IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

PAUL MOORE,	*	
Plaintiff,	*	
v.	*	
REALPAGE UTILITY MANAGEMENT, INC.,	*	**Case No.: 8:20-CV-00927-PX**
	*	Hon. Paula Xinis
Defendant.	*	

* * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY'S FEES AND EXPENSES TO CLASS COUNSEL

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I. INTRODUCTION

This novel litigation challenged the actions of Defendant RealPage Utility Management, Inc. ("RUM") in charging fees to the Representative Plaintiff and others for sending them monthly utility bills, when RUM was not licensed as a collection agency under the Maryland Collection Agency Licensing Act ("MCALA"), Md. Code Ann., Bus. Reg. §§ 7-101 *et seq*. Before Class Counsel filed this lawsuit in early 2020, no other lawyers had challenged the assessment of fees for utility billing of Maryland residential tenants as collection agency activity requiring a collection agency license. Class Counsel pioneered this new area of litigation, at considerable risk. *See* Plaintiff's Memorandum in Support of Motion for Final Settlement Approval ("Final Approval Memo"), Exhibit 4, Declaration of Benjamin H. Carney ("Carney Decl.") ¶ 30. No other lawyers were willing to devote the resources required to pursue this case for four years and endure the delay in payment – and risk of no payment at all – which is inherent in litigation like this which is undertaken on a contingency basis.

The risk for Class Counsel of nonpayment was demonstrably high. For example, one of the novel challenges Class Counsel originally mounted against RUM's utility billing practices – the argument that RUM's allocation of utilities violated Maryland's Public Utilities Article – was the subject of a published decision of the now-Maryland Supreme Court which technically sided with Representative Plaintiff but nevertheless foreclosed recovery under that theory. *See Moore v. RealPage Util. Mgmt., Inc*., 476 Md. 501, 264 A.3d 700 (2021); *see also* part II, *infra*.

Nevertheless, Class Counsel adapted to the negative case development, immediately filed an amended complaint streamlining Representative Plaintiff's allegations to focus entirely on RUM's alleged practice of charging fees for its unlicensed collection agency activity, and prevailed on a thoroughly briefed motion for judgment on the pleadings. *See* ECF Nos. 30, 32, 66.

Now, after years of litigation in which this case traveled from the Circuit Court for Montgomery County, to this Court, to the Supreme Court of Maryland and back, Class Counsel has secured a settlement under which RUM has agreed to 1) create a common fund representing disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period, to the tune of $1.8 million (the "Common Settlement Fund"); and, 2) apply for the collection agency license which Class Counsel advocated was required.

In line with the market for class action attorney's fees for this kind of case, Class Counsel now respectfully requests an award of attorney's fees of one-third of the Common Settlement Fund plus reimbursement of a portion of Class Counsel's litigation costs in the amount of $8,100.00, pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2) and ¶ 18(b)(ii)(a) of the Settlement Agreement, ECF No. 71-1.

The requested award is well-supported by decisions including *Decohen v. Abbasi, LLC*, 299 F.R.D. 469 (D. Md. 2014), which approved a one-third attorney's fee in another consumer class action brought by these same Class Counsel. *Decohen* is now the leading reported Maryland decision on attorney's fee awards in class actions, and its rationale and result has been cited approvingly and followed by numerous courts in Maryland and elsewhere. *See, e.g., Kelly v. Johns Hopkins Univ.*, No. 1:16-CV-2835-GLR, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) (holding that "a one-third fee is the market rate" for similar class action attorney's fees, and citing *Decohen* as support for its award of attorney's fees of $4,666,667, which represented one-third of the common fund); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at *5 (M.D.N.C. Dec. 3, 2018) (citing *Decohen* as support for its award of an attorney's fee of $20,447,600, which represented one-third of the common fund); *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at *5 (M.D.N.C. Sept. 25, 2019) (citing *Decohen* as support for its

award of an attorney's fee of $18,166,666.67, which represented one-third of the common fund). Class Counsel therefore requests the same one-third fee approved in *Decohen* and the many other cases discussed below.[1]

The requested award is both appropriate and reasonable, especially considering the history and results of this case, as outlined in Part II of this Motion, the standards in Maryland and elsewhere for attorney fee awards from common funds generated by class action litigation, and the Maryland Rules of Professional Conduct. *See* Part III.

In the end, the ultimate touchstone of any fee recovery is related to success. And this settlement undoubtedly reflects success. This lawsuit challenged RUM's assessment of Administration Fees for its unlicensed collection activity – and recovered a disgorgement of RUM's profits for that activity, plus RUM's agreement to apply for the collection agency license Class Counsel advocated that it should have had all along. These excellent results justify the award requested.

II. CASE BACKGROUND

This case began with the experience of Representative Plaintiff, Paul Moore, who received a number of bills from RUM assessing utility charges and "Administration Fees" to him in connection with his residential apartment lease. RUM provides a "utility billing services platform" that assists third-party landlords in collecting utility charges. First Amended Complaint ("FAC") ¶¶ 15, 16. RUM contracts directly with landlords to provide billing services for them, and bills tenants on a monthly basis. *Id.* ¶¶ 3, 14, 20, 50, 51, 64. RUM, however, was not licensed to act as a collection agency in Maryland. *Id.* ¶¶ 5, 36.

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[1] Attorney's fee calculations are subject to a different standard in cases under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. In FLSA cases, unlike "many common fund cases," a lodestar-based fee is preferred due to the text of FLSA. *Amaya v. Young & Chang, Inc.*, No. CIV. PWG-14-749, 2014 WL 3671569, at *4 (D. Md. July 22, 2014).

Representative Plaintiff received bills from RUM "seeking to collect allocated utility charges and administrative fees from him, concerning his apartment house residence." *Id.* ¶ 50; *see also id.* ¶¶ 51, 53, 63. The bills itemized charges for water, sewer, and gas services, and separately assess an "Administrative Service Fee." *Id.* ¶ 52. Each bill included a flat Administrative Service Fee of $5.50. *Id.* Representative Plaintiff alleged that the Administrative Service Fee requires tenants "to pay [RUM] for billing them" and "is a fee imposed on tenants to pay [RUM] for its unlicensed collection activity." *Id.* ¶¶ 4, 17.

Representative Plaintiff filed a proposed class-action lawsuit in the Circuit Court for Montgomery County against RUM challenging its utility billing practices on two grounds: 1) that RealPage was not licensed as a collection agency under the Maryland Collection Agency Licensing Act ("MCALA"), Md. Code Ann., Bus. Reg. §§ 7-101 *et seq.*; and, 2) that the method that RUM used to allocate energy costs was not permitted under the Public Utilities Article of the Maryland Code. *See* ECF No. 6, State Court Complaint at ¶ 1.

RUM removed the lawsuit to this Court and argued that Mr. Moore's allegations concerning RUM's energy allocation procedures should be dismissed, on the basis that Mr. Moore's apartment building was built in 1968, and that apartments built prior to 1978 are not subject to the energy allocation statute Plaintiff relied upon – Md. Code Ann., Pub. Util. § 7-304. *See* ECF No. 11.

Representative Plaintiff responded by moving to certify the question raised by RUM to what is now the Maryland Supreme Court. *See* ECF No. 15. After briefing, this Court granted the certification motion. *See* ECF Nos. 21 – 25.

The parties completed full briefing and oral argument in the certified question proceedings in Maryland's highest court, and the ultimate decision answered the certified question in Representative Plaintiff's favor. *See Moore*, 476 Md. at 532, 264 A.3d at 718 ("we

answer the question certified to us by the federal district court in the affirmative and hold that the approval requirements stated in PU § 7-304 are applicable to all energy allocation systems" regardless of date of construction). However, the *Moore* decision went a bit further than the certified question, and also observed that "the allocation of energy costs solely computed on the basis of square footage computations and pro rata assessments are … exempt from the approval requirements stated in PU § 7-304." *Id.* As Representative Plaintiff's allegations with regard to RUM's energy allocation practices were that RUM allocated energy costs on square footage computations and pro rata assessments, *Moore* undermined those claims.

In order to streamline the litigation and pursue strong claims, Class Counsel, in consultation with the Representative Plaintiff, immediately amended the complaint following the decision on the certified question to remove the allegations that RUM's energy allocation practices violated the Public Utilities Article. *See* ECF No. 32, First Amended Complaint ("FAC").

As amended, the FAC focuses solely on RUM's actions as an alleged unlicensed collection agency and asserts claims for declaratory judgment pursuant to the Maryland Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Pro. §§ 3-401 et seq. (Count I), violation of the Maryland Consumer Debt Collection Act, Md. Code Ann., Com. Law §§ 14-201 et seq. (Count II), violation of the Maryland Consumer Protection Act, Md. Code Ann., Com. Law §§ 13-101 et seq. (Count III), and money had and received and unjust enrichment (Counts IV – V).

Following the filing of the FAC, RUM continued to vigorously dispute liability. Among other things, it filed a motion for judgment on the pleadings, asserting that nothing RUM did or did not do caused damages to Representative Plaintiff which are recoverable under Maryland law. *See, e.g.*, ECF No. 59-1. Instead, RUM argued that the Maryland Supreme Court has generally prohibited tenants from recovering payments for lack of licensure alone. *See id.* In

support of that argument, RUM relied upon recent authority from the Maryland Supreme Court denying plaintiffs recovery for the lack of an apartment building license alone. *See id.* (*citing, e.g., Aleti v. Metro. Baltimore, LLC*, 479 Md. 696, 722-23 (2022)). RUM asserted that the same rationale prevented Plaintiff and the Class from recovering here. *See id.* RUM also maintained that it had other substantial defenses, including that it is not required to be licensed as a collection agency, and defenses to class certification.

A. Settlement Negotiations

The Parties began discussing the potential for a negotiated resolution in 2022 – before RUM filed its motion for judgment on the pleadings – and the parties ultimately agreed to engage the Hon. Ronald B. Rubin (Ret.) as mediator. *See* Carney Decl. ¶ 16. Judge Rubin conducted a mediation session on May 31, 2022, another session on June 9, 2022, and the parties continued negotiations supervised by Judge Rubin through July, 2022. *Id.* ¶ 17.

Then, the parties reached an impasse in their negotiations, and RUM filed the motion for judgment on the pleadings discussed above, which the Court denied. *See id.* ¶ 18; *see also* ECF No. 59.

Following that decision, the parties resumed mediation on May 2, 2023, and subsequently engaged in additional negotiations with Judge Rubin which were ultimately successful and resulted in the Settlement Agreement. *See* Carney Decl. ¶ 19.

The Parties' mediation efforts were both lengthy and intensive, included multiple mediation sessions supervised by Judge Rubin, and months of extended additional arms-length negotiations. *See* Carney Decl. ¶ 20. In addition to the mediation sessions, Class Counsel and RUM also exchanged informal discovery and information relating to their respective positions. *See id.* The negotiations between the parties were characterized by substantial compromise on

both sides, mutual give-and-take, and the absence of collusion. *See id.* ¶ 21. These extended arms-length efforts to reach compromise resulted in the Settlement Agreement. *See id.*

Prior to mediation, the Parties each conducted extensive research into the applicable facts and law relating to the practices challenged by Representative Plaintiff in this case. For example, Class Counsel engaged in extensive research of the facts and applicable statutory and case law in the course of drafting the Complaint. *See id.* ¶¶ 11-13. For its part, RUM has also conducted extensive research into the applicable facts and law and has provided substantial information concerning the allegations in the Complaint and putative class member collections in connection with mediation. *See* ECF No. 73-1, Settlement Agreement ¶ 4.

As a result of the extensive efforts of Class Counsel, both in litigation and in settlement negotiations, the parties reached the Settlement Agreement which they are presently requesting the Court to approve – a settlement which provides substantial monetary relief to thousands of Settlement Class members and requires RUM to apply for the collection agency license Plaintiff alleged it should have had all along. *See, generally,* ECF No. 73-1, Settlement Agreement.

In the settlement of this action, Class Counsel has achieved a superior result for the Class. After four years of litigation and negotiations, Class Counsel managed to recover a disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period, in the amount of $1.8 million – a recovery which can be distributed to Settlement Class members now, instead of after additional years of litigation and appeals. And, RUM has agreed to apply for the collection agency license Representative Plaintiff alleged it should have, thus subjecting RUM's collection practices to the oversight of Maryland regulators and protecting Settlement Class members.

B. The Litigation Involved a High Level of Risk

This case entailed a high level of risk in litigation. Although Representative Plaintiff and Class Counsel are confident in the merit of the Class' claims and believe that Representative Plaintiff and the Class should and would ultimately prevail on those claims on a class-wide basis, this case is already four years old, has been to the Maryland Supreme Court, and yet it is barely beyond the pleadings stage. Representative Plaintiff would have to overcome substantial obstacles, and a substantial amount of time would pass during litigation and appeals, before he or other Class members would be able to enjoy any fruits of a litigated resolution in this case.

Settling Defendants demonstrated an intention to fully and zealously litigate their defenses in the absence of settlement. For example, RUM hired a top-tier national class action defense firm with more than 1,000 lawyers – Troutman Pepper Hamilton Sanders LLP. Three partners of Troutman Pepper, who specialize in class action defense, are among the counsel of record for RUM in this case. They advanced an aggressive defense at each stage of the litigation. And RUM is the subsidiary of a multi-billion dollar corporation. Had the case not settled, it is clear that RUM had the resources and intention to continue to press a vigorous defense. Any ultimate victory in this case could well have been Pyhrric in light of the time and expense which would have been required to obtain a litigated resolution.

Furthermore, no other lawsuits challenging RUM's utility billing practices had been filed before this one. Indeed, to Class Counsel's knowledge, before Class Counsel filed this lawsuit on Representative Plaintiff's behalf in early 2020, no other lawyers had challenged utility billing of Maryland residential tenants as collection agency activity requiring a collection agency license. *See* Carney Decl. ¶ 30. The novel nature of this litigation and the vigorous nature of RUM's defense posed significant risks to any recovery. *See Kelly v. Johns Hopkins Univ.*, No. 1:16-CV-2835-GLR, 2020 WL 434473, at *3 (D. Md. Jan. 28, 2020) ("no other law firm had been willing to

devote the necessary resources to prosecute this type of action. Without question, this case required a willingness by counsel to risk very significant amounts of time and money 'in the face of vigorous resistance' by the defendants.") (*citing Ramsey v. Philips N.A.*, No. 18-1099, Doc. 27 at 2 (S.D. Ill. Oct. 15, 2018)).

Many challenges would have faced Class Counsel and Settlement Class members had this litigation continued. For example, RUM argued that Representative Plaintiff did "not allege any amounts Moore 'directly paid to RealPage, as opposed to his landlord.'" *Moore v. RealPage Util. Mgmt. Inc.*, No. 8:20-CV-00927-PX, 2023 WL 2599571, at *4 (D. Md. Mar. 22, 2023). Although the Court held that, on the pleadings, Representative Plaintiff nevertheless made "plausible the liability theory that RealPage obtained funds to which it is not entitled," *id.* at *4, RUM no doubt would have resurrected this argument had litigation continued and would have argued at the summary judgment stage that it did not even receive the Administration Fees which are the subject of this lawsuit. That defense, or others RUM raised or would raise, could conceivably have been resolved in RUM's favor and undermined Representative Plaintiff's claims.

Furthermore, had this matter proceeded through litigation, RUM would have strenuously contested class certification. Representative Plaintiff and the Class also would have likely faced one or more comprehensive motions for summary judgment which could have been dispositive.

C. The Litigation Involved Substantial Efforts by Class Counsel.

This case has involved significant expenditures of time and effort by Class Counsel, all of which positioned the litigation for the successful resolution which is now proposed to the Court.

In particular, prior to the filing of this lawsuit, Class Counsel reviewed numerous documents relating to Representative Plaintiff's dealings with RUM. *See* Carney Decl. ¶ 12. In addition, Class Counsel reviewed the documents of other potential Class members. *See id.*

Following the pre-suit investigation, Class Counsel researched and drafted the Complaint. *See* Carney Decl. ¶ 13. After the Complaint was filed in Montgomery County, RUM noticed removal of the litigation to this Court. *See*, *e.g.*, ECF No. 1 (Notice of Removal). As discussed above, the parties then engaged in briefing and certified question proceedings. Once the certified question proceedings were complete, Class Counsel drafted and filed the FAC. *See* Carney Decl. ¶ 15.

At the same time that Class Counsel was engaging on the litigation front, Class Counsel also engaged counsel for RUM in settlement negotiations. Those negotiations were arms-length and in good faith, and took substantial time, but were ultimately successful as described above. *See* Carney Decl. ¶ 20 - 21.

After settlement was reached, Class Counsel worked diligently and cooperatively with RUM's counsel to draft the Agreement – a process which involved numerous drafts of the Agreement, substantial give-and-take between the parties, and additional negotiations to reach consensus on disputed points. *See id*.

Class Counsel spent substantial time researching the facts and applicable law for this case, drafting pleadings, preparing for and conducting mediation and settlement negotiations, and on other necessary matters. *See id*. ¶ 26. Thus far, Class Counsel have devoted more than 838 hours to this litigation – and expect that the time spent on this litigation will substantially increase as notice is disseminated to the Class and Class Counsel responds to inquiries from Settlement Class members and other administrative issues during the notice period, and as the settlement is ultimately distributed to Settlement Class members and inquiries and administrative duties continue. *See id*.

D. The Class Is Being Notified of Class Counsel's Request for Attorney's Fees

Class members are being informed of Class Counsel's request for attorney's fees as part of Class Notice. After this Court gave preliminary approval to the Settlement, the Court appointed Settlement Administrator has prepared and is disseminating notice to Settlement Class Members. Each Notice states that Class Counsel intends to apply for attorneys' fees and expenses in the amount of one-third (1/3) of the Settlement Fund, plus expenses. *See* Final Approval Memo Exhibits 1, 2 & 3, Settlement Notices. Settlement Class Members will also have the opportunity to review this motion for attorney's fees and other documents, which will be posted on the Settlement Website. *See* Carney Decl. ¶ 27.

III. LEGAL STANDARDS GOVERNING THE AWARD OF ATTORNEY'S FEES

A. An Award Of Attorney's Fees Is Warranted Under the Common Fund Doctrine

Under Federal Rule of Civil Procedure 23(h), "the court may award reasonable attorney's fees ... that are authorized ... by law or by the parties' agreement." *Id.*; *see also Decohen*, 299 F.R.D. at 480–81 (same). Under the "common fund doctrine," "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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* As one court noted in memorable language, quoting the Book of Deuteronomy, a common fund fee award is designed to ensure that attorneys will continue to take the risks and invest the resources to confer such benefits:

> Were it not for the efforts of the attorneys, there would be no funds to dispute. Thou shalt not muzzle the ox that treadeth out the corn.

Equifax. Inc. v. Luster, 463 F. Supp. 352, 358 (E.D. Ark. 1978), *aff'd per curiam*, 604 F.2d 31 (8th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980).

B. A Percentage-of-Recovery Award Is Appropriate

In class actions, "[t]here are two main methods for calculating the reasonableness of attorneys' fees—the lodestar method and the percentage-of-recovery method. … A district court may choose the method it deems appropriate based on its judgment and the facts of the case." *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022).

Although either approach is permitted in the Fourth Circuit, "the percentage-of-recovery approach is not only permitted, but is the preferred approach to determine attorney's fees' in class actions." *Boger v. Citrix Sys., Inc.*, No. 19-CV-01234-LKG, 2023 WL 1415625, at *9 (D. Md. Jan. 31, 2023) (*quoting Starr v. Credible Behav. Health, Inc.*, No. CV 20-2986 PJM, 2021 WL 2141542, at *5 (D. Md. May 26, 2021) (*quoting Savani v. URS Pro. Sols. LLC*, 121 F. Supp. 3d 564, 568 (D.S.C. 2015)).

Indeed, the percentage-of-recovery approach "is 'overwhelmingly' preferred." *Kelly*, 2020 WL 434473, at *2 (*citing Krakauer v. Dish Network, L.L.C.*, No. 14-333, 2018 WL 6305785, at *2 (M.D.N.C. Dec. 3, 2018); *Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]he Court concludes that there is a clear consensus ... that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery.")); *see also Jones v. Dominion Resource Servs., Inc.*, 601 F. Supp. 2d 756, 759 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases.").

The percentage-of-the-fund approach is preferable because it aligns the interests of the Class and Class Counsel, and encourages efficient and effective representation:

> The trend among most courts seems to be towards favoring the percentage-of-the-fund approach to awarding attorney's fees in class action cases because it "better aligns the interests of class counsel and class members ... [by] t [ying] the attorneys' award to the overall result achieved rather than the hours expended by the attorneys." *Kay Co. v. Equitable Production Co.,* 749 F.Supp.2d 455, 461 (S.D.W.Va.2010). 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. *Id.*

DeWitt v. Darlington Cnty., S.C., No. 4:11-CV-00740-RBH, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013).

Furthermore, "the percentage method is more efficient and less burdensome that the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang v. JHM Mortgage Sec. Ltd. Partnership,* 890 F.Supp. 499, 503 (E.D.Va.1995); *see also In re LandAmerica 1031 Exch. Servs., Inc. I.R.S. 1031 Tax Deferred Exch. Litig.*, No. 3:09-CV-00054, 2012 WL 5430841, at *2 (D.S.C. Nov. 7, 2012) (same). "Courts within the Fourth Circuit have cautioned against the lodestar approach in determining attorneys' fees in common fund cases such as this … the lodestar method 'create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits.'" *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *3 (M.D.N.C. Sept. 29, 2016) (*quoting Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (other citations and internal quotations omitted).

The percentage-of-the-fund method is particularly appropriate in cases like this one, in which Class Counsel has a contingent fee agreement with the Representative Plaintiff.

> Class Counsel were not hired on an hourly basis, nor have any of their fees or expenses been paid as would have been required in representation on an hourly basis. Accordingly, this Court will determine the reasonableness of the requested fee using a percentage of the fund approach.

In re LandAmerica 1031 Exch. Servs., Inc. I.R.S. 1031 Tax Deferred Exch. Litig., 2012 WL 5430841, at *2; *see also* Carney Decl. ¶ 24 (Class Counsel have a contingent fee agreement with Representative Plaintiff).

Contingency awards in class actions are important to encourage lawyers to take these risks and make these investments, to protect access to justice:

> The contingent fee and the class action are "the poor man's keys to the courthouse." Both vehicles allow the average citizen and taxpayer to have their injuries redressed and their rights protected. Both permit persons of limited resources to obtain competent legal counsel, an essential ingredient in our adversary system of justice….
> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear ….

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985) (awarding requested 35% fee).

Accordingly, as this Court held in *Decohen*, not only Maryland courts but also "the majority of courts in other jurisdictions, use the percentage of recovery method in [a] common fund case." 299 F.R.D. at 481. *See also* Manual for Complex Litigation, Fourth, § 14.121 ("After a period of experimentation " with "the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common fund cases.") (citations omitted); *see also* § 5 Newberg on Class Actions § 15:62 n. 3 (5th ed.) (same). As a sister Court in the Fourth Circuit held:

> 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) (*citing Jones v. Dominion Res. Servs.*, 601 F.Supp.2d 756, 758 (S.D.W.Va.2009); *Smith v. Krispy Kreme Doughnut Co*rp., 2007 WL 119157, *1, 2007 U.S. Dist. LEXIS 2392, *3–4, (M.D.N.C. Jan. 10, 2007); *In re Microstrategy, Inc.*,

172 F. Supp. 2d 778, 787 (E.D. Va. 2001); *Strang et al v. JHM Mortgage Sec. Ltd. P'ship et al.*, 890 F.Supp. 499, 502 (E.D.Va.1995).

Indeed, "[t]he Supreme Court has suggested that percentage-of-the-fund is the appropriate method for awarding fees under the common fund doctrine." *In re Peanut Farmers Antitrust Litig.*, No. 2:19-CV-00463, 2021 WL 9494033, at *1 (E.D. Va. Aug. 10, 2021) (*citing Blum v. Stenson*, 465 U.S. 886. 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class ...."); *see also Kelly*, 2020 WL 434473, at *2 (same).

Although, as discussed below, this case has demanded an expenditure of many hours by Class Counsel, the time expenditure is of less importance than the size of the common fund:

> Unlike a statutory-fee analysis, where the lodestar is generally determinative, a percentage fee award sometimes gives little weight to the amount of time expended. Attorneys' hours may be one of many factors to consider. ***Indeed, one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation.*** Generally, the factor given the greatest emphasis is the size of the fund created, because a "common fund is itself the measure of success…[and] represents the benchmark from which a reasonable fee will be awarded."

Manual for Complex Litigation, Fourth § 14.121 (quoting 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 14:6 at 547, 550 (4th ed. 2002) (emphasis added).

The percentage of the fund method is standard in the legal market for class counsel's services in class action cases:

> The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel: when potential clients and lawyers bargain freely for representation, most contracts award the lawyer a percentage (commonly, about one third) of the client's recovery.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 991 F.Supp.2d 437, 440 (E.D.N.Y. 2014).

The long history of courts approving an award of a percentage of the settlement fund for class counsel's attorneys' fees recognizes that like other contingency-based litigation, a percentage fee in class litigation best aligns the interests of Class Counsel with those of the Class and rewards counsel for undertaking risky, but ultimately successful, cases.

C. An Award of One-Third of the Common Fund Is the "Market Rate" and Customary Award in Class Action Litigation in Maryland and Elsewhere

As Judge Russell recently held, the "market rate" in this District for attorney's fees in similar class action cases is one-third of the common fund. *See Kelly*, 2020 WL 434473, at *3 ("Contingent fees of up to one-third are common in this circuit…In similar ERISA excessive fee cases, and in particular those brought by Class Counsel, district courts have consistently recognized that a one-third fee is the market rate."). In support of that holding, the *Kelly* Court cited, *inter alia*, *Decohen*, 299 F.R.D. at 483 - another consumer class action brought by these Class Counsel, confirming that the one-third rate is customary in a case like this one. *See Kelly*, 2020 WL 434473, at *3.

Indeed, multiple recent decisions of this Court and others have recognized that in the Fourth Circuit, an attorney's fee award of one-third of a common settlement fund in a class action is appropriate:

> "[A] request for one-third of a settlement fund [in attorney's fees] is common in this circuit and generally considered reasonable." *Id.* (*citing Kirkpatrick v. Cardinal Innovations Healthcare Sols.*, 352 F. Supp. 3d 499, 505 (M.D.N.C. 2018)); *see also Phillips v. Triad Guar. Inc.*, 2016 WL 2636289, at *6 (M.D.N.C. May 9, 2016) (collecting cases on percentage-of-recovery fee awards and finding that, generally, attorneys' fee awards between 25% and 33% are reasonable).

Boger v. Citrix Sys., Inc., No. 19-CV-01234-LKG, 2023 WL 1415625, at *9 (D. Md. Jan. 31, 2023); *see also Earls v. Forga Contracting, Inc.*, No. 1:19-CV-00190-MR-WCM, 2020 WL 3063921, at *4 (W.D.N.C. June 9, 2020) ("Within the Fourth Circuit, contingent fees of roughly 33% are

common.")(*citing Kirkpatrick v. Cardinal Innovations Healthcare Sols.,* 352 F. Supp. 3d 499, 505 (M.D.N.C. 2018) (33.39%); *Kirven v. Cent. States Health & Life Co. of Omaha*, No. CA 3:11-2149-MBS, 2015 WL 1314086, at *13 (D.S.C. Mar. 23, 2015) (33%); *Reynolds v. Fid. Investments Institutional Operations Co., Inc.*, No. 1:18-CV-423, 2020 WL 92092, at *3 (M.D.N.C. Jan. 8, 2020) (33%)). The one-third of a common fund attorney fees award is applied even in some mega-fund cases where the common fund exceeds $100 million. *See, e.g., In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318 RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding attorney's fee of $54.5 million, one-third of the $163.5 million common fund).

The same is true in many courts outside the Fourth Circuit as well – an attorney's fee of one-third of the common fund is "the normal rate of compensation." *George v. Kraft Foods Global, Inc.*, No. 1:08-cv-3799, 2012 WL 13089487, at *2 (N.D. Ill. Jun. 26, 2012)("[t]he normal rate of compensation in the market [is] 33.33% of the common fund recovered' because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment."); *see also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (affirming award of one-third of $60 million common fund in addition to reimbursement of counsel's out-of-pocket expenses in a consumer class action); *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (affirming award of one-third of $25.75 million common fund in a consumer class action); *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 F. App'x 880, 885 (3d Cir. 2016) (affirming award of one-third of $625,000 common fund in addition to reimbursement of counsel's out-of-pocket expenses in a consumer class action); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of one-third of settlement of $40 million); *Martinez v. Medicredit, Inc.*, 2018 WL 2223681, at *5 (E.D. Mo. May 15, 2018) (awarding attorney's fees of one-third of $5,000,000.00 common fund plus expenses in consumer class action); *Goldsmith v. Tech. Solutions Co.*, 1995 WL 17009594, at *7-8 (N.D. Ill. Oct. 10, 1995) ("where the percentage

method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); *Smith v. CRST Van Expedited, Inc*., 2013 WL 163293, at *5 (S.D. Cal. 2013) ("Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent...."); *Woods v. Club Cabaret, Inc.*, 2017 WL 4054523, at *10 (C.D. Ill. May 17, 2017) ("In Illinois, '[c]ourts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement'"); *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 310 (S.D. Miss. 2014) ("numerous decisions have found that a one-third recovery [from a common fund] is well within the range of a customary fee."); *Simpson v. Citizens Bank*, 2014 WL 12738263, at *6 (E.D. Mich. Jan. 31, 2014) ("Class Counsel's request for 33% of the common fund created by their efforts is well within the benchmark range and in line with what is often awarded in this Circuit."); *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *15 (W.D. Okla. Oct. 27, 2008) ("Fees in the range of at least one-third of the common fund are frequently awarded in class action cases of this general variety."); *Shaw v. Toshiba America Information Systems, Inc.* 91 F.Supp.2d 942, 972 (E.D.Tex.2000) ("[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, 75 Cal. Rptr. 3d 413, 434 (2008) (same). *See also* Alba Conte *et al., Newberg on Class Actions* § 14.6 (4th ed. 2002) ("[F]ee awards in class actions average around one-third of the recovery[.]")).

In sum, an attorney's fee award in class action litigation of one-third of the common fund is customary and appropriate in Maryland, the Fourth Circuit, and elsewhere.

D. Numerous Maryland Courts have Approved a One-Third Award to These Class Counsel

Past attorney's fee awards to to specific class counsel are also relevant in analyzing the reasonableness of a requested attorney's fee. *See Kelly*, 2020 WL 434473, at *3 ("In similar … cases, and in particular those brought by Class Counsel, district courts have consistently recognized that a one-third fee is the market rate.")

Courts considering settlements achieved by Class Counsel have repeatedly approved fee awards of one-third of the common fund. This Court, for example, has many times awarded one-third of the common fund to the same Class Counsel in consumer class action litigation. *See*, *e.g.*, *Decohen*, 299 F.R.D. at 480-83 (awarding Class Counsel attorney's fees of one-third of common fund, in addition to reimbursement of out-of-pocket expenses in a consumer class action); *Edge v. Stillman Law Office, LLC*, 8:21-cv-02813-TDC (D.Md. June 2, 2023) (ECF No. 87 at ¶ 13); *Thomas v. Cameron Mericle, P.A.*, Case No. 8:18-cv-03645-CBD (D.Md. Dec. 4, 2020) (ECF No. 82 at ¶ 10) (same); *Smith v. Ace Motor Acceptance Corp.*, Case No. 1:12-cv-02149-JKS (D. Md. Oct. 7, 2013) (ECF No. 37 at ¶ 10) (same); *Benway v. Resource Real Estate Services, LLC, et al.*, Civil Action No. 1:05-cv-3250-WMN (D. Md. Oct. 12, 2011) (ECF No. 191 at ¶ 11) (same); *Robinson v. Fountainhead Title Group Corp.*, Civil Action No. 03-cv-03106-WMN (D. Md. Oct. 7, 2010) (ECF No. 198 at ¶ 9) (same); *Brittingham v. Prosperity Mortgage Company*, Case No. 1:09-cv-00826-WMN (D. Md. Apr. 14, 2010) (ECF No. 74 at ¶ 10) (same); *Watts v. Capital One Auto Finance, Inc.*, Civil No. 1:07-cv-03477-CCB (D. Md. Jan 15, 2010) (ECF No. 67 at ¶ 9) (same); *Shelton v. Crescent Bank & Trust*, Case No. 1:08-cv-01799-RDB (D.Md. May 28, 2009) (ECF No. 39 at ¶ 9) (same).

Numerous Maryland state Circuit Court decisions have also awarded Class Counsel one-third of the common fund in attorney's fees. *See, e.g.*, *Headen v. Conservice, Inc.*, Case No. CAL2019314 (Cir. Ct. Pr. George's Co., Dec. 9, 2022) (Snoddy, J.) (awarding Class Counsel

attorney's fees of one-third of common fund, in addition to reimbursement of counsel's out-of-pocket expenses in a consumer class action brought by Class Counsel) (**Exhibit 1**); *Cottom v. North State Acceptance, LLC*, Case No. 24-C-19005874 (Cir. Ct. Balt. City 2020) (Brown, J.) (same) (**Exhibit 2**); *Hale v. Mariner Finance, LLC*, Case No. 24-C-18-00053 (Cir Ct. Balt. City 2018) (Brown, J.) (same) (**Exhibit 3**); *Lendmark Financial Services, LLC v. Cruz*, Case No. 24C17000109 (Cir. Ct. Balt. City 2018) (Brown, J.) (same) (**Exhibit 4**); *Yang v. G&C Gulf, Inc.*, Case No. 403885V (Cir. Ct. Mont. Co. 2019) (Rubin, J.) (same) (**Exhibit 5**); *Yang v. G&C Gulf, Inc.*, Case No. 403885V (Cir. Ct. Mont. Co. 2018) (Rubin, J.) (same) (**Exhibit 6**); *Chalk v. Tower Federal Credit Union*, Case No. 03-C-15-006873 (Cir. Ct. Balt. Co. 2016) (Ensor, J.) (same) (**Exhibit 7**); *Clinton v. Money One Federal Credit Union*, Case No. 408053V (Cir. Ct. Mont. Co. 2016) (Greenberg, J.) (same) (**Exhibit 8**); *Sekuler v. Financial Freedom Acquisition, LLC*, Case No. 360327-V (Cir. Ct. Mont. Co. 2013) (Mason, J.) (same) (**Exhibit 9**); *Schmidt v. Redwood Capital, Inc.*, Case No. 03-C-11-010442 (Cir. Ct. Balt. Co. 2012) (Nagle, J.) (same) (**Exhibit 10**); *Wuerstlin v. Sandy Spring Bank*, Case No. 335030V (Cir. Ct. Mont. Co. 2011) (Rubin, J.) (same) (**Exhibit 11**); *Ferrell v. JK III*, Case No. 13-C-03-56836 (Cir. Ct. How. Co. 2011) (Leasure, J.) (same) (**Exhibit 12**); *Cooper v. United Auto Credit Corp.*, Case No. 03-C-09000477 (Cir. Ct. Balt. Co. 2011) (Cahill, J.) (same) (**Exhibit 13**); *Butler v. C&F Finance Co.*, Case No. 03-C-09002127 (Cir. Ct. Balt. Co. 2010) (Stringer, J.) (same) (**Exhibit 14**); *Taylor v. Wells Fargo Home Mortgage*, Case No. 24-C-02-001635 (Cir. Ct. Balt. City 2010) (Glynn, J.) (same) (**Exhibit 15**).

As the fee award requested in this case is the same as awards approved by other courts, time and time again, in Maryland and nationwide, including to Class Counsel here, it should be approved as reasonable.

E. The Maryland Rules of Professional Conduct Support an Attorney's Fee Award of One-Third of the Common Fund.

Maryland Rule of Professional Conduct 1.5 provides general guidelines for determining the reasonableness of attorney's fees:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and,
> (8) whether the fee is fixed or contingent.

Maryland Rule of Professional Conduct 1.5(a).

Considering each of these factors, the request for attorney's fees in the amount of one-third of the Common Settlement Fund, as well as litigation expenses, is both reasonable and appropriate, as discussed below.

1. This Matter Was Time-Intensive, Involved Novel and Difficult Legal Issues, and Required Skill.

This action was time-intensive and novel. To Class Counsel's knowledge, no other attorneys have brought actions against RUM challenging the activity alleged by Representative Plaintiff. *See* Carney Decl. ¶ 30.

Class Counsel's pursuit of this litigation thus involved a substantial amount of risk and a significant possibility that the efforts expended in this litigation would go unrewarded. Class Counsel, however, successfully litigated this case and achieved a superior class-action settlement recovering $1.8 million for Class members – representing a disgorgement of all profits that RUM made in connection with the monthly billing services it provided to its customers in relation to the Settlement Class Members during the Class Period. *See* Settlement Agreement, ECF No. 73-1

¶ 21(b). The settlement confers a significant financial benefit on the Class and ensures that all Class members have the opportunity to recover for claims which, in the absence of a class action, they would have no practical ability to pursue.

It is also unquestionable that the results achieved in this case would not have been possible without the determination and mixed talent and skills of representation by private counsel throughout the litigation. Among other things, the crafting and litigation of the claims in this case required skill and expertise. Class Counsel are experienced in class action litigation, having been certified as class counsel dozens of times by numerous courts (*see* Carney Decl. ¶¶ 3, 7, 10), and have been counsel in no fewer than 40 published and officially reported trial and appellate decisions in state and federal courts involving consumer claims. *See* Carney Decl. ¶ 3.

Representative Plaintiffs' claims were opposed by experienced and able defense counsel with a national class action defense practice and ample litigation support, and by an opposing party with substantial resources. However, in face of that opposition, Class Counsel successfully negotiated a positive resolution which in some respects could not have been achieved through a litigated resolution. For example, litigating this case to a judgment could not have resulted in the RUM's agreement, obtained by Class Counsel, that it would apply for a collection agency license - thus subjecting RUM's practices to the oversight of Maryland's regulators and protecting Settlement Class members. The time-intensive, novel, and difficult nature of this litigation, in light of the results obtained, supports the award requested.

2. Opportunity Costs

Class Counsel's representation of Plaintiff and the Class has been, and will continue to be, a significant undertaking, requiring substantial time and attention. Class Counsel has already devoted many hours to this case – more than 838 hours to date – and time spent by Class Counsel on this litigation displaced substantial time from other matters. *See* Carney Decl. ¶ 26.

That time investment is not over but is expected to continue for many months. *See id*. The nature and complexity of class action litigation, if it is to be handled professionally and effectively, requires a substantial allocation of time, staff, and other resources – and that reflects the experience of Class Counsel in this case. The opportunity costs factor thus weighs in favor of the fee award requested.

3. The Fee Requested Is Within the Range of Awards in Similar Cases Both in and out of Maryland

The fee requested is well within the range of awards allowed in class actions by courts in Maryland and is especially appropriate given the results achieved by the counsel. As discussed above, the requested 1/3 fee is the market rate and the customary award approved by this Court and other courts in Maryland, and elsewhere, in similar circumstances. *See* Part III.C, *supra*.

4. The Result Obtained for the Class Was Superior

Class Counsel obtained substantial relief for the Class – a common settlement fund of $1.8 million, plus RUM's agreement to pay settlement administration fees and expenses, plus RUM's agreement to pay an incentive payment to the Representative Plaintiff separate from and in addition to the common fund, plus RUM's agreement to apply for a collection agency license. *See* ECF No. 73-1, Settlement Agreement.

That result is superior. The $1.8 million settlement fund alone represents a disgorgement of RUM's relevant profits. *See* ECF No. 73-1, Settlement Agreement ¶ 21(b). Furthermore, Settlement Class members could not have obtained through litigation RUM's agreement to apply for a collection agency license – yet Class Counsel obtained that relief through this settlement. A further substantial benefit is that the relief to Settlement Class members comes now, instead of after additional years in trial and appellate courts.

The settlement Class Counsel secured, which benefits Settlement Class members and judgment debtors to the tune of $1.8 million, is an excellent result.

5. The Time Limitations Imposed on Counsel

As noted above, this matter required a significant dedication of time on the part of Class Counsel. Counsel spent hundreds of hours litigating this case – investigating the case, crafting legal theories, drafting pleadings, conducting informal and formal discovery, reviewing records, preparing and participating in mediation and settlement negotiations and addressing other issues necessary to effect settlement. *See* Carney Decl. ¶ 26.

Indeed, the time expended by Class Counsel in this litigation – more than 838 hours to date – translates into a "lodestar" (or hours multiplied by billing rate) of $426,200.00. *See id*. And that lodestar number will only go up from here. Class Counsel is investing substantial additional time in this case on an ongoing basis, including communicating with Settlement Class members about the proposed settlement, preparing documents in support of the settlement, and engaging in additional tasks in administering the settlement. *See id*. Accordingly, the eventual lodestar in this case will be significantly higher than it stands today. Yet even today, Class Counsel's lodestar firmly supports the fee requested under the cross-check employed in *Decohen*. As Judge Quarles held in that case:

> When the lodestar method is used only as a cross-check, the "exhaustive scrutiny" normally required by that method is not necessary. *Kay Co.,* 749 F.Supp.2d at 469 (*citing Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir.2000) ("[W]here used as a mere cross-check ... the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case.") (internal citations omitted)). Thus, the Court may accept as reasonable class counsel's estimate of the hours they have spent working on the case. *See, e.g., Jones v. Dominion Res. Servs., Inc.,* 601 F.Supp.2d 756, 766 (S.D.W.Va.2009).
>
> Class counsel aver that they have spent 650 hours litigating this case, and each attorney bills between $400 and $550 per hour. *See* ECF No. 87–4 at 7. Using the lower billing rate of $400, class counsel's requested award [of one-third of the $3 million common fund] is 3.9 times the lodestar rate. "Courts have generally held

> that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorney's fee." *Singleton,* 2013 WL 5506027, at *16, 976 F.Supp.2d at 689. Accordingly, the lodestar cross-check confirms that the requested fee award is reasonable. The Court will award class counsel the requested fee award of one-third of the common fund.

Decohen, 299 F.R.D. at 483. Here, the requested award is far less than the 4.5 multiplier approved in *Decohen*. Even using the current lodestar, the present multiplier is only 1.4. That multiplier will only decrease as Class Counsel devotes additional hours to this settlement in the future.

Accordingly, the time limitations imposed on counsel support the award requested.

6. The Nature of the Relationship Between the Attorneys and the Class

The nature of the relationship between the attorneys and the Settlement Class also supports the award requested. Class Counsel pursued relief on behalf of the Class and negotiated a settlement which includes substantial relief for the Class, all prior to obtaining any compensation. Indeed, any recovery for Class Counsel was and is contingent on recovery of money for the claims in this case. *See* Carney Decl. ¶ 24. Accordingly, in the contingent-fee relationship between Class Counsel and Plaintiff and Class, the interests of Class Counsel and the Class are aligned. *See Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986) ("The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. … So long as the percentage is set by category of case (as it should be), rather than case by case, defendants with good cases pay no more than defendants with poor ones. The adjustment for risk takes place not in the judge's chambers but in the private market-under a contingent fee system, potential litigants with poor chances simply cannot find counsel. Weak cases stay out of court.")

The aligned interests of Class Counsel and Plaintiff and the Class, and the contingent nature of the recovery of any fee in this case, weighs in favor of the requested one-third fee. *See*,

e.g., *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327, 339 (Bankr. D. Md. 2000) (awarding attorney's fee of $71.2 million, finding that "pure contingency fee of 40% was …within the range of fees customarily charged in Maryland for similar services" even though it was "as much as 20 times a customary hourly rate fee" when "the fee agreement was for a contingency"). Here, as described in part III.C, *supra*, the customary fee for consumer class action litigation which generates a common fund is one-third, and the contingent fee relationship between Class Counsel and the Settlement Class supports an award of that customary amount.

7. Class Counsel Are Experienced and Reputable

The standing and prior experience of Class Counsel are also relevant in determining fair compensation. Class Counsel are recognized nationally as leading and skillful practitioners in the field of complex class actions and have been certified as class counsel in dozens of class action cases. *See* Carney Decl. ¶¶ 2 - 10. The fact that Representative Plaintiff and the other Settlement Class members were competently represented undoubtedly played a role in bringing RUM to the settlement table and in achieving a substantial recovery for Settlement Class members, despite RUM's defenses.

8. Recovery of Any Attorney's Fees Was Completely Contingent on Success.

Class Counsel prosecuted this action on behalf of the Class on a fully contingent basis and at considerable risk. *See* Carney Decl. ¶ 24. If this were non-class action litigation, the customary fee arrangement would be contingent, based upon a percentage of the recovery, typically in the 33⅓ to 40 percent range. *See, e.g.*, *Kirchoff*, 786 F.2d at 323; *see also Richendollar v. Bertini,* 27 F.3d 563 (4th Cir. 1994) (characterizing as "typical" a "contingent fee arrangement" under which the plaintiff's attorney "would collect one-third of the settlement.")

Where counsel pursues a class action on a contingency basis "despite its risks," the class action litigation results in a common fund, and the Class has been notified of the percentage to be requested in attorney's fees, a percentage-based award from the common fund is appropriate. As one court held in awarding $4 million in attorney's fees in a securities litigation case which was litigated for approximately a year and a half, between 1992 and 1993, because of the contingent nature of the representation, and the notice to class members of the percentage requested, an award of 1/3 award of the settlement was reasonable:

> As part of the process of notifying class members of the proposed settlement in this action, plaintiffs' counsel notified class members that counsel would seek an award of attorney's fees from the Settlement Fund, and that counsel would request 33 1/3% of the total Settlement Fund. Class members were also notified of their right to object to the request for attorney's fees. No member of the Settlement Class has made any objection to the request for attorney's fees.
>
> Plaintiffs' counsel's efforts have resulted in creation of a $10.7 million common fund, plus interest, for the benefit of the class. Under *Blum v. Stenson*, 645 U.S. 886 900 n.16, 104 S.Ct. 1541, 1550 n. 16, 79 L. Ed. 2d 891 (1984), counsel may be awarded a reasonable fee based upon a percentage of the fund. *See In re Bulk Popcorn Antitrust Litig.*, Civ. No. 3-89-710 (D. Minn. Sept. 3, 1992); *In re Wirebound Boxes Antitrust Litig.*, File No. MDL-793 slip op., at 2 (D. Minn. May 2, 1991) (Murphy, J.); *In re Digital Sound Corp. Sec. Litig.*, File No. 90-3533-MRP (C.D. Cal. Apr. 9, 1991).
>
> Based upon a review of cases which have awarded attorney's fees under the "common fund" approach, the Court finds that an award of 33 1/3% of the common fund is reasonable.
>
> Based upon careful consideration of plaintiffs' counsel's application, the Court finds that it is reasonable and will be granted. Plaintiffs' counsel have achieved a successful result in this litigation, having amassed a total settlement value of at least $10.7 million in cash and the debenture, exclusive of interest. Counsel achieved this outcome through extensive efforts, in terms of both advocacy and compromise. The Court further notes counsel's willingness to pursue this action, despite its risks, on a contingency basis.

In re Employee Benefit Plans Securities Litigation, 1993 WL 330595 (D. Minn. June 2, 1993).

During the time that this case was pending, Class counsel received no compensation in this case, while expending significant attorney time and substantial resources for the benefit of the

Class. *See* Carney Decl. ¶ 24. As important, had the Class lost, Class Counsel would have received no compensation from either Representative Plaintiff or the Class. *See id*.

Furthermore, Settlement Class members are being notified of the attorney's fees requested here. The Court-approved notices to Settlement Class members expressly state that Class Counsel will ask the Court to approve payment of 1/3 of the Common Settlement Fund for attorneys' fees, plus expenses. *See* Final Approval Memo Exhibits 1, 2 & 3.

Despite the competent and diligent efforts of counsel, at no time was success guaranteed. Indeed, from the beginning, Class Counsel faced serious risks regarding liability and the ability to establish harm. Those issues were explained in the Settlement Agreement and are discussed above. Suffice it to say that the multitude of legal issues in this case, any one of which, if resolved against Plaintiffs and the Class could have been dispositive, made this case risky and recovery uncertain. *See In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) (fee award remanded to district court for revision, with admonition "that the failure to make any provision for risk of loss may result in systematic undercompensation of [Class] counsel in a Class action case").

Even a victory at trial would not have guaranteed the ultimate success of Representative Plaintiff and the Class, because RUM no doubt would have pursued appeals. As a result of the settlement, however, Settlement Class members will be able to receive the benefits of the settlement immediately, without uncertainty or delay. Class Counsel's compensation is entirely dependent upon the Settlement Class obtaining relief, which supports the one-third contingency fee requested.

IV. THE REQUESTED EXPENSES ARE REASONABLE

Under Fed. R. Civ. P. 23(h), the Court is authorized to award costs that are reasonable in nature. *See id*. ("In a certified class action, the court may award reasonable... untaxable costs that

are authorized by law or by the parties' agreement."). "Generally, courts permit recovery of costs advanced for litigation expenses, including … mediation costs." *Robinson v. Carolina First Bank NA*, No. 7:18-CV-02927-JDA, 2019 WL 2591153, at *17 (D.S.C. June 21, 2019); *see also McClaran v. Carolina Ale House Operating Co., LLC*, No. 3:14-CV-03884-MBS, 2015 WL 5037836, at *5 (D.S.C. Aug. 26, 2015) (same).

Accordingly, Class Counsel respectfully requests Court approval of payment of $8,100.00 in expenses from the common Settlement Fund, which represents the amount paid by Class Counsel for the Representative Plaintiff's share of mediation costs. *See* Carney Decl. ¶ 28.

V. CONCLUSION

For the reasons set forth above, Representative Plaintiff respectfully requests that the Court approve payment of one-third of the common fund as attorney's fees, plus $8,100.00 in expenses, and enter the comprehensive proposed Final Order Approving Settlement and Certifying Settlement Class submitted with the Motion for Final Settlement Approval.

Respectfully submitted,

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