and ability required to represent a class of Plaintiffs in complex class litigation, and has done so for more than 25 years. *See* Fazio Decl. ¶¶ 2-19; ECF No. 113 at 11-12. Moreover, the DeHeng firm provided other attorneys to assist Class Counsel with the prosecution of this case, which ultimately led Defendants to settle it. *See, e.g.*, Fazio Decl. ¶¶ 33-35.

After Class Counsel rejected Defendants' proposal for a classwide settlement, Defendants proposed to settle with individual Class Members, six of whom took Defendants up on their offer.

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Id. ¶¶ 29-31. Four of those Class Members settled for [redacted]

[redacted]

[redacted]. *See id.* In addition, Class Counsel negotiated a classwide settlement that provided each of the 60 remaining Settlement Class Members [redacted]

[redacted]. Thus, these settlements produced a grand total o [redacted]. *See id.*; Fazio Decl. ¶ 31.

As discussed in Plaintiffs' motion for preliminary approval, settlements amounting to substantially less than the amounts at issue here have been approved as reasonable and adequate. *See, e.g., Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 WL 6751061, at *7 (S.D. Fla. Nov. 5, 2015) ("Approximately ten percent (10%) of the most probable sum Plaintiffs anticipated recovering at trial, which is being paid by one defendant on aiding and abetting claims and who did not initiate the scheme, constitutes a very fair settlement"); *Parsons v. Brighthouse Networks, LLC*, No. 2:09-cv-267, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (class settlement recovery of between 13% to 20% is "frequently found ... to be fair and adequate"); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1346, 1350 (S.D. Fla. 2011) (settlement producing "between 45 percent and 9 percent of [class members'] anticipated total recovery" was an "exemplary result"); *In re Newbridge Networks Sec. Litig.*, No. 94-cv-1678, 1998 WL 765724, at *2 (D.D.C. 1998) ("an agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness"). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Behrens*, 118 F.R.D. at 542.

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In light of the result achieved here, which is orders of magnitude larger than the average recovery deemed sufficient to approve a class-action settlement, the request for 25% of the recovery Plaintiffs' counsel obtained for the Class, which amounts to [redacted] The requested award is substantially less than the 33% average award in the Eleventh Circuit, making it eminently fair and reasonable. *See Belin*, 2022 WL 1126006, at *3 ("Courts often apply the percentage method and [the] *Camden I* factors resulting in fee awards totaling one-third or more of the common fund recovered for the class."); *Gonzalez*, 2019 WL 2249941, at *6 ("an award of one-third of the common fund is consistent with the trend in this Circuit") (citation and internal quotation marks omitted); *Wolff*, 2012 WL 5290155, at *5–6 ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one-third").

B. Plaintiffs' Litigation Expenses are Included in the Award of Attorneys' Fees They Seek

Plaintiffs have incurred $47,687.14 in litigation expenses for items ranging from photocopying to depositions and travel. *See* Fazio Decl., Ex. 4 (itemized list of costs). Those costs are recoverable under Rule 23, which provides that "the court may award reasonable attorney's fees and nontaxable cost*s* that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Similarly, Rule 54 provides that, "[u]nless a federal statute, these rules, or a court provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1).[6] Thus, in common fund cases like this one, courts grant expense requests "as a matter of course." *Belin*, 2022 WL 1126006, at *6.

[6] For purposes of Rule 54(d)(1), a "prevailing party" is the party in whose favor judgment is rendered by the Court. *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002).

Here, however, an itemized list of Plaintiffs' expenses is included in their request for an award of attorneys' fees. *See id.* (finding costs reasonable "[b]ased on a review of the itemized breakdown"); *Hanley v. Tampa Bay Sports & Ent. LLC*, No. 819CV00550CEHCPT, 2020 WL 2517766, at *6 (M.D. Fla. Apr. 23, 2020) (awarding costs based upon the inclusion of a "line item breakdown of actual costs incurred"). Thus, Plaintiffs would be entitled to a separate award of taxable and non-taxable costs they incurred in this case, but that information has been included in support of this motion for the purpose of illustrating the reasonableness of the requested fee award, in that it is not only well below the average award in this Circuit, it subsumes nearly $50,000 in litigation expenses as well.

IV. CONCLUSION

This litigation produced an exceptional result for Class Members by virtue of recovering nearly ███ of their losses. And although the average award of attorneys' fees in common fund cases is 33%, Plaintiffs' counsel seek only 25% of the common fund that they created, including nearly $50,000 in litigation costs. Plaintiffs submit that this is fair and reasonable by any standard, and respectfully request that this motion be granted.

Dated: March 16, 2023

Respectfully Submitted,

by /s/ *Robert C.L. Vaughan*

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