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

GENEVA HENDERSON et al., *Plaintiffs*, v. EMORY UNIVERSITY et al., *Defendants*.	Civil Action No. 16-2920-CAP

MEMORANDUM AND ORDER

Class Counsel for Plaintiffs seek an award of attorneys' fees, reimbursement of reasonable expenses, and compensation for class representatives from a common fund created from the class action settlement. The Court has reviewed Class Counsel's request and supporting evidence, as well as attorney-fee and class-representative awards from similar cases. For the reasons stated herein, the Court will grant the motion.

BACKGROUND

On August 11, 2016, Plaintiffs filed this action alleging that Defendants breached their fiduciary duties and took part in prohibited transactions in operating the Emory University Retirement Plan and the Emory Healthcare, Inc. Retirement Savings and Matching Plan. Doc. 1.[1] Prior to August 2016, no case had been

[1] "Doc." references are to the docket unless otherwise indicated.

brought by a private law firm, the Department of Labor, or any other party or entity asserting claims of fiduciary breach for excessive fees and imprudent investments on behalf of a university's retirement plan. Since the filing of this case, the parties engaged in over three years of litigation that included the production of over 500,000 pages of documents and the deposition of 24 fact witnesses and seven experts.

The Court granted class certification on September 13, 2018, certifying the following class:

> All participants and beneficiaries of the Emory University Retirement Plan and the Emory Healthcare, Inc. Retirement Savings and Matching Plan from August 11, 2010 through the date of judgment, excluding Defendants.

On March 2, 2020, the Parties jointly moved for a stay of then-current case deadlines, which the Court granted on March 4, 2020. Docs. 210, 211. On April 16, 2020, the Parties filed a joint status report informing the Court that the Parties had reached an agreement in principle to resolve this matter. Doc. 214.

ANALYSIS

I. Attorney's Fees

Class Counsel requests attorneys' fees of one-third of the settlement proceeds, or $5,583,333.33. The requested fee of one-third of the monetary recovery is reasonable and appropriate given the significant risk of nonpayment in

these types of cases due to the novel nature of this case and adverse precedents. *Columbus Drywall & Insulation, Inc. v. Masco Corp*., No. 04-3066-JEC, 2008 WL 11234103, at *3 (N.D. Ga. Mar. 4, 2008). In particular, for this case, the risk of nonpayment was tremendous, especially in light of the fact that the only ERISA excessive fee case involving a university to go to trial in history resulted in judgment for the Defendants. *Sacerdote v. New York Univ*., 328 F. Supp. 3d 273 (S.D.N.Y. 2018). The risk of nonpayment is further illustrated by dismissals of similar excessive fee allegations involving university retirement plans. *See, e.g.*, *Divane v. Northwestern Univ.,* No. 16-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018) (granting motion to dismiss) (affirmed on appeal, 953 F.3d 980, 2020 WL 1444966 (7th Cir. Mar. 25, 2020)); *Cunningham v. Cornell Univ.*, No. 16-6525, 2019 WL 4735876 (S.D.N.Y. Sep. 27, 2019) (granting defendants' summary judgment in significant part). Moreover, even if the class obtains a trial judgment, recovery is far from certain and years of appeals may follow.

> In determining the reasonableness of class counsel's fee award under either the percentage of fund or lodestar method, the Court considered the following factors:
> (1) the time and labor required;
> (2) the novelty and difficulty of the relevant questions;
> (3) the skill required to properly carry out the legal services;
> (4) the preclusion of other employment by the attorney as a result of his acceptance of the case;
> (5) the customary fee;
> (6) whether the fee is fixed or contingent;

(7) time limitations imposed by the clients or the circumstances;
(8) the results obtained, including the amount recovered for the clients;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and the length of the professional relationship with the clients; and
(12) fee awards in similar cases.

Lunsford v. Woodforest Nat'l Bank, No. 12-103-CAP, 2014 WL 12740375, at *11–12 (N.D. Ga. May 19, 2014) (citing *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772 n.3 (11th Cir. 1991)). Pursuant to these factors, the requested award is not only fair and reasonable, it is warranted.

Class Counsel's requested fee is amply justified by their work in this case. Though a lodestar cross-check is not required, courts may use it to see whether a requested fee is in the "ballpark" of an appropriate fee. *In re Home Depot Inc*., 931 F.3d 1065, 1076, n.25 (11th Cir. 2019). This involves determining the hours reasonably expended and then multiplying that amount by the reasonable hourly rate. *Camden*, 946 F.2d at 772.

Complex ERISA class action litigation, such as this, involves a national market. Defendants in this, and similar cases, retain large multi-national law firms and utilize attorneys from offices across the nation. The Court therefore finds that the relevant market rate for cases such as this is a nationwide market rate. This is consistent with the findings of numerous other district courts in similar excessive

fee cases handled by Class Counsel. *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (collecting cases). Based on the documentation and arguments submitted by Class Counsel, the Court approves the following hourly rates for Class Counsel: for attorneys with at least 25 years of experience, $1,060 per hour; for attorneys with 15–24 years of experience, $900 per hour; for attorneys with 5–14 years of experience, $650 per hour; for attorneys with 2–4 years of experience, $490 per hour; and for Paralegals and Law Clerks, $330 per hour. The Court finds that these rates are consistent with the rates charged by firms defending these types of complex class actions. Class Counsel's reasonable hourly rates were approved by district courts in similar class action litigation in 2020. *Troudt v. Oracle Corp*, No. 16-00175-REB-SKC, Doc. No. 236 (D. Col. July 10, 2020); *Kelly v. Johns Hopkins Univ.*, No. 16-2835, 2020 WL 434473, at *6–7 (D. Md. Jan. 28, 2020); *see also, e.g.*, *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 174 at 3 (M.D. Tenn. Oct. 22, 2019).

These reasonable hourly rates were independently verified by a recognized expert in attorney fee litigation who opined that Class Counsel's requested rates were reasonable based on rates charged by national attorneys of equivalent experience, skill, and expertise in complex class action litigation. Declaration of Sanford Rosen, *Tracey v. MIT*, No. 18-1099, Doc. 302-6 at 18 (D. Mass. Mar. 27. 2020). These rates were brought up to date based on 2016 hourly rates for

Schlichter Bogard & Denton that were previously approved. *Kruger*, 2016 WL 6769066, at *4. The 2016 hourly rates were previously approved by the Southern District of Illinois in *Spano v. Boeing Co*., No. 06-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016). In light of the close similarities between the fiduciary breach claims in those cases and this one, Schlichter Bogard & Denton's representation of the class in those cases and this one, and the recency of the decisions, the Court finds that these hourly rates are reasonable for the services provided.

The hours expended are also reasonable. Class Counsel spent over 8,500 hours of attorney and staff time on this matter to date. The Court finds that the time spent by Class Counsel on the case is reasonable considering the complexity and number of contested issues throughout the litigation. These hours are consistent with the hours expended litigating similar complex class actions. *See*, *e.g.*, *Sims v. BB&T Corp*., No. 15-1705, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (Plaintiffs spent 18,200 hour prosecuting case to eve of trial); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F.Supp.2d 980, 989 (D. Minn. 2005) (Plaintiffs' counsel spent a total of 10,401.67 hours prosecuting the case for two and a half years).

Using the approved rates set forth above, Class Counsel's lodestar is $5,682,942, creating a multiplier of 0.98. This is well within the range of

multipliers approved by district courts in the Eleventh Circuit. *Columbus Drywall,* 2008 WL 11234103 at *3 (approving fee with lodestar multiplier between 2 and 3); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 696 (N.D. Ga. 2001) (noting that courts have used multipliers from over five); *Cox v. Cmty. Loans of Am., Inc.*, No. 11-177-CDL, 2016 WL 9130979, at *3 (M.D. Ga. Oct. 6, 2016) (lodestar multipliers "in large and complicated class actions range from 2.26 to 4.5 while three appears to be the average[.]"); *see also Davis v. Locke*, 936 F.2d 1208, 1215 (11th Cir. 1991) (affirming district court's enhancement of lodestar by a multiplier of 1.6 to compensate, among other things, for the risk associated with a contingency fee).

ERISA is a "rapidly evolving, complex, and demanding area of the law." *In re BellSouth Corp. ERISA Litig*., No. 02-2440-JOF, 2006 WL 8431178, at *7 (N.D. Ga. Dec. 5, 2006). Litigation of ERISA 401(k) breach of fiduciary duty claims requires significant expertise and the devotion of significant resources. *See id*. The subject matter is highly technical, including facts about prudent investment practices, retirement industry best practices, fiduciary practices, and complex financial matters, requiring the use of multiple experts for all parties. Class Counsel devoted over 8,500 hours of attorney and staff time over three years to bring this case to an $16.75 million settlement. These hours were efficiently expended and are less than the approved hours expended in other similar cases.

Courts across the country have recognized the reputation, skill, and determination of Class Counsel in pursuing relief on behalf of retirement plan participants. This Court agrees. In this case, Class Counsel obtained a settlement that is multiples of the other university sponsored retirement plan settlements handled by different law firms. *See Short v. Brown Univ.*, No. 17-318, Doc. 55 (D. R.I. Aug. 2, 2019) ($3.5 million; 41,780 class members); *Daugherty v. Univ. of Chi.*, No. 17-3736, Doc. 57-1 (N.D. Ill. Sept. 12, 2018) ($6.5 million; 14,838 class members). The robust non-monetary relief herein also exceeds any relief obtained by other firms. The superior result was reached because of Class Counsel's well-earned and acknowledged reputation as the pioneering law firm in retirement plan excessive fee litigation—a field Class Counsel created—along with its diligent work in this case.

The decision to pursue this case, advance substantial costs and commit substantial resources and thousands of attorney hours to obtain a successful recovery materially impacted Class Counsel's ability to handle other matters. The commitment to litigation like this may require tens of thousands of hours, years of litigation, trial, appeals, and other proceedings. Given this reality, despite Class Counsel's success in similar litigation, few law firms have the necessary expertise and are willing take the risk and devote the substantial resources necessary, all at risk of nonpayment, to litigate these complex ERISA claims.

Obtaining the $16.75 million settlement in this case required Class Counsel to remain committed to the litigation throughout, and entailed significant risk of nonpayment. Class Counsel's efforts resulted in significant benefits to the Class. Current participants will receive their distributions directly into their accounts tax deferred and former participants have the right to direct their distribution into a tax-deferred vehicle, such as an Individual Retirement Account. The Investment Company Institute estimates that the present value of the benefit of tax deferral for 20 years is an additional 18.6%,[2] and this Court adopts that value. This Court finds that the actual value to the class of the monetary portion of the settlement is $19,865,500, when this tax-deferred benefit is taken into account.

Although the $16.75 million monetary component alone would support the requested fee award, the Court must also consider the value of the non-monetary relief when evaluating the overall benefit to the class. *Faught v. Am. Home Shield Corp*., 668 F.3d 1233, 1243 (11th Cir. 2011); *Home Depot*, 931 F.3d at 1076. The affirmative relief Class Counsel obtained is extensive and provides substantial additional value to the Class.

[2] Peter Brady, *Marginal Tax Rates and the Benefits of Tax Deferral,* Investment Company Institute, Sept. 17, 2013, http://www.ici.org/viewpoints/view_13_marginal_tax_and_deferral.

Class Counsel engaged Dr. Stewart Brown, a nationally recognized economist, at no expense to the Class, to provide the Court with an estimate of the economic benefits that will be achieved by the above non-monetary relief. Dr. Brown determined that the reduction in recordkeeping fees through the competitive bidding process for recordkeeping services provides an additional benefit to the class of $5,129,995, with a present value of $5,095,704.

The Court finds that Dr. Brown provided reliable analysis of the estimated economic benefits the Class will achieve through the settlement. As a result, the Court will consider these benefits in the economic value of the common fund that Class Counsel created through their diligent efforts.

Taking into account the benefit of tax deferral and saving from the non-monetary relief provisions, the settlement is valued at $24,961,204. Thus, Class Counsel's requested fee is less than 23% of the total benefit to the Class. This is a conservative estimate because it does not take into account additional benefits that are provided through other non-monetary terms.

II. Expenses

Under Rule 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). A cost award is authorized by both the parties' settlement agreement and the common fund doctrine. Doc. 218-01 at 3, 23 (§§2.4, 7.1). Class Counsel brought this case without guarantee of

reimbursement or recovery. There was a strong incentive to limit costs. Given the complexity of this case, the costs incurred are much lower than what would be expected in a case of this magnitude that was litigated for years and settled on the eve of trial. Here, Class Counsel requests reimbursement of expenses in the amount of $595,249.35. The requested expenses are all for legitimate costs associated with prosecuting the case and the amounts are reasonable. The Court finds that Class Counsel's request is fair and reasonable and will approve it.

III. Class Representatives

In their discretion, courts typically award special compensation to class representatives in recognition of their time and effort. *Columbus Drywall*, 2008 WL 11319972 at *2. "A substantial incentive award is appropriate in [a] complex ERISA case given the benefits accruing to the entire class in part resulting from [named plaintiff's] efforts." *Savani v. URS Prof'l Solutions LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015). Here, Class Counsel requests a case contribution award of $25,000 each for Class Representative. The Class Representatives provided invaluable assistance to Class Counsel in prosecuting the case. They also risked their reputation and alienation from employers or peers in bringing an action against a prominent institution in their community.

The Court finds that the requested case contribution award for the Class Representatives is reasonable and appropriate given their contributions to the

action. This amount is consistent with awards in similar excessive fee settlements. *See Kruger,* 2016 WL 6769066, at *6 (collecting cases awarding $25,000 to each named plaintiff). The court finds that this award is not of the type prohibited in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885). The Class Representatives, employees of the Defendants, faced considerable risk in pursuing this lawsuit. The award does not constitute either a salary or a bounty. Furthermore, the settlement agreement in this action is not contingent on the Class Representatives receiving an award. The Class Representatives were integral to achieving the settlement which in turn benefits the entire class. Without them, the class members would receive nothing and their retirement plans would not have been adjusted.

It is **ORDERED** that:

1. Class Counsel's motion for attorneys' fees, reimbursement of expenses, and case contribution awards for named plaintiffs is **GRANTED**.
2. The Court awards Class Counsel an attorney's fee of $5,583,333.33, to be paid from the settlement amount.
3. The Court awards Class Counsel expenses of $595,249.35, which are to be paid from the settlement amount.
4. The Court awards a case contribution award of $25,000 each for Class

Representatives Geneva Henderson, Rena Guzman, Jacqueline Goldberg, Connie Corpening, Joanne Rackstraw, Joann D. Wright, Deon M. Moore, Cynthia T. James, and Huberta W. Waller, also to be paid from the settlement amount.

So ordered this 4th day of November, 2020.

/s/CHARLES A. PANNELL, JR.
HON. CHARLES A. PANNELL, JR.
UNITED STATES DISTRICT JUDGE