IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD ALDERFER, on behalf of himself and all others similarly situated, Plaintiffs,	:	**CIVIL ACTION**
v.	:	
CLEMENS MARKETS, INC. RETIREMENT SAVINGS AND PROFIT SHARING PLAN 003, et al., Defendants.	:	**No. 10-4423**

MEMORANDUM

Schiller, J. **April 18, 2012**

Plaintiff Gerald Alderfer moves for final approval of a class action settlement involving an alleged breach of fiduciary duty by Defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"). Class counsel have also requested attorneys' fees, costs and expenses, and an incentive award for Alderfer. The Court conducted a fairness hearing pursuant to Federal Rule of Civil Procedure 23(e) on March 16, 2012. For the following reasons, the motion is granted.

I. BACKGROUND

A. Class Claims

Alderfer worked at Clemens Markets, Inc. ("CMI"), a now-defunct Pennsylvania supermarket chain. (Compl. ¶¶ 34-36.) CMI maintained the Clemens Market, Inc. Retirement Savings and Profit Sharing Plan 003 (the "Plan"). (*Id.* ¶ 4.) Alderfer became a Plan participant in 1975 and held CMI stock as a portion of his Plan investments. (*Id.* ¶¶ 3, 35.)

CMI converted the Plan from a traditional pension plan into a 401(k) plan in the spring of 1998. (*Id.* ¶ 18.) In September 2006, CMI divided the Plan into two separate trusts, each with its

own set of trustees. (*Id.* ¶ 25.) Trust A held CMI's company stock and was known as the Clemens Stock Fund, while Trust B held the Plan's remaining assets. (*Id.* ¶¶ 25, 37.) CMI appointed five trustees for Trust A: Defendants Jack Clemens, Robert Derstine, Robert Lavin, Douglas Moyer, and Gerald Spencer (collectively, the "Individual Trustees"). (*Id.* ¶ 26.) Alderfer alleged that Plan participants were not notified of the creation of Trust A and the appointment of the Individual Trustees. (*Id.* ¶¶ 27-28.)

In the fall of 2006, CMI decided to sell its assets to another supermarket chain. (*Id.* ¶ 36.) CMI sent Plan participants a Sarbanes-Oxley Notice in October 2006 that announced a blackout of CMI stock held by the Clemens Stock Fund. (*Id.* ¶ 40.) The notice informed Plan participants that the Clemens Stock Fund would be converted to cash as a result of CMI's liquidation and that CMI would make periodic payments to Plan participants until the Fund was liquidated. (*Id.* ¶ 42.) Plan participants were barred from disposing of their Plan investments between the date of the notice and the projected completion of CMI's liquidation in 2009. (*Id.* ¶ 43.) Alderfer alleged that the 2006 Sarbanes-Oxley Notice failed to distinguish Trust A from Trust B and failed to inform Plan participants that the value of the CMI stock held by Trust A was dependent upon the value of CMI's real estate holdings. (*Id.* ¶¶ 40, 44.)

CMI's board and voting shareholders approved a liquidation plan on December 21, 2006. (*Id.* ¶ 47.) Under the liquidation plan, the Board projected that it would sell CMI's real property holdings "during calendar year 2007 or 2008." (*Id.*) These holdings included CMI's offices in Kulpsville, Pennsylvania. (*Id.* ¶ 50.) Alderfer alleged that, in 2009, Clemens, CMI's president and one of the Individual Trustees, rejected as too low a multimillion-dollar offer for the Kulpsville property. (*Id.* ¶ 53.)

In 2007 and 2008, Plan participants received periodic payments on their CMI stock representing their share of the sales of CMI's assets. (*Id.* ¶ 54.) Meanwhile, the value of the CMI stock held by Trust A declined from $3.045 million in 2007 to $2.368 million in 2008. (*Id.* ¶ 59.) A notice sent to Plan participants on March 5, 2010 stated that CMI would purchase the Plan's CMI stock and valued the Plan's stock holdings at $1.831 million. (*Id.* ¶ 66.) However, on April 5, 2010, Plan participants were advised that the stock purchase was delayed due to the bankruptcy of a major tenant of the Kulpsville property. (*Id.* ¶ 69.) The blackout period remained in effect until the Plan was terminated on September 30, 2010. (Answer ¶¶ 3, 60.)

B. Procedural History

On September 1, 2010, Alderfer filed this action against the Plan and its trustees on behalf of himself and other participants in Trust A, alleging breach of fiduciary duty under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1132(a)(3). Specifically, Alderfer claimed that Defendants failed to prudently monitor, maintain, and protect their investment in CMI stock and failed to properly inform Plan participants of the status and nature of their investment in Trust A. (Compl. ¶ 88.) Alderfer sought restitution in an amount equal to the loss in value of his investment in Trust A, as well as injunctive relief. (*Id.* ¶ 91.)

On December 23, 2010, the Court granted Defendants' motion to dismiss with respect to Alderfer's claims against the Plan and his Section 1132(a)(3) claim against all Defendants but allowed Alderfer's Section 1132(a)(2) claim against the trustees to proceed. On February 4, 2011, the remaining Defendants filed motions for summary judgment and to stay discovery. The Court denied the motion for summary judgment without prejudice and directed that discovery continue. On December 2, 2011, Alderfer filed a motion seeking preliminary approval of a settlement reached

between the putative class and Defendants. The Court granted the motion and preliminarily certified the following settlement class:

> Excluding Defendants, all persons located in the United States who are or were participants in the Clemens Markets, Inc. Retirement Savings and Profit Sharing Plan 003, Trust A, since September 1, 2006, who held Clemens Markets, Inc. stock, directly or through the Clemens Markets Company Stock Fund, as a component of their investment in the Plan.

In accordance with the Court's Order, notice was mailed to all 452 members of the class. (Pls.' Mem. of Law in Supp. of Mot. for Final Approval Ex. 1 [Aff. of Edward J. Sincavage].) Four of the notices were returned as undeliverable and were re-sent after additional research into the class members' addresses. (*Id.*) No class member has filed any objection to the settlement.

The parties now seek certification of the class for settlement purposes and final approval of the settlement. At a fairness hearing conducted on March 16, 2012, the Court questioned class counsel about why only 267—or 59 percent—of the class members had submitted claim forms. The Court directed class counsel to contact each of the remaining class members by telephone to ensure that they understood their rights under the settlement and extended the claims deadline to April 6, 2012. On April 12, 2012, class counsel reported that the additional outreach efforts had resulted in a total of 303 valid claims, representing 67 percent of the class members. (Pls.' Am. Mot. for Final Approval ¶ 4.)

C. Settlement Agreement

Under the settlement agreement, Defendants agree to pay $642,500 to settle all claims arising from the facts alleged in the complaint. (Pls.' Mot. for Prelim. Approval Ex. A [Stipulation of Settlement].) Class members will receive a *pro rata* share of the settlement fund after the payment of attorneys' fees of up to $192,750, expenses (including the costs of administering the settlement

fund), an incentive award of $5,000 to Alderfer, and reimbursement of the $7,500 initial retainer fee paid by Alderfer. (*Id.*) As of April 12, 2012, class counsel estimated that, after deducting the anticipated fees and costs, each class member would receive approximately $4.93 per share. (Pls.' Am. Mot. for Final Approval ¶ 7.)

An independent fiduciary, Richard S. Waldron of Sterling Financial Advisors, LLC, was retained to evaluate the settlement. He concluded that the settlement "is very reasonable and fair and would constitute full recovery by the Plan and its participants." (Pls.' Mem. of Law in Supp. of Mot. for Final Approval Ex. 3 [Waldron Report].)

II. STANDARD OF REVIEW

In evaluating a motion for final approval of a class action settlement, the court must determine that certification is appropriate under Federal Rule of Civil Procedure 23(a) and (b), and that the settlement is fair, reasonable, and adequate under Rule 23(e). *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 257 (3d Cir. 2009). As the Supreme Court has explained:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (citations omitted). However, the court must apply the class certification requirements of Rule 23(a) and (b) independently of its fairness determination under Rule 23(e). *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308 (3d Cir. 1998).

III. DISCUSSION

A. Class Certification

To obtain class certification under Rule 23, Plaintiff must satisfy all four requirements of subpart (a) and one of the requirements of subpart (b). The requirements of subpart (a) are: (1) numerosity (a class so large "that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (the representative party's claims "are typical of the claims . . . of the class"); and (4) adequacy of representation (the representative party "will fairly and adequately protect the interests of the class"). *Amchem Prods.*, 521 U.S. at 613. Alderfer seeks class certification pursuant to Rule 23(b)(1)(A), which states that the court may certify a class upon a finding that the prosecution of separate actions by members of the class would pose a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."

1. Numerosity

The first requirement for a class action is that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While no magic number demonstrates that the numerosity requirement is satisfied, a class of more than forty is generally considered sufficient. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Here, numerosity is satisfied because the class has over 450 members.

2. Commonality

The commonality requirement of Rule 23(a)(2) is met if the named plaintiff shares "at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey*, 43

F.3d 48, 56 (3d Cir. 1994). This requirement is met because Alderfer's breach of fiduciary duty claim under ERISA is common to all class members. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596-97 (3d Cir. 2009).

3. Typicality

The typicality inquiry of Rule 23(a)(3) examines whether the named plaintiff has incentives that align with those of absent class members so that the absentees' interests will be fairly represented. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996). This requirement "is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." *Baby Neal*, 43 F.3d at 57. In this case, Alderfer's legal claim, factual circumstances, and stake in the litigation are similar or identical to those of other class members, and there are no defenses unique to Alderfer. *See Schering Plough*, 589 F.3d at 597-99.

4. Adequacy of Representation

The adequacy of representation requirement of Rule 23(a)(4) "considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005) (internal quotation marks omitted). Here, there is nothing to suggest that Alderfer has any interest antagonistic to the class. The Court believes that Alderfer's counsel, Michael J. Burns, Edward Rubin, and Steven B. Barrett, possess the skill, experience, and qualifications in ERISA and class action litigation necessary to conduct this litigation. (See Pls.' Mot. for Prelim. Approval Ex. B [Curricula Vitae].)

5. Maintainability of Class Action

Alderfer asserts that this class action is maintainable under Rule 23(b)(1)(A), which permits class certification if the prosecution of separate actions by members of the class would pose a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." As "breach of fiduciary duty claims brought under [29 U.S.C. § 1132(a)(2)] are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class," *Schering Plough*, 589 F.3d at 604, this requirement is satisfied.

Accordingly, the Court will grant Alderfer's motion for class certification.

B. Fairness of the Settlement

Rule 23(e) provides that the claims "of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The rule is meant "to protect the unnamed members of the class from unjust or unfair settlements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 592-93 (3d Cir. 2010). Prior to approval, the court must conduct a hearing and decide whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975); *see also Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983).

The law favors class action settlements because they conserve judicial resources. *Gen. Motors*, 55 F.3d at 784. The decision of whether a settlement should be approved as fair, reasonable, and adequate is guided by the nine-factor test enunciated by the Third Circuit in *Girsh*, which directs

district courts to examine:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157 (internal quotation marks and alterations omitted).

1. Complexity, Expense, and Duration of Litigation

This factor looks at the probable monetary costs and time involved in pursuing the litigation to trial and beyond. *See Gen. Motors*, 55 F.3d at 812. The Court is persuaded that if this case were to continue, the parties would incur substantial additional costs over an extended period of time. ERISA is a complex area of law and, as is apparent from the motion to dismiss and the motion for summary judgment filed by Defendants, the parties dispute numerous legal and factual issues. *See Moore v. Comcast Corp.*, Civ. A. No. 08-773, 2011 WL 238821, at *3 (E.D. Pa. Jan. 24, 2011) (noting "the evolving and unsettled state of ERISA class action law"). This factor weighs in favor of approval.

2. Reaction of the Class to the Settlement

This factor asks whether the class supports the settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004); *see also Prudential*, 148 F.3d at 318. Silence from the class is generally presumed to indicate agreement with the settlement terms. *Gen. Motors*, 55 F.3d at 812. No class member has objected to this settlement, and additional outreach efforts have increased the claims rate to 67 percent. Thus, this factor also weighs in favor of approval.

3. Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor considers the current stage of the proceedings and the lawyers' knowledge of the strengths and weaknesses of their case. "Through this lens, courts can determine whether counsel has an adequate appreciation of the merits of the case before negotiating." *Id.* at 813. The Court believes that the proposed settlement was the result of arm's-length negotiation and therefore gives considerable weight to the views of experienced counsel regarding the merits of the settlement. *See In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001). Moreover, "post-discovery settlements are more likely to reflect the true value of the claim and be fair." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993). Because the Court denied Defendants' motion for summary judgment and ordered discovery to proceed, the parties conducted extensive discovery before reaching a settlement agreement. Therefore, the Court finds that this factor weighs in favor of approval.

4. Risks of Establishing Liability and Damages

"By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *Gen. Motors*, 55 F.3d at 814. In examining this factor, the Court need not delve into the merits of each side's arguments, but rather "may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." *Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997). Alderfer acknowledges certain weaknesses in his case, including potential problems of proof and defenses that may be raised. (Stipulation of Settlement.) In their motion for summary judgment, which the Court did not address on the merits,

Defendants argued that Alderfer's claims must fail because the Plan made a substantial profit on its investment in CMI stock, there was no misstatement of fact or detrimental reliance for any of Defendants' alleged misrepresentations, Alderfer could not prove causation due to the blackout of CMI stock, and Alderfer lacked standing to seek injunctive relief. As victory for Alderfer is not assured, the Court finds that the risks of establishing liability and damages weigh in favor of approval.

5. Risks of Maintaining the Class Action Through Trial

"Under Rule 23, a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Prudential*, 148 F.3d at 321. Because there is no particular risk of decertification here, the Court finds that this factor is neutral. *See id.* (observing that "the manageability inquiry in settlement-only class actions may not be significant").

6. Ability of Defendants to Withstand a Greater Judgment

Alderfer asserts that Defendants could afford to pay an amount greater than $642,500. However, this factor does not necessarily weigh against approval. *See Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011) ("[T]his factor is most clearly relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement."); *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, Civ. A. No. 06-3202, 2009 WL 2137224, at *10 (E.D. Pa. July 16, 2009) ("[T]his factor's importance is lessened by the obstacles the class would face in establishing liability and damages."). The Court finds that this factor is neutral.

7. Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last two *Girsh* factors assess "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing . . . compared with the amount of the proposed settlement." *Prudential*, 148 F.3d at 322 (internal quotation marks omitted). In conducting this analysis, courts consider "the opinions of experienced attorneys in deciding the fairness of a settlement compared to the likely recovery at trial." *Orloff v. Syndicated Office Sys., Inc.*, Civ. A. No. 00-5355, 2004 WL 870691, at *7 (E.D. Pa. Apr. 22, 2004). Here, the settlement provides for $642,500 to be distributed to the class, less attorneys' fees and other expenses, an incentive award to Alderfer, and reimbursement of the retainer fee paid by Alderfer. The Court finds that this settlement is fair in light of the best possible recovery and in light of all attendant risks of litigation.

8. Additional **Prudential** *Factors*

A court must also make findings, when appropriate, as to the *Prudential* factors, which are:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 323; *see also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350-51 (3d Cir. 2010). The Court concludes that none of these factors weighs against approval.

9. Plan of Allocation

Alderfer also seeks approval of the plan of allocation of the settlement fund. (*See* [Proposed] Am. Order and Final Judgment Ex. A [Plan of Allocation].) "A district court's principal obligation in approving a plan of allocation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (internal quotation marks omitted). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). Here, the proposed plan of allocation is reasonable because it reimburses members of the class on a *pro rata* basis as determined by the number of shares of CMI stock held.

Based upon the submissions and representations of counsel, the absence of objections from class members, and the foregoing analysis, the Court is satisfied that the settlement agreement and plan of allocation are fair, reasonable, and adequate. Therefore, the Court will grant Alderfer's motion for final approval.

C. Attorneys' Fees

Class counsel seek $192,750 in attorneys' fees, which is 30 percent of the settlement fund. The Court finds that counsel's requested fee award is reasonable.

Federal Rule of Civil Procedure 23(h) provides, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." The court must conduct a thorough review of a request for attorneys' fees. *See Gen. Motors*, 55 F.3d at 819; *Prudential*, 148 F.3d at 333. The party requesting fees must demonstrate the reasonableness of its request and therefore must submit evidence to support its request. *See Hensley*

v. Eckerhart, 461 U.S. 424, 433 (1983).

There are two methods for calculating attorneys' fees in a class action: the percentage-of-recovery method and the lodestar method. *Prudential*, 148 F.3d at 333. The percentage-of-recovery method is preferred when, as here, the fee is to be paid from a common fund "because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (internal quotation marks omitted). In such cases, district courts should consider the following factors:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). These factors "need not be applied in a formulaic way" because each case is different. *Id.*

1. Size of the Fund Created and Number of Persons Benefitted

"[P]ercentage awards generally decrease as the amount of the recovery increases." *Prudential*, 148 F.3d at 339 (internal quotation marks omitted). This inverse relationship is predicated on the assumption that often the increase in the size of a recovery is merely due to the size of the class and not the efforts of counsel. *Id.* The Court finds the 30 percent award in this case reasonable in light of the relatively small settlement fund and class size. *Cf. Rite Aid*, 396 F.3d at 303 (approving 25 percent fee for settlement fund of $126.6 million and class size of approximately 300,000).

2. Presence or Absence of Objections by Class Members

As noted above, no class member has objected to any aspect of the settlement, including the request for attorneys' fees. The absence of objections militates against reducing a fee award. *See In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 337 (D.N.J. 2002). This factor thus favors awarding the requested fees.

3. Skill and Efficiency of the Attorneys Involved and the Complexity and Duration of the Litigation

The quality of representation in a case can be "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Ikon*, 194 F.R.D. at 194 (internal quotation marks omitted). Here, class counsel performed ably, obtaining substantial benefits for class members over one and a half years of litigation that included a motion to dismiss and extensive discovery. This factor weighs in favor of awarding fees.

4. Risk of Nonpayment

Courts have found that this factor favors a fee application when defendants are close to insolvency or lack significant unencumbered assets from which a judgment could be obtained. See *Yong Soon Oh v. AT & T Corp.*, 225 F.R.D. 142, 152 (D.N.J. 2004). Alderfer has not presented any evidence of a risk of nonpayment by Defendants. Courts have also considered risks related to proving liability at trial and successfully prosecuting the claims of the class. *See Cendant Corp.*, 232 F. Supp. 2d at 339. As noted previously, establishing liability at trial and maintaining class certification throughout the course of litigation were not certain in this case, but class actions often present such

risks. Ultimately, the Court deems this factor of minimal importance in this case and finds that it is neutral in relation to approval of the fee application.

5. Amount of Time Devoted to the Case by Class Counsel

As the Court will discuss in greater detail in employing the lodestar cross-check, class counsel expended considerable time on this litigation, totaling in excess of 470 hours. This factor also favors approval.

6. Awards in Similar Cases

The Court is satisfied that the award of 30 percent of the settlement fund is consistent with the percentage of recovery in similar cases. *See Rite Aid*, 396 F.3d at 303 (holding that district court did not abuse its discretion in relying on studies showing typical fee awards ranging from 25 to 31 percent); *Gen. Motors*, 55 F.3d at 822 ("One court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund."); *In re Cell Pathways, Inc., Sec. Litig. II*, Civ. A. No. 01-1189, 2002 WL 31528573, at *10 (E.D. Pa. Sept. 23, 2002) ("The thirty percent counsel has requested is well within the range approved in other class action fee awards where a percentage of the common fund was awarded."); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000) (concluding "that an award of one-third of the settlement fund is reasonable in consideration of other courts' awards"). Therefore, this factor favors approval of the attorneys' fees requested.

7. Lodestar Comparison

The Third Circuit has "recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006). The lodestar method, normally applied in statutory fee-shifting cases,

multiplies the number of hours reasonably worked by a reasonable hourly rate. *Saunders v. Berks Credit & Collections, Inc.*, Civ. A. No. 00-3477, 2002 WL 1497374, at * 15 (E.D. Pa. July 11, 2001). "The crosscheck is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier." *AT & T Corp.*, 455 F.3d at 164. The court "should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." *Rite Aid*, 396 F.3d at 306. A court determines a reasonable hourly rate by assessing the experience and skill of the prevailing party's attorneys and by looking at the market rates in the relevant community for lawyers of reasonably comparable skill, experience and reputation. *See Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001).

In this case, counsel at Hamburg, Rubin, Mullin, Maxwell & Lupin, PC worked a total of 247.3 hours at a blended hourly rate of approximately $355, for a total of $87,737.50. (Pls.' Mem. of Law in Supp. of Mot. for Final Approval Ex. 6 [Billing Records].) Michael J. Burns of Bowen & Burns worked a total of 223.5 hours at an hourly rate of $350, for a total of $78,225. (*Id.*) The blended hourly rate for all class counsel is approximately $352.50, which the Court finds to be reasonable. The lodestar calculation is thus $165,962.50. Dividing the proposed fee award of $192,750 by the lodestar calculation results in a lodestar multiplier of 1.16. Given that the Third Circuit has "approved a multiplier of 2.99 in a relatively simple case," *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011), the multiplier in this case raises no concerns about the reasonableness of the requested attorneys' fees. *See also Prudential*, 148 F.3d at 341 (noting that multipliers of one to four are frequently awarded in common fund cases in the Third Circuit).

D. Incentive Award

Incentive awards to class representatives lie within the discretion of the court and may be awarded for the benefit conferred on the class. *See Hall v. Best Buy Co.*, 274 F.R.D. 154, 173 (E.D. Pa. 2011). Factors courts examine when assessing such awards include the risks to the representative, his or her involvement in the litigation, and the degree to which he or she benefitted as a class member. *Id.* Here, class counsel represents that Alderfer was the only class member who took the initiative to investigate the Plan and bring this lawsuit. At the fairness hearing, Alderfer testified about his personal efforts to inform class members of the settlement. An incentive award of $5,000 is reasonable. *See id.* (approving $5,000 incentive awards for each named plaintiff).

E. Costs

"Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *Cendant Corp.*, 232 F. Supp. 2d at 343. Here, counsel have documented $7,187.68 in appropriate costs, including expert fees and filing fees, as well as administrative expenses of $21,590.30 incurred to pay Heffler Claims Administration to provide notice to class members and to administer the settlement fund. (*See* Billing Records; Pls.' Am. Mot. for Final Approval Ex. D [Invoices from Claims Administrator].) In addition, class counsel requests that Alderfer be reimbursed for the $7,500 initial retainer fee he paid. All costs are to be paid from the $642,500 settlement fund. These requests are in accordance with the settlement agreement and are reasonable.

IV. CONCLUSION

For the reasons stated, the Court grants final certification of the class in accordance with Rule 23; holds that settlement is fair, adequate, and reasonable; awards class counsel $192,750 in attorneys' fees and $7,187.68 in costs; awards $21,590.30 in administrative expenses; and awards Alderfer an incentive fee of $5,000 and reimbursement of his $7,500 retainer fee. An Order consistent with this Memorandum will be docketed separately.