IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Benjamin Reetz, individually and as the representative of a class of similarly situated persons, and on behalf of the Lowe's 401(k) Plan, Plaintiff, v. Lowe's Companies, Inc., Administrative Committee of Lowe's Companies, Inc., and Aon Hewitt Investment Consulting, Inc., Defendants.	Case No. 5:18-cv-00075-KDB-DCK

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD

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INTRODUCTION

In connection with the partial Class Action Settlement that has been reached with Lowe's Companies, Inc. and the Administrative Committee of Lowe's Companies Inc. (collectively, the "Lowe's Defendants"), Plaintiff and Class Counsel respectfully petition the Court to approve the following disbursements from the Settlement Fund: (1) attorneys' fees in the amount of $4,166,666.67 (one-third of the $12,500,000 Settlement Fund); (2) reimbursement of $613,105.46 in litigation costs (half of the litigation costs incurred through the date of settlement); (3) settlement administration expenses in the amount of $203,045; and (4) a service award in the amount of $10,000 to Plaintiff Benjamin Reetz as the class representative.

As discussed below, the requested distributions are appropriate under the Settlement Agreement and reasonable in comparison to awards in similar cases. Courts have routinely found "'[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter." *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (collecting cases); *see also Clark v. Duke Univ.*, 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).[1]

Likewise, the proposed $10,000 service award to the class representative is authorized under the Settlement, *see Settlement Agreement ¶ 7.2*, and well within the bounds of what has been approved in other ERISA cases. *See, e.g.*, *Kruger*, 2016 WL 6769066, at *6 (approving $25,000

[1] *See also, e.g., Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *1 (S.D. Ohio Feb. 18, 2021) (approving one-third fee to Nichols Kaster, PLLP in ERISA class action); *Intravaia v. Nat'l Rural Elec. Coop. Ass'n*, No. 1:19-cv-00973, Dkt. 114 (E.D. Va. Feb. 25, 2021) (same); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020) (same); *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, Dkt. 232 (S.D.N.Y. Oct. 7, 2020) (same); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, Dkt. 190 (W.D.N.Y. Sept. 3, 2020) (same); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, Dkt. 23 (S.D. Fla. Dec. 20, 2018) (same); *Andrus v. New York Life Ins. Co.*, No. 16-05698, Dkt. 83 (S.D.N.Y. June 15, 2017) (same).

service awards); *Clark*, 2019 WL 2579201, at *5 (approving service awards of $25,000 - $30,000); *Sims*, 2019 WL 1993519, at *4–5 (approving $20,000 service award).

Finally, the requested expenses are typical and reasonable in comparison to other cases. *See, e.g., Clark*, 2019 WL 2579201, at *5 (approving $822,212 in expenses); *Sims*, 2019 WL 1993519, at *5 ("Class counsel shall be reimbursed for expenses of $768,176, which are to be paid from the settlement amount.").

Accordingly, Plaintiff and Class Counsel respectfully request that the Court approve the requested distributions. As of the date of this motion, no Settlement Class Member has objected to the proposed distributions, and the Lowe's Defendants also do not oppose the motion.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Motion to Dismiss

Plaintiff filed this action on April 27, 2018. *Dkt. 1.* In his Class Action Complaint, Plaintiff asserted claims for (1) breaches of the fiduciary duties of loyalty and prudence under 29 U.S.C. § 1104(a)(1); and (2) failure to monitor fiduciaries. *Dkt. 1.* In summary, Plaintiff alleged that Aon Hewitt Investment Consulting, Inc. ("Aon") engaged in an imprudent and self-serving scheme to replace the Plan's eight existing equity investment options with a new and underperforming Growth Fund managed by Aon, and transferred over $1 billion to this fund, with the consent of the Lowe's Defendants. *Id. ¶ 1.*

The Lowe's Defendants moved to dismiss the Complaint on June 29, 2018 for failure to state a claim. *Dkt. 38*. On February 14, 2019, Magistrate Judge David Keesler recommended that the motion be denied. *Dkt. 54.* The Lowe's Defendants filed an objection, *Dkt. 55*, but on September 6, 2019, this Court entered an order largely adopting Judge Keesler's recommendation, *Dkt. 58.* The Court denied the motion as to Plaintiff's breach of fiduciary duty claim, *id. at 12*, and

dismissed only the portion of Plaintiff's failure to monitor claim related to Lowe Companies' alleged failure to monitor Aon, *id. at 16*.

Plaintiff filed a First Amended Complaint ("FAC") on March 23, 2020, adding as defendants the individual members of the Administrative Committee, while leaving the substance of Plaintiff's allegations unchanged. *Dkt. 84.* On October 29, 2020, Defendants stipulated to class certification, *Dkt. 94*, and the Court approved the stipulation on November 5, 2020, *Dkt. 95*.[2] As part of the same stipulation, Plaintiff agreed to dismiss the individual members of the Administrative Committee as defendants, and Lowe's Companies agreed that it "will be responsible" for any judgment based on their acts or omissions. *Id.*

B. Discovery and Mediation

Following the Court's ruling on the motion to dismiss, the parties engaged in extensive discovery and produced more than 400,000 pages of documents. *Declaration of Kai Richter in Support of Plaintiff's Motion of Preliminary Approval of Partial Class Action Settlement with Lowe's Defendants ("First Richter Decl."), Dkt. 221-1, ¶ 11.* Plaintiff also subpoenaed six third parties and received nearly 25,000 pages of documents in response. *Id. ¶ 12.* In addition, the parties took 17 depositions and served expert reports (and/or rebuttal reports) from nine expert witnesses. *Id. ¶¶ 13–14.*

The parties engaged in an initial mediation session on November 12, 2020, but were unable to reach an agreement. *Id. ¶¶ 16–17.* Subsequently, the parties each moved for summary judgment on December 17, 2020, *see Dkt. 134, 137, 140*, and the Court denied the motions on February 12, 2021, *Dkt. 198.* The Lowe's Defendants and Plaintiff then engaged in a second mediation on

[2] The Court's order was preliminary at the time it was issued, *see Dkt. 95*, but automatically became final because no objections to class certification were received from the class after notice was provided to the class, *see Dkt. 181.*

March 22, 2021, which ultimately resulted in a settlement between them shortly before trial was scheduled to begin. *First Richter Decl. ¶ 17.*

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Lowe's will contribute a Gross Settlement Amount of $12,500,000 to a Qualified Settlement Fund (the "Settlement Fund"). *Settlement Agreement ¶¶ 1.30, 1.44, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Service Award approved by the Court, the Net Settlement Amount will be distributed to Settlement Class Members in accordance with the Plan of Allocation in the Settlement. *Id. ¶ 4.8.*

In addition to monetary relief, the Settlement also provides significant prospective relief: (1) within twelve (12) months after the Settlement Effective Date, the Administrative Committee will issue an RFP for a delegated fiduciary investment manager for the Plan; (2) the Committee will engage an independent consulting firm (unrelated to Aon Hewitt) with experience conducting similar RFPs to assist with the RFP process; (3) the candidates in the RFP process will be free to propose alternative investment options, investment strategies, and/or investment lineup structures to the Administrative Committee; and (4) as part of the process, the Administrative Committee will consider all options presented. *Id. ¶ 6.1.*

Plaintiff moved for preliminary approval of the Settlement on May 28, 2021. *Dkt. 220.* The Court granted that motion on June 9, 2021. *Dkt. 234*. Plaintiff is filing the present motion 30 days in advance of the objection deadline, pursuant the Court's order preliminarily approving the Settlement. *Id. ¶ 9.* To date, no objections to the Settlement, or to the proposed attorneys' fees, costs and expenses, or service award have been received. *Declaration of Kai Richter in Support of Plaintiff's Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Award ("Second Richter Decl.")* ¶ *25.*

III. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the partial Settlement on behalf of the Class. To date, the total amount of time invested by Class Counsel is over 8,000 hours, and additional work will be required going forward to implement the Settlement. *See Second Richter Decl. ¶¶ 10, 14 & Ex. 1; Declaration of F. Hill Allen in Support of Plaintiff's Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Award ("Allen Decl.") ¶ 6.* 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 investment options, and the performance of the Aon Growth Fund versus other Plan investment options and alternatives in the marketplace. *First Richter Decl. ¶ 9.* Thereafter, Class Counsel vigorously prosecuted the action on behalf of the class. Among other things, Class Counsel (1) drafted a detailed Class Action Complaint (Dkt. 1) and First Amended Complaint (Dkt. 84); (2) responded to the Lowe's Defendants' Motion to Dismiss the Complaint (Dkt. 38) and appeared in-person for the motion to dismiss hearing; (3) responded to the Lowe's Defendants' appeal from the Magistrate Judge's Report and Recommendation; (4) propounded numerous discovery requests and repeatedly met and conferred with Defendants regarding discovery; (5) analyzed over 400,000 pages of documents produced by Defendants and additional data regarding the class; (6) produced over 2,400 pages of documents; (7) pursued relevant discovery from six non-parties[3] and reviewed nearly 25,000 pages of documents produced by those non-parties; (8) took seven depositions of fact witnesses and defended the deposition of the named Plaintiff; (9)

[3] These non-parties included Callan LLC, Gallagher Fiduciary Advisors LLC, NEPC LLC, PricewaterhouseCoopers LLP, Wells Fargo Bank N.A., and Willis Towers Watson.

engaged five experts to consult on fiduciary process, conflicts of interest, Plan investment, and appropriate damages comparators and calculation methods; (10) defended or deposed a total of nine expert witnesses; (11) filed a Motion to Compel Discovery from Defendant Aon Hewitt Investment Consulting, Inc. (Dkt. 106); (12) filed a Motion to Strike the Lowe's Defendants' amended Rule 26(a) disclosures (Dkt. 121); (13) filed and responded to cross motions for summary judgment (Dkt. 134, 137, & 140); (14) responded to Defendants' *Daubert* motions (Dkt. 173, 174); (15) participated in a mediation with Martin F. Scheinman and all parties, and prepared a lengthy mediation statement in advance; and (16) engaged in a second mediation with the Lowe's Defendants, which resulted in the present Settlement with the Lowe's Defendants. *Second Richter Decl. ¶ 9.*

In addition, Class Counsel have undertaken considerable work in connection with the partial Settlement and settlement administration. This has included (1) drafting the Settlement Agreement and exhibits thereto (including the Settlement Notices, Former Participant Rollover Form, and the proposed preliminary approval order); (2) preparing Plaintiff's Preliminary Approval Motion papers; (3) reviewing the bid received from the Settlement Administrator (Analytics Consulting LLC); (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 Settlement Class Members who would like additional information about the Settlement; (6) communicating with Settlement Class Members; and (7) preparing the present motion. *Second Richter Decl. ¶ 9.*[4]

[4] Class Counsel also proceeded with trial preparations, including extensive pre-trial filings, and vigorously pursued the Class claims against the non-settling Defendant (Aon) in a five-day bench trial. The work that Class Counsel has performed since April 22, 2021 in connection with the remaining claims against Aon is not included in the present motion.

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiff's motion for final approval of the partial Settlement. *Second Richter Decl. ¶ 14.* Class Counsel also will communicate with the Independent Fiduciary and provide all necessary information in connection with the Independent Fiduciary's review of the proposed release on behalf of the Plan. *Id.; see also Settlement Agreement ¶ 2.2.*[5] Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to eligible Settlement Class Members. *Second Richter Decl. ¶ 14.* In addition, Class Counsel will continue to respond to questions from Settlement Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

IV. WORK OF THE CLASS REPRESENTATIVE

As the class representative, Mr. Reetz also has worked to advance the interests of the Settlement Class. Specifically, Mr. Reetz has (1) reviewed the allegations in the Complaint and operative Amended Complaint; (2) provided information and documents to counsel to assist in the prosecution of the action; (3) produced documents in response to Defendants' discovery requests; (4) reviewed and signed answers to interrogatories; (5) appeared for his deposition; and (6) reviewed the Settlement Agreement in its entirety and communicated with Class Counsel regarding the Settlement. *Second Richter Decl. ¶ 23; see also Dkt. 221-07 & Ex. 1.*[6]

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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).

[6] Additionally, Plaintiff travelled from McCleary, Washington to Charlotte, North Carolina to be present at the trial with Aon and to testify in support of his claims. Plaintiff was subjected to extensive cross-examination during trial, and consistently and diligently represented the best interests of the Class.

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.

Analytics, as the approved Settlement Administrator, was responsible for disseminating the Settlement Notices to the Settlement Class Members and establishing the settlement website and telephone support line. *Second Richter Decl. ¶ 19*; *see Dkt. 234 ¶¶ 4–6.* Analytics also will review the Former Participant Rollover Forms submitted by Former Participant Settlement Class Members,[7] *see Settlement Agreement ¶ 5.3*, and coordinate distribution of payments to all Settlement Class Members in the event that the Settlement receives final approval, *id. ¶ 3.4*.

The Escrow Agent, Alerus Financial ("Alerus"), will hold the monies in the Settlement Fund while approval of the Settlement and distributions to Settlement Class Members are pending. *Settlement Agreement ¶¶ 1.23, 4.1*. Upon final approval of the Settlement, Alerus will release these funds and also execute the investment and tax qualification mandates in the Settlement Agreement. *See generally id. ¶¶ 4.1–4.10.*

Finally, Jim Carroll of Carroll Services LLC, acting as Independent Fiduciary for the Plan, will review the partial Settlement and independently determine whether it is in the best interest of the Plan to release the claims against the Lowe's Defendants in exchange for the relief provided. *See id. ¶ 2.2*. This independent fiduciary review is required by DOL regulations. *See supra* at n.5.

VI. Attorneys' Fees, Expenses, and Service Award Sought

In consideration of the work summarized above and associated expenses, Article VII of the Settlement Agreement provides that Plaintiff and Class Counsel may seek (1) attorneys' fees equal

[7] Participant Class Members will automatically receive their Entitlement Amounts via direct deposit in their individual Plan accounts. *Settlement Agreement ¶ 5.2(b).*

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 Independent Fiduciary; and (4) payment of a $10,000 service award for the Class Representative. *Id. ¶¶ 7.1–7.2*. Consistent with the above, Plaintiff and Class Counsel seek the following amounts in connection with this motion:

- Attorneys' fees: $4,166,666.67
- Litigation Expenses: $613,105.46
- Administrative Expenses: $203,045 (itemized below)
    - Settlement Administrator expense: $160,545
    - Escrow Agent expense: $2,500
    - Independent Fiduciary expense: $40,000
- Class Representative Service Award: $10,000

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 VII 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). Likewise, "[c]osts that are 'reasonable in nature and amount, may be reimbursed from the common fund,' " *Scott v. Family Dollar Stores, Inc.*, 2018 WL 1321048, at *5 (W.D.N.C. Mar. 14, 2018) (quoting *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 471 (S.D.W. Va. 2010)); *Sims*, 2019 WL 1993519, at *4 ("The prevailing view is that expenses are awarded in addition to the fee percentage.") (quoting *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *3 (M.D.N.C. Jan. 10, 2007)). Finally, class representative service awards are a "routinely approved in class actions" and are

intended to compensate class representatives for their efforts, burden, and risks taken on behalf of the class. *Scott*, 2018 WL 1321048, at *5. 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. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009),; *see also Sims*, 2019 WL 1993519, at *1; *Kruger*, 2016 WL 6769066, at *2–3 (noting "a 'clear consensus among the federal and state courts ... that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery' because 'the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases") (quoting *Archbold v. Wells Fargo Bank, N.A.*, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015)); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *1 (M.D.N.C. Jan. 10, 2007) (collecting cases); Manual for Complex Litigation §§ 14.121 nn.483–85 (4th ed. 2018) (same).[8] "One of the reasons that courts prefer the percentage method is that [it] better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys." *In re Wachovia Corp. ERISA Litig.*, 2011 WL 7787962, at *2 (W.D.N.C. Oct. 24, 2011)

[8] By contrast, the lodestar method multiplies the hours expended by class counsel by a reasonable hourly rate. "Given that courts in the Fourth Circuit approve of the percentage-of-fund method for awarding fees in common fund cases, '[i]t is not necessary for the Court to conduct a lodestar analysis[.]'" *Kruger*, 2016 WL 6769066, at *4 (quoting *Krispy Kreme*, 2007 WL 119157, at *3). However, the Court may choose to review the lodestar method as a "cross-check" to ensure that the percentage award is fair and reasonable. *Id.*; *Jones v. Dominion Resources Servs, Inc.*, 601 F. Supp. 2d 756, 758–60 (S.D. W.Va. 2009) (noting that while the percentage method is "overwhelmingly" preferred to the lodestar method, courts may use the lodestar method to "cross-check" the percentage method).

(quoting *Jones*, 601 F.Supp.2d at 759); *see also Kruger,* 2016 WL 6769066, at *3 ("The percentage-of-the-fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorney's fees on an hourly basis.") (quoting *DeWitt v. Darlington County, S.C.*, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013)).

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

In evaluating the reasonableness of attorneys' fees, courts in this circuit consider "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Sims*, 2019 WL 1993519, at *1 (citing *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 & n.28 (4th Cir. 1978)). Here, each of the applicable factors strongly support the reasonableness of the proposed fee.

1. Customary Fee Awards in Similar ERISA Cases and Expectations at the Outset of Litigation

As noted above, the requested fee award of one-third of the Settlement Fund is consistent with awards in similar ERISA class actions involving defined contribution plans. *See supra* at 1. As the court stated in another case involving proprietary funds in a 401(k) plan:

> [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***.

Krueger v. Ameriprise Financial, Inc., 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) (emphasis added) (citing cases); *see also Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases."); *Clark*, 2019 WL 2579201, at *5 (approving one-third fee as reasonable); *Kruger*, 2016 WL 6769066, at *2 ("[A] one-third fee is consistent with the market rate in a complex ERISA 401(k) fee case such as this matter.") (internal quotation marks omitted) (citing additional cases).

Consistent with this established benchmark, Nichols Kaster previously received one-third fee awards in two other ERISA cases in this Circuit. *See Intravaia*, No. 1:19-cv-00973, Dkt. 114; *Sims*, 2019 WL 1993519, at *2. In addition, Class Counsel have received one-third fee awards in several additional ERISA cases as well. *See, e.g., Karpik*, 2021 WL 757123, at *1; *Stevens*, 2020 WL 996418, at *14; *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, Dkt. 232 (S.D.N.Y. Oct. 7, 2020); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, Dkt. 190 (W.D.N.Y. Sept. 3, 2020); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, Dkt. 23 (S.D. Fla. Dec. 20, 2018); *Andrus v. New York Life Ins. Co.*, No. 16-05698, Dkt. 83 (S.D.N.Y. June 15, 2017).

Moreover, upon commencement of the litigation, both Plaintiff and Class Counsel agreed to this standard one-third fee.[9] *See Second Richter Decl. ¶ 22 n.5.* Accordingly, the requested fee is also consistent with expectations at the outset of the litigation. *See Devlin v. Ferrandino & Son, Inc.*, 2016 WL 7178338, at *9 (E.D. Pa. Dec. 9, 2016) ("Class Counsel … seeks approval of the contingent fee agreed to when this matter was initiated. This factor supports approval.").

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[9] Plaintiff and Class Counsel did not have a pre-existing relationship that affected the amount that was negotiated. *Second Richter Decl. ¶ 22 n.5*. The fee was set strictly based on custom and legal precedent.

2. Results Obtained for the Class

The requested fee is also reasonable in relation to the results obtained for the class – indeed, it is directly tied to those results as a percentage of the negotiated relief. The $12,500,000 settlement amount represents a significant monetary recovery, and is particularly impressive here given that Aon is the primary defendant in the case as the Plan's delegated investment manager. *See* 29 U.S.C. § 1105(d) ("If an investment manager or managers have been appointed …, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.").[10] As discussed in Plaintiff's preliminary approval motion papers, a similar recent case involving a plan sponsor and discretionary investment manager resulted in a settlement that was funded entirely by the investment manager with no contribution from the sponsor (even though the sponsor was a released party under the settlement). *See Plaintiff's Memo in Support of Motion for Preliminary Approval of Class Action Settlement, ECF No. 221, at 16-17* (discussing settlement in *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Oct. 12, 2020)). Here, Class Counsel were able to negotiate an eight-figure recovery from the plan sponsor (Lowe's), while simultaneously preserving all claims against Aon as the Plan's delegated investment manager.

[10] Even prior to the delegation, Aon bore primary responsibility for the recommendations it made as the Plan's investment advisor. *See* Restatement (Third) of Trusts § 102 cmt. b(2) (listing four factors to be considered when evaluating the relative fault of two breaching trustees: (1) whether one trustee "mislead the other(s) into joining in the breach"; (2) whether "one trustee commit[ted] the breach intentionally ... while the other(s) did so by simple negligence"; (3) whether "*one trustee, having greater experience or expertise, essentially control[led] the actions of the other(s), such as where a trustee without business experience regularly relied on the judgment of the experienced trustee*"; and (4) and whether "one trustee act[ed] essentially alone while the joint and several liability of the other(s) resulted merely from a failure to exercise reasonable care to prevent the breach or from improper delegation or monitoring") (emphasis added).

Moreover, the Settlement provides for critical prospective relief that addresses the core allegations in the lawsuit and will benefit the class on a going-forward basis. Specifically, the Lowe's Defendants have agreed to "issue a request for proposal ('RFP') for a delegated fiduciary investment manager for the Plan," *Settlement Agreement ¶ 6.1*, at which time the Lowe's Defendants will objectively reevaluate the delegated investment manager, the investment lineup structure, and the specific investment strategies and investment options (including the Aon Growth Fund). The value of this prospective relief, which is not accounted for in the one-third fee, further supports the proposed award in this case. *Cf.*, *Hooker v. Sirius XM Radio, Inc.*, 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.").

3. Complexity of the Case, and Experience and Skill of Class Counsel

The nature of the case and specialized qualifications of Class Counsel also support the requested fee. This area of law has been repeatedly noted by courts to present complex legal issues. *See Thomas v. Saber Healthcare Group, LLC*, 2021 WL 467206, at *2 (W.D.N.C. Feb. 9, 2021) ("The Court recognizes that 'ERISA is a complex area of federal law, requiring particular skill and experience to properly perform the legal services rendered in such cases.'") (quoting *Vincent v. Lucent Techs., Inc.*, 2011 WL 5075650, at *5 (W.D.N.C. Oct. 25, 2011)); *Kinsinger v. SmartCore, LLC*, 2020 WL 2926476, at *5 (W.D.N.C. June 3, 2020) ("ERISA litigation is a complex area of federal law that is constantly evolving."); *In re Wachovia Corp. ERISA Litig.*, 2011 WL 5037183, at *4 (W.D.N.C. Oct. 24, 2011) ("ERISA litigation of the type presented here is a rapidly evolving area of the law. New precedents are frequently issued, and demands on counsel and court are complex and require the devotion of significant resources."). This complexity is further enhanced in ERISA class cases, and "often leads to lengthy litigation." *Krueger*, 2015 WL 4246879, at *1.

The present case is a good example, as it involved voluminous discovery and briefing, and was litigated up to trial against the Lowe's Defendants and through trial against Aon.

Meeting these challenges required counsel with specialized subject matter knowledge and "expertise regarding industry practices." *See Kruger*, 2016 WL 6769066, at *3. As another court recently observed, "Class Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this." *Karpik*, 2021 WL 757123, at *9. Courts have repeatedly recognized Nichols Kaster's expertise in this difficult area,[11] and the firm has a demonstrated track record of success in ERISA litigation. *See First Richter Decl. ¶¶ 22–24*. This expertise benefitted the Class throughout the litigation, provided credibility at the bargaining table, and was instrumental in achieving the result that was obtained. Moreover, the class also benefitted from the reputation and experience of well-qualified local counsel. *See Allen Decl. ¶¶ 8-10 & Ex. A.*

4. Time Investment

The time invested by Class Counsel further confirms that the requested fee is reasonable. Class Counsel have dedicated approximately 8,463 hours to this case (exclusive of time spent on the trial or other non-settlement related matters after reaching a partial settlement). *Second Richter Decl. ¶ 10 & Ex. 1.* Multiplying the time invested by Class Counsel by their hourly billing rates[12]

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[11] *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[.]").

[12] 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). Indeed, these rates are slightly less than the rates approved for other experienced ERISA litigators. *See e.g.*, *Pledger v. Reliance Tr. Co.*, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021) (adopting rates of $490 to $1,060 per hour based on years of experience); *Clark*, 2019 WL 2579201, at *4 (same); *Kruger*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience). Given the complex nature of this ERISA case, it is reasonable to evaluate Class Counsel's billing

yields a lodestar of $4,763,951.25. *Id. ¶ 14.* Accordingly, Class Counsel's request for one-third of the proposed Settlement Fund—$4,166,667—is *less* than their calculated lodestar. Given that Class Counsel took the case on a contingent fee basis and accepted all risk of loss, they normally would be justified in seeking an award in excess of their lodestar. *See Brundle ex rel. Constellis Employee Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 786 (4th Cir. 2019), *as amended* (Mar. 22, 2019), ("[C]ourts routinely impose enhanced common fund awards to compensate counsel for litigation risk[.]"); *Kruger*, 2016 WL 6769066, at *5 (collecting cases adopting multipliers ranging from 2.5 to 8.9).[13]

5. Other Factors

To the extent that the other *Barber* factors have any application here, they also support the requested fee. The time invested by Class Counsel comes with an opportunity cost because it is time that cannot be invested by counsel on other cases. There was no limitation placed on Class Counsel's time investment and they have expended fulsome resources to the case. Finally, as noted above, very few other firms have the experience, capacity, and financial resources prosecute a case such as this (which requires not only a significant time investment, but also the advancement of sizeable expert costs and other expenses). *See supra* at 15.

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rates in comparison to the rates charged by other experienced ERISA class action practitioners. *See Clark*, 2019 WL 2579201, at *2 ("A reasonable rate is usually calculated by looking at the local market, but a national market rate is appropriate for matters involving complex issues requiring specialized expertise, such as ERISA class actions."); *accord BAM Capital, LLC v. Houser Transp., Inc.*, 2020 WL 97459, at *2 (W.D.N.C. Jan. 8, 2020) (Bell, J.) (noting "evidence of awards in similar cases, or other specific evidence that allows the court to determine actual rates which counsel can command in the [relevant] market" may inform the Court's determination of the prevailing rate "[i]n circumstances where it is reasonable to retain attorneys from other communities") (citations omitted).

[13] *Accord City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.").

II. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES

A. Litigation Expenses

In addition to attorneys' fees, courts may award reasonable litigation costs and expenses. *See, e.g., Scott*, 2018 WL 1321048, at *5; *Sims*, 2019 WL 1993519, at *4. Here, Class Counsel seek reimbursement of $613,105.46 in litigation expenses, representing half of the expenses advanced by Class Counsel through the date of settlement.[14] The types of expenses for which reimbursement is sought are typical for a case such as this, and include expert and mediator fees, transcript costs, travel expenses, copying charges, postage and shipping charges, court filing fees, and the like. *See Second Richter Decl. ¶ 16*. These expenses are reasonable in comparison to similar ERISA cases. *See Sims*, 2019 WL 1993519, at *4 (approving $768,176 in expenses, which "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"); *Clark*, 2019 WL 2579201, at *4 (approving $822,212 in expenses).

B. Settlement Administration Expenses

The requested settlement administration expenses also are reasonable. The Settlement Notice, website and telephone support, and payment distribution services provided by Analytics are essential to carry out the Settlement. The cost of providing those services ($160,545) is reasonable in light of the size of the Class (74,724 members) and comes to less than $2.20 per Class Member inclusive of postage for mailing the Notices. The Escrow Agent expense of $2,500 is also reasonable in light of the responsibility of handling a $12.5 million Settlement Fund. *See Intravaia*, No. 1:19-cv-00973, Dkt. 114 at ¶ 3 (finding $2,500 fee for Escrow Agent to be reasonable in connection with handling of $10 million settlement fund). Finally, review of the

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[14] Plaintiff and Class Counsel will seek reimbursement of the remaining expenses, and additional expenses through trial, if and when the remainder of the case is successfully resolved against Aon.

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. 128, 139 (S.D.N.Y. 2010). The fee for the Independent Fiduciary's services here is also reasonable. *See Intravaia*, No. 1:19-cv-00973, Dkt. 114 at ¶ 3 (approving $40,000 fee for Independent Fiduciary). Accordingly, the requested settlement administration expenses in the total amount of $203,045 should be approved.

III. THE COURT SHOULD GRANT THE REQUESTED SERVICE AWARD

Finally, it is typical for courts in this circuit to grant service awards "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." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (citation omitted). All three of these rationales apply here. First, Plaintiff invested time and energy on behalf of the class by producing documents, answering interrogatories, appearing for his deposition, attending trial, communicating with counsel, and reviewing the Settlement Agreement and other case materials. Second, he accepted both financial risks and reputational risks in bringing the action. *See Kruger,* 2016 WL 6769066 at *6; *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (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). Finally, "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.*, 2014 WL 5455473, at *9 (S.D.N.Y. Oct. 28, 2014); *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").

For all of these reasons, "[a] substantial incentive award is appropriate in [this] complex ERISA case given the benefits accruing to the entire class in part resulting from [plaintiff's] efforts." *Kruger*, 2016 WL 6769066, at *6 (quoting *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015)). Here, the proposed $10,000 service award represents less than one-tenth of one percent of the Settlement Fund (0.08%), and is reasonable in comparison to other cases. *See, e.g.*, *Intravaia*, No. 1:19-cv-00973, Dkt. 114 at *2 (approving service award of $10,000). Indeed, this amount is significantly *less* than the service awards approved in other ERISA settlements in North Carolina. *See, e.g., Kruger*, 2016 WL 6769066, at *6 ($25,000); *Clark*, 2019 WL 2579201, at *5 ($25,000 to $30,000); *Sims*, 2019 WL 1993519, at *4–5 ($20,000).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the requested distributions from the Settlement Fund.

Respectfully Submitted,

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