STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
CASE TYPE: Civil Other/Misc.

PASTOR DAVID BACON, PATRICIA HEPNER, RUTH DOLD, AND SHARON HVAM, individually and as representatives of a class of similarly situated persons on behalf of the Evangelical Lutheran Church in America Retirement Plan and the ELCA Retirement Plan for the Evangelical Lutheran Good Samaritan Society,

Plaintiffs,

v.

BOARD OF PENSIONS OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA (D/B/A PORTICO BENEFIT SERVICES), A MINNESOTA CORPORATION.

Defendant.

ORDER GRANTING MOTION FOR ATTORNEY FEES, COSTS AND EXPENSES, AND CLASS REPRESENTATIVE AWARDS

27-CV-15-3425

Judge Ronald L. Abrams

This matter came on for a hearing before the Honorable Ronald L. Abrams on May 11, 2020 in Courtroom 1659 of the Hennepin County Government Center. Jerome Schlicter, Esq., Heather Lea, Esq., and Troy Doles, Esq. appeared on behalf of Plaintiffs. Deborah Davidson, Esq., Sharon Markowitz, Esq., Matthew Sharbaugh, Esq., and Christopher Weals, Esq., appeared on behalf of Defendants. Based on the arguments of counsel, submissions of the Parties, and all the files and records herein, the Court enters the following:

ORDER

1. Class counsel's motion for an award of attorneys' fees, reimbursement of reasonable expenses, and compensation for class representatives is **GRANTED**.

2. The attached Memorandum is incorporated herein.

BY THE COURT:

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Dated: August 10, 2020

Ronald L. Abrams
Judge of District Court

MEMORANDUM

Factual Background

Plaintiffs are the members and former members of the Evangelical Lutheran Church in America Retirement Plan and the ELCA Retirement Plan for the Evangelical Lutheran Good Samaritan Society (collectively, the "Plan."). On March 4, 2015, Plaintiffs commenced this action against Defendant, and the Board of Pensions of the Evangelical Lutheran Church in America, d/b/a Portico Benefit Services, a Minnesota corporation that administered the Plan. Among other things, Plaintiffs alleged that Defendant breached its fiduciary duties and duties under the Plan documents and the Minnesota Prudent Investor Act relating to the management, operation, and administration of the Plan, including by causing the Plan to pay unreasonable investment management and administrative fees. This type of litigation involving retirement plans is often termed "excessive fee litigation."[1]

Defendant moved to dismiss the Complaint on the basis that a court's evaluation of Plaintiffs' claims would constitute government entanglement in the free exercise of religion. This Court granted Defendant's motion to dismiss on October 13, 2015, based upon the ecclesiastical abstention doctrine. This Court reasoned that, because of the applicability of the ecclesiastical abstention doctrine, this Court lacked subject-matter jurisdiction.

Plaintiffs appealed the judgment to the Minnesota Court of Appeals. At the time the appeal was filed and briefed to the Court of Appeals, as at the time this Court issued its Order for Dismissal, Minnesota courts treated claims of religious entanglement in violation of the First Amendment to the U.S. Constitution and the Minnesota Constitution as challenges to the court's subject-matter jurisdiction. *See, e.g., Odenthal v. Minn. Conference of Seventh–Day Adventists,* 649 N.W.2d 426, 434, 441 (Minn. 2002). After the parties filed their briefs with the Minnesota Court of Appeals, the Minnesota Supreme Court issued an opinion that clarified Minnesota courts' analysis of the ecclesiastical abstention doctrine. *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528 (Minn. 2016).

In *Pfiel,* the Minnesota Supreme Court concluded, based on *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n,* 565 U.S. 171, 186 n. 4 (2012), that "the ecclesiastical abstention doctrine is not a jurisdictional bar." *Pfeil,* 877 N.W.2d at 535. Although in *Hosanna–Tabor*, the United States Supreme Court treated the ecclesiastical abstention doctrine as an affirmative defense on the merits when applied to a state-law tort claim, 565 U.S. at 194, the Minnesota Supreme Court noted that there is "some latitude to decide how the doctrine will be applied in Minnesota courts." *Pfeil,* 877 N.W.2d at 535. The Minnesota Supreme Court explained that "one possible option is to treat the doctrine as an affirmative defense on the merits,"

[1] In its Complaint, Plaintiffs also alleged that Portico breached its fiduciary duty by failing to exercise reasonable care, skill, and diligence in managing the assets of the Plans, and failing to act in the exclusive interest of participants in the selection and retention of plan-investment options. Plaintiffs alleged Portico breached trust by: (1) "failing to exercise care, skill, prudence, and diligence in the selection and retention of Plan investment options because it selected and retained excessive cost, poorly-performing ELCA investment funds that generated revenue to itself while failing to consider or analyze the use of superior low-cost options that were readily available" and "offering ELCA investment funds because they benefited Portico instead of choosing funds for the exclusive purpose of providing benefits to participants."

but noted that "the doctrine could also function as a form of abstention, as one of its names implies." *Id.* The Minnesota Supreme Court "decline[d] to characterize the doctrine" because the distinction between an affirmative defense and abstention was not briefed on appeal and was "not essential to the disposition" of the case. *Id.* Applying the criteria set forth in *Pfeil*, the Minnesota Court of Appeals found that Minnesota courts had subject-matter jurisdiction over Plaintiffs' claims and, therefore, reversed and remanded. *See Bacon v. Bd. of Pensions of Evangelical Lutheran Church in Am.*, No. A15-1999, 2016 WL 391690, at *7 (Minn. Ct. App. July 25, 2016) (*Bacon I*).

Defendant subsequently submitted a Petition to Review to the Minnesota Supreme Court. The Minnesota Supreme Court denied the Request. Defendant then filed a Writ of Certiorari with United States Supreme Court for review. Six states filed *amici curie* in support of Defendant's writ. The United States Supreme Court denied Defendant's writ.

On remand, Defendant moved for partial dismissal of the Complaint on different grounds. This Court denied that motion on October 23, 2017. The Parties then engaged in merits discovery for nearly two years. On January 5, 2018, Plaintiffs moved to certify a class under either Minn. R. Civ. P. 23.02(a) or Minn. R. Civ. P. 23.02(c). Defendant opposed the motion. The Court granted in part and denied in part Plaintiffs' motion on July 10, 2018. This Court certified the class for the excessive fee litigation claims pursuant to Minn. R. Civ. P. 23.02(c) and denied class certification pursuant to 23.02(a). This Court did not certify any class for Plaintiffs' other claims.

Plaintiffs filed an interlocutory appeal with the Minnesota Court of Appeals on this Court's decision to certify the Plaintiff class for excessive fees pursuant to Minn. R. Civ. P. 23.02(c) rather than Minn. R. Civ. P. 23.02(a). Plaintiffs did not appeal this Court's determination not to certify a class for their other claims. On May 28, 2019, the Minnesota Court of Appeals reversed and remanded, holding that the excessive fee litigation class should be certified under Minn. R. Civ. P. 23.02(a). *Bacon v. Bd. of Pensions of the Evangelical Lutheran Church in Am.,* 930 N.W. 2d 437 (Minn. Ct. App. 2019) (*Bacon II*); *but see*, *e.g.*, *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610 (C.D. Cal. 2009); *Carr v. Int'l Game Tech.,* No. 3:09-cv-00584-ECR-WGC, 2012 WL 909437 (D. Nev. Mar. 16, 2012).[2]

The Parties thereafter began settlement discussions. Both Parties meaningfully participated in a mediation on July 9, 2019, but were unable to resolve the matter. The Parties continued to discuss settlement and were able to agree on all terms by September 24, 2019. The settlement requires Defendant to deposit $11,000,000.00 in an interest-bearing settlement account. The majority of class members will automatically receive their distributions into their tax-deferred retirement accounts and those who have left the Plan will have the option to receive their distribution by check or into a tax-deferred account. In addition, the Parties agreed to affirmative non-monetary relief. Defendant has committed to retaining a consultant familiar with church retirement plans which will review the operations of Defendant and make recommendations for

[2] The application and interpretation of Minn. R. Civ. P. 23.02(a) and Minn. R. Civ. P. 23.03(c) was a case of first impression in Minnesota state courts. The Minnesota Court of Appeals ruled that this Court should have certified the excessive fee litigation class pursuant to Minn. R. Civ. P. 23.02(a). The Minnesota Court of Appeals did not indicate in its opinion if the class certification should have been pursuant to Minn. R. Civ. P. 23.02(a)(1) or Minn. R. Civ. P. 23.02(a)(2).

improving the Plan. Class counsel will receive the recommendations and will have the ability to enforce disputes regarding the non-monetary relief.

Plaintiffs moved for preliminary approval of the settlement and, on January 9, 2020, this Court preliminarily approved the settlement. Notices were sent to class members on March 12, 2020, and included the amount of attorney fees, expenses, and Class Representative awards requested. No class members objected. On that same day, Class Counsel moved for attorney fees, requesting $3,666,300.00 in attorney fees, an amount equal to one-third of the recovery; reimbursement of $130,001.00 in litigation-advanced expenses; and contribution awards of $25,000.00 for Class Representatives Pastor David Bacon, Patricia Hepner and Ruth Dold and an incentive award of $10,000.00 for Individually Named Plaintiff Sharon Hvam.

Analysis

I. Attorney Fee Award

"In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized law or by agreement of the parties." Minn. R. Civ. P. 23.08. District courts have wide discretion in assessing the reasonableness of attorney fees in class action cases, including those involving a common fund. *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005); *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. Ct. App. 2007) ("We will not reverse the district court's decision on attorney fees absent an abuse of discretion."). The reasonableness of a proposed attorney fee is a question of fact. *Ryan v. Bigos Props. by Bigos*, 351 N.W.2d 680, 681 (Minn. Ct. App. 1984). The court's determination "must be based either upon its observation of the services performed or proof of their value . . . and the findings must be reasonably supported by the evidence." *Id.*

"[A] litigant or 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Gilchrist v. Perl*, 387 N.W.2d 412, 418 (Minn. 1986) ("[W]here the class representative is successful in creating a fund for the class, the representative is entitled to recover attorney fees," and such payment is made "out of the fund recovered for the class."). The percentage-based common fund method is "well established" under federal law in the Eighth Circuit. *See*, *e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3f 1140, 1157 (8th Cir. 1999). Like federal courts in the region, Minnesota state courts have used the percentage-based method for common fund cases. *See Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 289, 291 (Minn. Ct. App. 1991) (upholding the application of the percentage-based common fund method because "[t]his method of allocating attorneys' fees as a proportion of the recovery for each class member is acceptable as an application of the common-fund doctrine."); *see also Flores v. Zorbalas*, 27-cv-16-14225 (Minn. Dist. Ct., Feb. 11, 2016), *affirmed*, No. 19-578-RMK, 2019 WL 7142886 (Minn. Ct. App., Dec. 23, 2019) (upholding this Court's calculation of reasonable attorney fees using the percentage-based common fund method).

Under the percentage-based common fund method, federal and state courts consider seven factors:

(1) the benefit conferred on the class,

(2) the risk to which plaintiffs' counsel was exposed,
(3) the difficulty and novelty of the legal and factual issues of the case,
(4) the skill of the lawyers, both plaintiffs' and defendants',
(5) the time and labor involved,
(6) the reaction of the class, and
(7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Yarrington v. Solvay Pharm., Inc., 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) (discussed in *Flores*, 27-cv-16-14225, at *7). Some of these factors overlap, while others may not apply in every case. *Id.* Thus, the Court has "wide discretion in the weight to assign to each factor." *Id.*

Plaintiff's class counsel requested an attorney fee equal to one-third of the common fund, or $3,666,300.00. Based on careful analysis of the foregoing factors, this Court concludes that Plaintiff's class counsel is entitled to the requested attorney fee award as a percentage of the common fund.

1. Benefit Conferred on the Class

In evaluating the reasonableness of a proposed fee award, the benefit conferred on the class and the results obtained are "accorded particular weight." *In re Xcel Energy*, 364 F. Supp. 2d at 994; *see also Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 623 (Minn. 2008) ("Minnesota courts consider the results obtained critical to the award."). The amount of monetary relief is an important factor to consider. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees."). However, courts should also consider the benefit non-monetary relief offers class members. *Milner*, 748 N.W.2d at 623.

Class counsel obtained an $11,000,000.00 settlement for the class members. The settlement will be distributed to class members that are current plan participants directly into a tax-deferred retirement account, while class members who are no longer plan participants have the option of receiving their distributions into a tax-deferred account. In addition, class counsel obtained affirmative non-monetary relief for class members. This includes a commitment by Defendant to obtain a consultant to review the operations of Defendant and the Plan and make recommendations for improving the Plan. Class counsel will monitor Defendant's compliance with the settlement agreement. The non-monetary relief may significantly enhance the value of the settlement because it provides for potential improvements to be made to the management of the Plan, thereby addressing the very issues that caused Plaintiffs to file a lawsuit in the first place. Given the significant monetary and non-monetary relief obtained by class counsel, this factor strongly supports class counsel's requested attorney fee.

2. Risk to Which Plaintiffs' Counsel was Exposed

The "risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quotations omitted). Courts must evaluate risks

"as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994. Excessive fee litigation involves a "significant risk of nonpayment." *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016); *Notle v Cigna Corp.*, No. 07-2045, 2013 WL 12242015, at *3–4 (C.D. Ill. Oct. 15, 2013) (describing risks as "enormous.").

Plaintiffs' counsel took an enormous risk in undertaking representation in this case. This risk was significantly greater than in typical class action excessive fee litigation.

First and foremost, at the time this action was commenced, the ecclesiastical abstention doctrine acted as a possible subject-matter jurisdiction bar, leaving class counsel with the very real possibility of no payment for its involvement in this case. *See Odenthal v. Minn. Conference of Seventh–Day Adventists,* 649 N.W.2d 426, 434, 441 (Minn. 2002). Class counsel took the substantial risk that Minnesota courts would not apply the reasoning of the United States Supreme Court's decision in *Hosanna–Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission,* 565 U.S. 171 (2012), in state court actions. During the pendency of the first appeal, the Minnesota Supreme Court issued *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528 (Minn. 2016). The Minnesota Court of Appeals, almost exclusively, based its determination of this case on the Minnesota Supreme Court's reasoning in *Pfeil* and found that the ecclesiastical abstention doctrine was not a subject-matter jurisdiction bar to this case. If *Pfeil* had been determined differently, there was a substantial risk that this Court's dismissal for lack of subject-matter jurisdiction would have been affirmed and that class counsel would have received nothing. It should also be noted that Defendant, pursuant to *Bacon I,* still could raise the ecclesiastic abstention doctrine as an affirmation defense, either in motion practice or at trial.

Second, the legal basis upon which Plaintiffs' Complaint rested upon was common law breach of fiduciary duties, duties under the Plan documents and the Minnesota Prudent Investor Act. Defendant is not a 403(b) Plan. This case was not brought under ERISA or various federal law theories. There has been extensive litigation and well established principals to evaluate class action claims and plan administrators' responsibilities under ERISA and other federal law theories. There is a dearth of similar litigation under Minnesota common law and the Minnesota Prudent Investor Act. Throughout this litigation, class counsel has advocated that the principals and duties established through ERISA litigation should guide Minnesota state courts in its evaluation of Plaintiff's common law and Minnesota Prudent Investor Act claims. Because of the settlement, the scope of the duties owed by Defendant to plan participants under Minnesota law remains unresolved. Class counsel took a substantial risk that an analysis of their claims through a legal prism other than through its previously highly successful ERISA litigation could have led to either no recovery or to a recovery substantially less than the settlement amount.

Class counsel undertook representation of plaintiffs on a contingency basis and invested over 11,500 hours and expenses of $130,001.00 in pursuing Plaintiffs' excessive fee claims. This was despite the possibility that they may not recover anything. Class counsel bore all of the financial risk in a complex civil matter where the risk of nonpayment was high. This factor supports class counsel's requested attorney fee.

3. Difficulty and Novelty of Issues

Plaintiffs alleged that Defendant violated its fiduciary duties in the operation and management of the Plan by charging excessive fees. This type of excessive fee retirement plan litigation is a "ground-breaking and novel area of litigation." *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-2835-GLR, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020). Since class counsel filed the first excessive fee lawsuit in 2006, *Abbott v. Lockheed Martin Corp.*, 06-cv-701-MJR, 2015 WL 4398475, at *3 (S.D. Ill., July 17, 2015), excessive fee litigation has been a "rapidly evolving and demanding area of the law." *In re Wachovia Corp. ERISA Litig*., No. 09-262, 2011 WL 5037183, at *4 (W.D. N.C. Oct. 24, 2011).

As discussed above, because the retirement plan at issue in this action was a ministry of the Evangelical Lutheran Church of America, this action involved issues of religious freedom and the Minnesota ecclesiastical abstention doctrine, which was clarified by the Minnesota Supreme Court while the first appeal in this case was pending. *Bacon v. Bd. of Pension of Evangelical Lutheran Church in Am.*, No. 15-1999, 2016 WL 3961960, *2 (Minn. Ct. App. July 25, 2016) (citing *Pfeil v. St. Matthews Evangelical Lutheran Church*, 877 N.W.2d 528, 534–35 (Minn. 2016)). This action involved enormously complex and novel legal issues in an emerging field of the law. This factor supports class counsel's requested attorney fee.

4. Skill of the Lawyers

Courts across the country have recognized that class counsel is highly experienced in this area of the law. Other Courts have chronicled the many admirable successes by class counsel. This Court need not repeat those findings, but will indicate its strong concurrence. *See*, *e.g.*, *Kelly*, 2020 WL 434473, at *4; *Waldbuesser v. Northrop Grumman Corp.*, CV 06-6213-AB, 2017 WL 9614818, at *4 (C.D. Cal. Oct. 24, 2017); *Abbott*, 2015 WL 4398475, at *2–3. As described above, fiduciary breach retirement plan litigation is a novel and emerging area of the law. Class counsel is one of only a few firms in the country to handle such litigation and, in fact, is regarded as a "pioneer and . . . leader" in the field. *Abbott*, 2015 WL 439875, at *1. Class counsel regularly achieves favorable results for class members in retirement plan excessive fee litigation, *Nolte*, 2013 WL 12242015, at *3–4, their firm is the only law firm to have tried such a case on behalf of class members, *Kelly*, 2020 WL 434473, at *4, and theirs is the only law firm to have obtained a victory in excessive fee litigation before the United States Supreme Court. *Tibble v. Edison Int'l*, 575 U.S. 523 (2015). Class counsel leveraged their significant skill and experience in this area of the law while they were challenged throughout the course of this litigation by Defendant's skilled attorneys at a major law firm. This factor supports class counsel's requested attorney fee.

5. Time and Labor Involved

Class counsel spent 11,565.9 hours of attorney and staff time on this matter over almost five years. (Suppl. Lea Decl., ¶ 3; Suppl. Lea Decl., Ex. A.) The bulk of this time was spent on depositions and deposition preparation (6,506.4 hours) and discovery (3,059.9 hours). (*Id.*) Time was also spent on case investigation, pleadings, legal research,

motion practice, mediation, court appearances, and the appeals. (*Id.*) The Court has reviewed Class Counsel's submissions detailing the hours worked by attorneys and staff on these activities. The hours expended on this matter are comparable to those in similar complex class action cases handled by class counsel. *See Waldbuesser v. Northrop Grunman Corp.*, No. 06-6213, 2017 WL 9613818, *3 (C.D. Cal. Oct. 24, 2017) (noting that class counsel spent over 26,000 of attorney and staff time on the case over eleven years); *Abbot*, 2015 WL 4398475, at *2–3 (noting that class counsel spent over 24,000 hours of attorney and staff time on the case over eight-and-a-half years). Class counsel also anticipates spending 50–100 uncompensated hours monitoring the affirmative, non-monetary relief once the settlement goes into effect. (Lea Decl., ¶ 5.) Class counsel expended significant time and labor in an amount similar to that expended in similar excessive fee cases, and the amount of time spent on this litigation was reasonable. This factor supports class counsel's requested attorney fee.

6. Reaction of the Class

A lack of objection to a settlement's terms supports its fairness. *See Heller*, 548 N.W.2d at 291 ("That so few plaintiffs objected to the settlement is a significant factor that supports the fairness and adequacy of the settlement terms."). Here, none of the nearly 58,000 class members objected to the settlement and class counsel's request for attorney fees under a percentage of the fund method. This factor supports class counsel's requested attorney fee.

7. Comparison With Similar Cases

In evaluating the reasonableness of attorney fees, courts should compare the requested fee with awards in similar cases. *In re Xcel*, 364 F. Supp. 2d at 998. Such a comparison may involve looking to awards for cases both inside and outside of the relevant jurisdiction. *Id.* "In the Eighth Circuit, courts have routinely awarded attorney fees ranging from 25% to 36% of a common fund under a percentage of the fund method." *Yarrington*, 697 F. Supp. 2d at 1061 (finding a 33% attorney fee reasonable and "in line with the range of fees approved by the Eighth Circuit."). Class counsel's requested one-third fee falls within this commonly accepted range. Significantly, federal courts around the country have awarded class counsel its requested attorney fee of one-third of the common fund in all excessive fee class action lawsuits involving retirement plans that they handled since 2013. This includes a one-third attorney fee approved by the Minnesota federal district court. *See Krueger v. Ameriprise Financial Inc.*, No. 11-2781, 2015 WL 4246879 (D.Minn. July 13, 2015). Class counsel's requested one-third fee is consistent with the fees requested and awarded in similar cases both inside and outside of this jurisdiction. This factor weighs in favor of class counsel's requested attorney fee.

8. The lodestar method in inapplicable to this case.

This Court applies the percentage-based common fund method rather than the lodestar method. While there is authority for the Court to use the lodestar method as a cross-check to the percentage-based common fund method, the Court finds that the lodestar method is inapplicable to this case. The Court makes this finding for three reasons.

First, the lodestar method, which is used primarily to calculate *statutory* attorney fees under Minnesota law, *see*, *e.g.*, *Green v. BMW of N. Am., LLC*¸826 N.W.2d 530, 535 (Minn. 2013), multiplies hours reasonably expended against a reasonable hourly rate. *Milner*, 748 N.W.2d at 621. As a result, it tends to incentivize attorneys to run up their hours while discouraging early settlement. *See Savoie v. Merchants Bank*, 166 F.3d 456, 461 (2d Cir. 1999); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167–68 (S.D.N.Y. 1989). By contrast, "[t]here are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method." *In re Xcel Energy*, 364 F. Supp. 2d at 991. Most importantly, the percentage-based common fund method ensures that the interests of both the attorneys and their clients are aligned. *Id.* at 992. "[T]he more an attorney succeeds in recovery of money for the client, and the fewer hours expended to reach that result, the higher dollar amount of fees the lawyer earns." *Id.* at 991–92.

Second, class counsel performed some arduous tasks that would normally be performed by outside financial experts. This was an unusually complex financial case. There were over 190,000 pages of records which had to be examined. Class counsel performed a detailed accounting analysis. Further, and unsurprisingly, Defendant's practices regarding reimbursement evolved over the time at issue in this case. There is nothing nefarious about those changes. It would have been surprising if those practices remained completely static over the timeframe examined. It was cost-efficient for class counsel to perform the financial analysis in this case in house. By doing so, the amount of attorney time devoted to that process increased the number of hours spent on this case by class counsel. Conversely, the amount of outside fees incurred by class counsel was less than it would have been if they had utilized outside financial experts to perform the tasks performed in-house.

Third, applying the lodestar method would result in attorney fees of approximately $8,700,000.00. Class counsel's fee request is $3,666,000.00. The 11,565.9 hours of attorney and staff time on this matter are reasonable. The blended rate requested is approximately $317.00. The blended rate applying the lodestar method to the amount of requested attorney fees is reasonable. Based upon the blended rate actually received, the Court need not make a determination regarding the reasonableness of the hourly billable rates contained in Plaintiffs' moving papers.

For these reasons, the Court finds the percentage-based common fund method both appropriate and sufficient on its own to assess the reasonableness of class counsel's requested one-third fee.

Upon careful evaluation of the factors state and federal courts in this jurisdiction use to evaluate the reasonableness of attorney fees in common fund cases, this Court concludes that the attorney fee requested by Class Counsel is reasonable and appropriate. Class Counsel's motion for approval of a one-third attorney fee is **GRANTED**.

II. Costs and Expenses

Courts may award nontaxable costs as authorized by law or agreement of the parties. Minn. R. Civ. P. 23.08. Here, the settlement agreement authorizes reimbursement of expenses. Class counsel requested reimbursement of litigation costs and expenses incurred during prosecution of this case. Reimbursement of such costs and expenses is reasonable and proper. *See Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 287, 291 (Minn. Ct. App. 1996) (upholding order for reimbursement of funds in a common fund class action settlement); *In re Xcel Energy Inc. Sec., Derivative, & ERISA Litig.*, 364 F. Supp. 2d 980, 1004 (D. Minn. 2005) (ordering reimbursement of costs and expenses). Class counsel's requested costs and expenses of $130,001.00 are all for legitimate and necessary costs incurred in prosecuting the action. The amounts requested are reasonable. The Court finds class counsel's request for reimbursement of costs and fees fair and reasonable. Class counsel's motion for reimbursement of costs and expenses is **GRANTED**.

III. Class Representative Awards

Incentive payments are commonly awarded to class representatives in recognition of the role they took in litigating claims on behalf of the larger class. *See Kurvers v. Nat'l Computer Syst., Inc.*, No. 27-cv-00-11010, 2003 WL 25437178, at *1 (Minn. Dist. Ct. Jan. 24, 2003) ("The incentive awards sought are reasonable given the Class Representatives' services on behalf of the Class and the policy of encouraging people to come forward and litigate meritorious claims on behalf of their fellow [class members]."); *see also Gordon v. Microsoft Corp.*, No. 27-cv-03-4162, 2004 WL 5578922, at *1 (Minn. Dist. Ct. Oct. 22, 2004) (ordering incentive award for class representatives); *Schaff v. Chateau Comms., Inc.*, No. 19-cx-03-6402, 2004 WL 1908209, at *2 (Minn. Dist. Ct. May 24, 2004) (ordering incentive award for class representatives).

In determining whether incentive or contribution awards are appropriate, courts consider "actions plaintiff[s] took to protect [the] class's interests, degree to which [the] class has benefited from those actions, and the amount of time and effort plaintiff[s] expended in pursuing litigation." *In re U.S. Bancorp. Litig.*, 291 F. 3d. 1035, 1038 (8th Cir. 2002). Here, the Class Representatives assisted class counsel in prosecuting the case for nearly five years, including by providing documents, assisting with pre-suit investigation, and providing information for interrogatories. (Lea Decl., ¶¶ 13–15.) Throughout the litigation, the Class Representatives risked their reputation and alienation from employers and peers. As a result of the actions of the Class Representatives, the plaintiff class obtained an $11,000,000.00 settlement and affirmative, non-monetary relief that will improve the Plan going forward.

The Court finds that the Class Representatives invested significant time and effort in order to secure a substantial benefit for the class members. On this basis, the Court finds that the requested case contribution award for the Class Representatives is reasonable given their contributions. This amount follows awards in similar excessive fee cases. *See Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (collecting cases awarding $25,000.00 to named plaintiffs). Plaintiffs' motion for approval of the Class Representatives' contribution or incentive awards is **GRANTED**.

Conclusion

The Court grants Plaintiffs' motion for an award of attorney fees, costs and expenses, and Class Representative contribution awards. Plaintiffs are awarded $3,666,300.00 in reasonable attorney fees; $130,001.00 in costs and expenses; contribution awards of $25,000.00 each for Class Representatives Pastor David Bacon, Patricia Hepner, and Ruth Dold, and an incentive award of $10,000.00 for Individually Named Plaintiff Sharon Hvam.

R.L.A.