IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

LISA RANIERI and MEGAN CORNELIUS, Individually and on Behalf of a Class of Similarly Situated Persons, Plaintiffs, v. ADVOCARE INTERNATIONAL, L.P., Defendants.	Case NO. 3:17-cv-00691-S

CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND CLASS REPRESENTATIVE'S MOTION FOR A SERVICE AWARD

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Class Counsel Reid Collins & Tsai LLP ("**RCT**"), having reached a $10,500,000 cash settlement for the benefit of the Class, hereby move for an award of attorneys' fees in the amount of $3,150,000, or 30% of the Settlement Fund.[1] Class Counsel also seek reimbursement of $35,517.11 in out-of-pocket expenses reasonably incurred in prosecuting this action. The Class Representative, Megan Cornelius, requests that the Court grant her a Service Award of $20,000. Per the Settlement Agreement, the Settlement Administrator will pay Class Counsel's fees and expenses (together, the "**Fee Award**") and the Service Award out of the Settlement Fund. A proposed order is submitted herewith.

The Court has set a hearing (the "**Fairness Hearing**") for May 21, 2021, at which time it will consider whether to finally approve the Settlement Agreement, to make a Fee Award, and to make a Service Award.[2]

I. INTRODUCTION

The work of Class Counsel and the Class Representative resulted in a settlement that will (should the Court approve the Settlement Agreement) deliver substantial monetary benefits to the Class. As described in more detail in the Final Approval Motion, the Settlement Agreement protects the Class Members from all further litigation risks associated with this case—including continued motion practice over whether the Class Representative can state a viable RICO claim, a contested fight over class certification, a trial on the merits, appeal risks, and collectability risks—while obtaining for them a $10.5 million cash settlement. The absentee Class Members will receive these benefits without putting forth any effort, without paying any fees out of their own

[1]Unless otherwise noted, capitalized terms have the meanings assigned in Plaintiff Megan Cornelius's Motion for Final Approval of Class Action Settlement and Plan of Allocation (the "**Final Approval Motion**"), filed contemporaneously herewith.

[2]On April 9, 2021, AdvoCare stated its position on this motion as follows: "While Defendant denies any of the factual allegations supporting the proposition that AdvoCare operated a pyramid scheme or did anything improper, it is not opposed to the relief requested."

pockets, and without taking any litigation risk. Class Counsel achieved these results while bearing all the litigation risk without, to date, receiving any compensation.

This action faced significant risks. Although Class Counsel was experienced in cases regarding pyramid scheme-allegations against multi-level marketing companies ("**MLMs**"), and although Class Counsel thoroughly researched AdvoCare's business operations prior to bringing this case, Class Counsel faced substantial risks in bringing and litigating this case. Class Counsel continues to bear risk because the Settlement Agreement contains no provision for an award of any particular fee. The Settlement Agreement imposes a 35% cap on the percentage of the Settlement Fund that Class Counsel may request as a fee, but otherwise leaves to this Court's discretion entirely the amount of any fee award. Approval of the Settlement Agreement is not dependent on the Court granting any fee at all.

When counsel take on risks like this and overcome significant odds to secure such a substantial result for the class they represent, it is important that their work be compensated with a fair and reasonable fee. Here, Class Counsel's request for an award of 30% of the $10.5 million Cash Payment AdvoCare has committed to make into the Settlement Fund is fair and reasonable. This request is lower than the percentage cap the Parties agreed to in the Settlement Agreement, lower than the percentage request allowed in Class Counsel's engagement agreement with the Class Representative, and well within the percentage range commonly approved. The respected and experienced mediator who helped the Parties resolve this dispute—former U.S. District Court Judge Royal Furgeson ("**Judge Furgeson**")—has submitted a declaration supporting this fee request.[3]

[3]*See* Declaration of W. Royal Furgeson, Jr. ¶ 20 (the "**Furgeson Decl.**") (Ex. H) [Appx. 312-313]. All exhibits are contained in the Appendix of Exhibits Submitted in Support of Motion for Final Approval and for Attorneys' Fees and Service Award, submitted herewith ("**Appx.**").

In addition, the Class Representative seeks a modest service award of $20,000 in keeping with service awards commonly made in the Fifth Circuit. Given the Class Representative's commitment to and effort in securing a substantial settlement for the Class, the Class Representative's request should be granted.

II. BACKGROUND

To avoid duplication, this Award Motion incorporates by reference the Background section in the Final Approval Motion.

Class Counsel's work in this case can be divided into five time periods:

- Initial investigation until the filing of the OC (November 2016-March 9, 2017);
- Filing of the OC to the arbitrator's decision (March 10, 2017-December 27, 2017);
- The arbitrator's decision, through briefing and argument on the first motions to dismiss, until discussions regarding the scheduling of the first mediation (December 28, 2017-August 5, 2019);
- The first mediation and further work on complaint amendments and motions to dismiss to preparations for the second mediation (August 6, 2019-August 13, 2020); and
- The third mediation, further negotiations, and preparation of the settlement papers (August 14, 2020-March 31, 2021).

The subjects of Class Counsel's work across these time periods are not distinct because some work on various tasks naturally spills across the time periods, and the descriptions below do not capture all of the work done during each time period. However, these descriptions provide some basis for the Court to understand the work that was required and that Class Counsel performed.

Initial investigation and filing of the OC. Class Counsel did a substantial amount of work prior to initiating this action, including many hours of legal research, witness interviews, discussions with the Plaintiffs and other Distributors, and many hours of internet research. This work resulted in a complaint full of minute details regarding AdvoCare's MLM operation and the

public and private statements of AdvoCare and the Individual Defendants promoting the business. RCT incurred 333.5 hours during this phase of the case, representing a fee investment of $227,977.50 at RCT's normal billing rates.[4]

Filing of the OC to the decision on arbitration. Shortly after Class Counsel filed the OC, AdvoCare and the Individual Defendants moved to compel arbitration. After that point, until the arbitrator issued his decision, most of Class Counsel's work was devoted to responding to the motion to compel arbitration, briefing in the arbitration proceeding, and appearing at the arbitration hearing. RCT incurred 669.15 hours during this phase of the case, representing a fee investment of $411,653.75 at RCT's normal billing rates.[5]

After the arbitrator's decision until scheduling the first mediation. After the arbitrator determined that the case was not arbitrable, Class Counsel turned to responding to AdvoCare's and the Individual Defendants' motions to dismiss the OC, the hearing on those motions to dismiss, amending the OC and filing the FAC, responding to AdvoCare's motion to dismiss the FAC, preparing and filing the SAC, and written discovery. RCT incurred 568.43 hours during this phase of the case, representing a fee investment of $442,082.25 at RCT's billing rates.[6]

Scheduling the first mediation through the second mediation. In early August 2019, the Parties discussed scheduling a mediation with Judge Furgeson, and the Parties first mediated on October 18, 2019. From August 2019 until the second mediation on October 18, 2020, Class Counsel was focused on preparing for the mediations, responding to the motion to dismiss the SAC, and further discovery. RCT incurred 322.8 hours during this phase of the case, representing

[4] *See* April 7, 2021 Declaration of J. Benjamin King ¶ 90 ("**King Decl.**") (Ex. C) [Appx. 132].

[5] *See* King Decl. ¶ 91 [Appx. 132].

[6] *See* King Decl. ¶ 92 [Appx. 133].

a fee investment of $267,452.50 at RCT's normal billing rates at the time the hours were incurred.[7]

The second mediation through the filing of the settlement papers with the Court. The second mediation resulted in an agreement-in-principle, but many details remained to be resolved. Even with the help of Judge Furgeson, it took a third mediation and extensive discussions to resolve the Parties' disputes. Substantial additional work was needed to draft the Settlement Agreement and its exhibits, the preliminary approval papers, and the final approval papers. RCT incurred at least 423.34 hours during this phase of the case, through March 31, 2021, (some of the time incurred preparing the settlement papers has not been entered) representing a fee investment of $364,349.50 at their normal billing rates at the time the hours were incurred.[8]

Class Counsel's rates are consistent with the rates of counsel in this area with their reputation, skills, and experience. J. Benjamin King and R. Adam Swick are the lead counsel on this matter, and they billed over 90% of the hours in this case. Mr. King's billing rate was between $725 and $875 per hour during the pendency of this case, and Mr. Swick's was between $725 and $825.[9] Leo Oppenheimer was the main associate working on the case, and his rate varied between $425 and $575 per hour.[10] These rates are comparable to what attorneys of similar experience and competence charge, and they are considerably lower than the rate charged by AdvoCare's lead counsel (over $1000 per hour).[11]

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[7] *See* King Decl. ¶ 93 [Appx. 133].

[8] *See* King Decl. ¶ 94 [Appx. 133].

[9] *See* King Decl. ¶ 97 [Appx. 134].

[10] *See* King Decl. ¶ 97 [Appx. 134].

[11] *See* King Decl. ¶ 98 [Appx. 134-135].

III. ARGUMENT

A. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

"The use of a common fund to pay attorney's fees in class action settlements is well established."[12] Courts recognize that awards of fair attorneys' fees from a common fund serve the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts."[13] Rule 23(h) specifically notes that a "court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

B. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

The Fifth Circuit has explained that, in common fund cases, district courts generally award attorneys' fees using one of two methods:

> (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier.[14]

In the lodestar approach, the court may apply an upward or downward multiplier based on the court's review of the twelve factors set out in *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717–19 (5th Cir. 1974). These *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the

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[12]*Erica P. John Fund, Inc. v. Halliburton Co.,* Civ. A. No. 3:02-cv-1152-M, 2018 WL 1942227, at *7 (N.D. Tex. April 25, 2018). *See also Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) ("[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself of his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Baron v. Drummond Co.,* 636 F.2d 978, 982 (5th Cir. 1981).

[13]*Jenkins v. Trustmark Nat'l Bank,* 300 F.R.D. 291, 306 (S.D. Miss. 2014) (citation omitted).

[14]*Union Asset Mgmt. Holding A.G. v. Dell, Inc.,* 669 F.3d 632, 642-43 (5th Cir. 2012).

> skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[15]

The *Johnson* factors are also used as a cross-check on the results of the percentage method to prevent class counsel from reaping an undeserved windfall.[16]

Many courts in the Fifth Circuit, where no statutory fee shifting provision is at issue, prefer the percentage method, cross-checked by the *Johnson* factors.[17] Problems with the lodestar method include "potential for manipulation, disincentive for an early settlement, reward for excessive and wasteful attorney effort, and confusion and lack of predictability in setting fees."[18] In contrast, the percentage method "provides more predictability to attorneys and class members, encourages settlement, and avoids protracted litigation for the sake of racking up hours."[19] "The blended method is usually used to ensure that the amount of the common benefit fee established

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[15] *Union Asset,* 669 F.3d at 642 n. 25. *See also In re Xarelto (Rivaroxaban) Prod. Liab. Litig.,* Civ. A. MDL No. 2592, 2020 WL 1433923, *4 (E.D. La. March 23, 2020) (listing *Johnson* factors).

[16] *See Union Asset,* 669 F.3d at 643 ("Indeed, district courts in this Circuit regularly use the percentage method blended with a *Johnson* reasonableness check, and for some it is the 'preferred method.'") (quoting *Batchelder v. Kerr-McGee Corp.,* 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003)); *Xarelto,* 2020 WL 1433923, at *4 (citing cases using the blended method); *Erica P. John*, 2018 WL 1942227, at *8 (discussing the blended method).

[17] *See Erica P. John,* 2018 WL 1942227, at *8 ("[D]istrict courts in [the Fifth Circuit] regularly use the percentage method blended with a *Johnson* reasonableness check.") (quoting *Union Asset Mgmt.,* 669 F.3d at 643) (alterations in *Erica P. John*); *Schwartz v. TXU Corp.,* Civ. A. No. 3:02-CV-2243-K, 2005 WL 3148350, at *26 (N.D. Tex. Nov. 8, 2005) ("In sum, there is a strong consensus in favor of awarding fees in common fund cases as a percentage of the recovery. For all the reasons previously accepted by this Court as well as other courts in this Circuit, the Court approves the use of the percentage method here.").

[18] *Xarelto,* 2020 WL 1433923, at *4.

[19] *Id. See also Schwartz,* 2005 WL 3148350, at *25 (discussing deficiencies in the lodestar approach; "Numerous courts and commentators have stated that the percentage method is vastly superior to the lodestar method for a variety of reasons, including an incentive for counsel to 'run up the bill' and the heavy burden that calculation under the lodestar method places upon the court.").

by the percentage method is reasonable."[20]

Class Counsel request that the Court evaluate this fee request under the percentage method, using the *Johnson* factors as a cross-check, but the requested fees here are reasonable under any of the approaches described above. Indeed, the Furgeson Declaration supports the fee requested by Class Counsel as fair and reasonable in light of Judge Furgeson's experience with Class Counsel in this litigation.[21]

1. A 30% Contingency Fee Award Is Reasonable

Class Counsel request an award of 30% of the Settlement Fund, or $3.15 million. Awards of 30% or more of a common fund are commonplace.[22] "[N]umerous courts in this Circuit have awarded fees in the 30% to 36% range."[23]

Class Counsel's 30% request is, in fact, conservative. The engagement agreement between Class Counsel and the Class Representative allowed Class Counsel to request up to 40% of any common fund created.[24] The Settlement Agreement allows Class Counsel to request up to 35% of

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[20]*Xarelto,* 2020 WL 1433923, at *4.

[21]*See* Furgeson Decl. ¶ 20 [Appx. 312-313].

[22]*Erica P. John,* 2018 WL 1942227, at *9 (citing cases) and *12 (approving a fee award of one-third of the common fund). *See also Deka Investment GMBH v. Santander Consumer USA Holdings Inc.,* Civ. A. No. 3:15-cv-02129-K, 2021 WL 118288, at *1-2 (N.D. Tex. Jan. 12, 2021) (awarding 30% of $47 million settlement fund with no lodestar cross-check); *Al's Pals Pet Care v. Woodforest Nat'l Bank, N.A.,* Civ. A. No. 4:17-CV-3852, 2019 WL 387409, at *4 (S.D. Tex. Jan. 30, 2019) (awarding one-third of $15 million class fund with no lodestar cross-check); *Fairway Med. Center, L.L.C. v. McGowan Enters., Inc.,* Civ. A. No. 16-3782, 2018 WL 1479222, at *2 (E.D. La. March 27, 2018) (noting that multiple courts in the Fifth Circuit have awarded fees of one-third of common funds; awarding class counsel one-third of $3.25 million recovery with no discussion of lodestar); *Kemp v. Unum Life Ins. Co. of Am.,* 2015 WL 8526689, at *9 (E.D. La. Dec. 11, 2015) (awarding class counsel one-third of $3,738,402 settlement fund); *Jenkins,* 300 F.R.D. at 306 (awarding one-third of $4 million settlement fund with no lodestar cross-check); *Burford v. Cargill, Inc.,* Civ. A. 05-0283, 2012 WL 5471985, at *3 (W.D. La. Nov. 8, 2012) (awarding one-third of $27.5 million with no lodestar cross-check); *Schwartz,* 2005 WL 3148350, at *27 (citing multiple cases awarding fund percentages of 30% or more).

[23]*Erica P. John,* 2018 WL 1942227, at *9 & n.8 (citing numerous cases). *See also Jenkins,* 300 F.R.D. at 307 ("[A]wards commonly fall between a lower end of 20% and an upper end of 50%"; awarding one-third of $4 million settlement fund).

[24]*See* King Decl. ¶ 84 [Appx. 130-131]. *See also Kemp,* 2015 WL 8526689, at *8 (noting the contingency fee percentage agreed upon in counsel's fee agreement with the class representative as a factor supporting a 1/3 fee award).

the Settlement Fund as a fee,[25] and the Class Notice notified the Class that Class Counsel could seek up to 35% of the Settlement Fund as a fee. As noted above, many courts have awarded fees significantly in excess of 30% of the fund, with one-third awards being extremely common. However, to allay any concerns by the Court or Class Members that Class Counsel seek an unreasonable fee, Class Counsel is requesting only 30% of the Settlement Fund.[26]

2. The *Johnson* Factors Support Awarding 30% of the Settlement Fund

As discussed above, courts in the Fifth Circuit cross-check the results of the percentage award against the *Johnson* factors. Not every *Johnson* factor need be considered,[27] and the "relevance of each of the *Johnson* factors will vary in any particular case."[28]

a. The time and labor required

This case is over four-years old and required over 2,300 hours of work by Class Counsel to bring it to resolution.[29] Among other things, Class Counsel:[30]

- Spent months researching how AdvoCare operated, including scouring the internet for information on its business practices, finding and interviewing former Distributors and others with knowledge, and researching how supposedly successful Distributors marketed AdvoCare products;
- Researched and interviewed potential experts in pyramid schemes, MLMs, and nutritional supplements;
- Drafted three extensive and detailed complaints;
- Performed scores of hours of legal research on multiple topics before and after facing AdvoCare's and the Individual Defendants' motions to dismiss;

[25] *See* S.A. § XI.C [Appx. 021].

[26] *See* King Decl. ¶ 69 [Appx. 127].

[27] *Erica P. John,* 2018 WL 1942227, at *10.

[28] *Schwartz,* 2005 WL 3148350, at *28.

[29] *See* King Decl. ¶ 99 [Appx. 135].

[30] *See* King Decl. ¶¶ 84-95 [Appx. 130-134].

- Extensively briefed oppositions to AdvoCare's motions to dismiss;
- Performed many hours of legal research on arbitrability before and after facing AdvoCare's and the Individual Defendant's motions to compel arbitration;
- Extensively briefed oppositions to AdvoCare's and the Individual Defendants' motions to compel arbitration;
- Prepared for and appeared at a hearing before this Court on the motions to dismiss the OC and prepared for and appeared at a hearing before an arbitrator determining arbitrability;
- Prepared for and attended three mediations and prepared extensive mediation briefs;
- Thoroughly analyzed the extensive data AdvoCare provided regarding its Distributors to prepare a robust damages model;
- Meticulously analyzed the data AdvoCare provided regarding its financial performance;
- Spent hours drafting the Settlement Agreement and settlement papers filed with the Court;
- Conferred repeatedly with the Class Representative and Plaintiff Ranieri; and
- Pursued written discovery from AdvoCare and responded to AdvoCare's written discovery requests.

The extensive efforts required to bring the case to a successful resolution support awarding the fees requested.

b. The novelty and difficulty of the issues

This case presented a variety of novel and difficult issues, including the following:

- Whether the case is arbitrable: Plaintiffs had strong arguments that the pre-May 2016 versions of AdvoCare's contracts were illusory as written, but AdvoCare raised significant arguments regarding contract reformation, which would have allowed AdvoCare to retroactively reform its contracts to avoid Plaintiffs' illusoriness argument. This argument required the most attention during the arbitration proceedings, and while Plaintiffs ultimately prevailed, the outcome was by no means certain.[31]
- Whether the PSLRA precluded a RICO claim: AdvoCare raised significant arguments

[31] *See* King Decl. ¶ 15 [Appx. 112].

in its first motion to dismiss regarding the PSLRA's preclusion of the bringing of securities fraud claims under RICO. The Court ruled in Plaintiffs' favor (correctly, in Class Counsel's opinion), but there was no Fifth Circuit law directly on point, and the law of other circuits supported AdvoCare's position. Also, even after the Court's ruling on the first motion to dismiss, AdvoCare still had the opportunity to establish at trial that its sale of distributorships constituted securities.[32]

- Whether AdvoCare operated a pyramid scheme: The critical question to determining whether a particular MLM operates a pyramid scheme is the amount of retail sales made to non-distributors. However, there is no hard-and-fast rule as to the amount of retail sales that is required for an MLM to avoid being a pyramid scheme. The amount of retail sales AdvoCare had, and whether that was enough to avoid the pyramid scheme label, were novel and difficult issues.[33]

- Whether Plaintiffs could state a viable RICO cause of action: To prevail on a contested class certification motion, Plaintiffs needed to frame their pyramid scheme allegations as RICO claims to take advantage of the Fifth Circuit's decision in *Torres II.* However, doing so was difficult, given the many technical requirements of pleading a RICO civil claim. These RICO issues were novel and difficult, as is evident from the Court's prior motion to dismiss rulings and Plaintiffs' need to file two amended complaints.[34]

- How much value to attribute to AdvoCare's product: Whether or not AdvoCare operated a pyramid scheme, it did sell actual product to its Distributors. AdvoCare would argue in this case that the product had some amount of value. How to handle this argument in a class action, in assessing individual class member damages, was a novel and difficult issue.[35]

c. The skill required to perform the legal service adequately

The difficulty and novelty of the issues in this case required counsel with a high skill level. The quality of the opposition faced by Class Counsel is also a relevant factor in assessing the skill required to litigate the case.[36] Here, one of the most prestigious firms in Texas, if not the country—Winston & Strawn LLP—represented AdvoCare, and its team was led by one of the most highly

[32] *See* King Decl. ¶¶ 16, 78 [Appx. 112, 129].

[33] *See* King Decl. ¶ 74 [Appx. 128].

[34] *See* King Decl. ¶¶ 75-76 [Appx. 128-129].

[35] *See* King Decl. ¶¶ 32-33, 80 [Appx. 116-117, 129-130].

[36] *See, e.g., Schwartz,* 2005 WL 3148350, at *30 ("The ability of Plaintiff's Counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."); *Erica P. John,* 2018 WL 1942227, at *11 (considering the quality of defense counsel's work in assessing the skill required of class counsel).

regarded attorneys in Texas—Tom Melsheimer.[37] Litigating the difficult issues in this case against a preeminent legal team certainly required a high degree of skill.

d. The preclusion of other employment by the attorney because he accepted the case

Class Counsel is generally in high demand and are usually employed at full capacity. Had Class Counsel not expended their time on this fully contingent representation, they could have invested those resources in other income-generating representations.[38]

e. The customary fee for similar work in the community

The fee requested is 30% of the common fund created by the work of Class Counsel. This is an average to below-average contingency fee in class action matters.[39]

f. Whether the fee is fixed or contingent

Class Counsel prosecuted this case on a fully contingent basis. Class Counsel fully funded all out-of-pocket costs and took on all the risks associated with this risky case. "Courts have consistently recognized that the risk of receiving little or no recovery is a factor in considering an award of attorneys' fees."[40] Accordingly, this factor supports the requested fee.

g. The time limitations imposed by the client or the circumstances

This factor does not apply.

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[37]*See* King Decl. ¶ 86 [Appx. 131].

[38]*See* King Decl. ¶ 88 [Appx. 131-132]. *See also Evans v. Greenlaw,* Case No. 3:16-cv-0635-M, 2019 WL 7879735, at *3 (N.D. Tex. Feb. 27, 2019) (finding that this factor supported the fee request; counsel had expended 342.05 hours on the case, which "inevitably precluded other representations"); *Burford*, 2012 WL 5471985, at *3 (finding this factor supported class counsel's fee request where, even though the "case did not preclude them from accepting other work, they were often times precluded from working on other cases due to the demands of the instant matter").

[39]*See supra* notes 22 & 23. *See also* King Decl. ¶ 88 [Appx. 131].

[40] *In re Xarelto,* 2020 WL 1433923, at *7. *See also Evans,* 2019 WL 7879735, at *3 (same); *Erica P. John,* 2018 WL 1942227, at *11 (same).

h. The amount involved and the results obtained

The results achieved is the most important factor,[41] and it strongly supports awarding Class Counsel the full 30% contingency fee requested. $10.5 million is a significant recovery, and 9,977 persons have already filed claims. As discussed in the Final Approval Motion, this is a very good result for the Class, considering all the risks and uncertainties facing the claim.

Moreover, the work of Class Counsel may have contributed to the FTC's $150 million recovery from AdvoCare and AdvoCare's agreement to abandon its MLM business model. Class Counsel filed the Original Complaint in this case years before the FTC settled with AdvoCare or publicly announced that it was pursuing AdvoCare.[42] The crux of the FTC's complaint is the same as that explained in the Original Complaint—AdvoCare operated its MLM business as a pyramid scheme. In addition, at AdvoCare's insistence, the Settlement Agreement allows AdvoCare the opportunity to reduce individual Class Member recoveries based on what individual Class Members receive from the FTC,[43] suggesting that one of AdvoCare's incentives for paying the FTC so much money was the potential to reduce its exposure in this class action.

The requested 30% fee award is fair and reasonable on the merits of the $10.5 million recovered in this action alone, but it is further supported by the massive FTC recovery, which will benefit AdvoCare's Distributors and many Class Members, on the same essential claims.

i. The experience, reputation, and ability of the attorneys

Class Counsel is highly credentialed. Mr. Swick and Mr. King both graduated *summa cum laude* from their respective law schools, and both have experience in class actions and other

[41]*Erica P. John,* 2018 WL 1942227, at *12.

[42]*See* King Decl. ¶¶ 22-23 [Appx. 114].

[43]*See* King Decl. ¶ 51 [Appx. 121].

complex litigations.[44] Of particular importance here, both have experience with other class actions raising pyramid scheme allegations against other MLMs, which allowed them to efficiently and effectively represent the Class here.[45] Class counsels' ability to efficiently reach a positive resolution of a class action is the "best indicator of the experience and ability of the attorneys involved."[46] In addition, Judge Furgeson was able to extensively observe Class Counsel at work in this case, and he fully supports this fee request.[47]

j. The undesirability of the case

The riskiness and undesirability of this case is evidence by the fact that no one else pursued the claims. An ESPN article published on March 15, 2016, drew public attention to the AdvoCare business model and suggested that AdvoCare might operate a pyramid scheme.[48] AdvoCare has hundreds of thousands of Distributors.[49] However, no case against AdvoCare was filed, by any private plaintiff or governmental entity, seeking to recover damages against AdvoCare based on its alleged operation of a pyramid scheme until Class Counsel filed the OC in this matter in March 2017.[50] Even thereafter no competing class action was filed.[51] Thus, the Class claims would likely never have been litigated absent Class Counsel's decision to bear all the risks and expense of this case. This factor supports the requested Fee Award.[52]

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[44]*See* King Decl. ¶¶ 3-10 [Appx. 109-110]. *See also* King Bio. [Appx. 139-140]; Swick Bio. [Appx. 143-145].

[45]*See* King Decl. ¶¶ 8, 12, 68 [Appx. 109-110, 111, 126].

[46] *Schwartz,* 2005 WL 3148350, at *33.

[47]*See* Furgeson Decl. ¶ 20 [Appx. 312-313].

[48]*See* King Decl. ¶ 11 [Appx. 110].

[49]*See* King Decl. ¶ 47 [Appx. 120].

[50]*See* King Decl. ¶ 14 [Appx. 112].

[51]*See* King Decl. ¶ 14 [Appx. 112].

[52]*See Schwartz,* 2005 WL 3148350, at *33 ("Class action cases that carry with them elevated risks, such as the present litigation and that also require lengthy investigation through informal discovery, not to mention a possibility of no recovery, certainly speaks to the undesirability of a case.").

k. The nature and length of the professional relationship with the client

This factor does not apply here.

l. Awards in similar cases

As discussed above, an award of 30% of the common fund is typical.[53] This is not a "mega-fund" case that might justify a lower percentage.[54]

3. Class Counsel's Lodestar Supports the Fee Award

As noted above, many courts in the Fifth Circuit grant class counsel fee awards without considering counsel's lodestar.[55] Where they do consider the lodestar as a cross-check on the percentage method, the lodestar need only be in "the ballpark" of the fee allowed by the percentage method to sustain the requested fee,[56] and the lodestar analysis may be simplified.[57] Should the Court determine to consider Class Counsel's lodestar here, it supports the full $3.15 million fee award requested.

Class Counsel's lodestar, calculated based on their hourly rates prevailing at the time the hours were incurred,[58] are the rates the market for legal services will pay for Class Counsel's work, are consistent with those of counsel with the level of experience and reputation in the market, and are lower than opposing counsel's rates.[59] At these rates, Class Counsel invested $1.71 million in

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[53] *See supra* p. 8-9.

[54] *See In Re Enron Secs., Derivative & ERISA Litig.,* 586 F. Supp. 2d 732, 790-91 (S.D. Tex. 2008) (discussing supposed "megafund rule" requiring a lower percentage contingent fees in very high recovery cases).

[55] *See supra* note n. 21.

[56] *Xarelto,* 2020 WL 1433923, at *4.

[57] *Erica P. John,* 2018 WL 1942227, at *9 (noting that court would perform a "simplified lodestar analysis as a cross-check" on the results of the percentage method). *See also In re Vioxx Prod. Liab. Litig.,* 760 F. Supp. 2d 640, 659 (E.D. La. 2010) (noting that the "lodestar cross-check is meant to be a rough analysis").

[58] *See Altier v. Worley Catastrophe Response, LLC,* Civ. A. No. 11-241, 2012 WL 161824, at *22 ((E.D. La. Jan. 18, 2012) (An attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates and the rate is not contested.").

[59] *See* King Decl. ¶¶ 84-99 [Appx. 130-135].

litigating this case.[60]

Class Counsel's requested fee award calls for a multiplier of 1.842, which is on the low end of multipliers regularly approved by courts in the Fifth Circuit in common fund cases. "The average range of multipliers applied to other class actions has been from 1.0 to 4.5. … The range of multipliers on large and complicated class actions have ranged from at least 2.26 to 4.5."[61] A multiplier of at least that requested is appropriate here given the application of the *Johnson* factors discussed above. In particular, Class Counsel took on a risky, fully contingent representation that resulted in a significant recovery for the Class.

C. CLASS COUNSEL REQUEST AN AWARD OF $35,517.11 AS REIMBURSEMENT FOR OUT-OF-POCKET EXPENSES

Class Counsel request that this Court grant an award of $35,517.11 in out-of-pocket expenses incurred and paid by Class Counsel in litigating this case. "'Expenses and administrative costs expended by class counsel are recoverable from a common fund in a class action settlement.'"[62] Reimbursement of such expenses are "typical in the settlement of class actions."[63] Reimbursable expenses include transportation, lodging, meals, photocopying, research, postage, mediation fees, and similar expenses.[64] All of the expenses sought to be recovered by Class Counsel fall within these categories.[65] Almost half of the expenses requested for reimbursement

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[60] *See* King Decl. ¶¶ 99 [Appx. 135].

[61] *DeHoyos v. Allstate Corp.,* 240 F.R.D. 269, 333-34 (W.D. Tex. 2007) (citing multiple cases applying multipliers of 2.0 or more). *See also Evans,* 2019 WL 7879735, at *2 (applying a multiplier of slightly more than 3x); *Sistrunk v. TitleMax, Inc.,* 5:14-CV-628-RP, 2018 WL 1773307, at *2, 4 (W.D. Tex. Feb. 22, 2018) (approving multiplier of approximately 2.0; awarding $1,557,675.00 in fees where lodestar was $745,851); *In re Enron,* 586 F. Supp. 2d at 798-800 (discussing multiple common fund cases using multipliers of over 3.0), 803 (applying a 5.2 multiplier).

[62] *Erica P. John,* 2018 Wl 1942227, at *14 (quoting *Billitteri v. Sec. Am., Inc.,* No. 3:09–cv–01568–F, 2011 WL 3585983, at *10 (N.D. Tex. Aug. 4, 2011)).

[63] *Kemp,* 2015 WL 8526689, at *11.

[64] *Id.*; *Buettgen v. Harless*, No. 3:09-CV-00791-K, 2013 WL 12303143, at *14 (N.D. Tex. Nov. 13, 2013).

[65] *See* King Decl. ¶ 100 [Appx. 135-136].

are arbitration fees and mediation fees (a combined $17,050.00), which were obviously necessary to obtain the result in this case.[66]

D. THE CLASS REPRESENTATIVE REQUESTS A SERVICE AWARD OF $20,000

Service awards "'compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class representation.'"[67] "Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives."[68] Courts have made service awards ranging from $5,000.00 to $100,000.00.[69] The factors courts consider in assessing whether to make a service award include:

> 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.[70]

Here, the Class Representative faced personal risk in bringing this suit. AdvoCare had hundreds of thousands of Distributors, many of whom could be expected to be upset by the filing of a lawsuit alleging that AdvoCare operated a pyramid scheme. The Class Representative's name is directly associated with AdvoCare and this lawsuit on multiple internet pages.[71]

The Class Representative was active in the preparation and litigation of this case. Her involvement included: (1) attending numerous meetings on the phone with Class Counsel to

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[66] *See* King Decl. ¶ 101 [Appx. 136].

[67] *Jenkins,* 300 F.R.D. at 305 (quoting *Altier*, 2012 WL 161824, at *15).

[68] *Id.* at 306.

[69] *Fairway*, 2018 WL 1479222, at *3 (citing cases; awarding class representative $75,000.00). *See also Sistrunk,* 2018 WL 1773307, at *4 (awarding $15,000 to class representative); *Erica P. John,* 2018 WL 1942224, at *14 (awarding class representative $100,000).

[70] *Jenkins,* 300 F.R.D. at 306.

[71] *See* King Decl. ¶ 103 [Appx. 136].

discuss fact investigation and case strategy; (2) providing information regarding AdvoCare's business model and directing Class Counsel to other Distributors who could provide information; (3) gathering factual information for inclusion in the complaints and mediation briefs; (4) traveling from her home in California to attend a full-day mediation in Dallas; and (5) attending a full-day mediation via videoconference.[72] The Class Representative was fully employed during this four-year case, and her participation in these activities reduced the amount of time she could spend on her jobs. The Class Representative had to take time off from her employment to participate in the first two mediations, and she was available by phone during the third mediation.[73]

The Class Representative will receive an award as a Class Member. Based on AdvoCare's data, the Class Representative's Base Award (subject to reduction based on any award she receives from the FTC and based on any needed *pro rata* reduction) is approximately $1,600.[74] The Settlement Agreement does not provide for any particular service award but rather caps any service award at $20,000.[75]

The Class Representative's request for a $20,000 service award is reasonable and consistent with the awards in other cases.

IV. CONCLUSION

For all the reasons set forth above, Class Counsel respectfully requests that the Court award Class Counsel fees in the amount of $3.15 million expenses in the amount of $35,517.11. The Class Representative respectfully requests that the Court make her a service award of $20,000. Class Counsel and the Class Representative further request that the Court direct the Settlement

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[72] *See* King Decl. ¶ 104 [Appx. 136-137].

[73] *See* King Decl. ¶ 104 [Appx. 137].

[74] *See* King Decl. ¶ 105 [Appx. 137].

[75] *See* S.A. § XI.B [Appx. 021].

Administrator to pay the amounts awarded from the Settlement Fund, as described in the Settlement Agreement.

Dated: April 9, 2021

By: /s/ *J. Benjamin King*

J. Benjamin King (SBN 24046217)
REID COLLINS & TSAI LLP
1601 Elm St., Suite 4250
Dallas, Texas 75201
Tel.: 214-420-8900
bking@rctlegal.com

R. Adam Swick (SBN 24051794)
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Hwy.
Bldg. C, Suite 300
Austin, Texas 78746
Tel.: 512-647-6100
aswick@rctlegal.com

Counsel for Plaintiff

CERTIFICATE OF CONFERENCE

I certify that I have conferred with counsel for Defendant AdvoCare International, L.P., on April 7-9, 2021, by email, and Defendant states its position as follows: "While Defendant denies any of the factual allegations supporting the proposition that AdvoCare operated a pyramid scheme or did anything improper, it is not opposed to the relief requested."

J. Benjamin King
J. Benjamin King

CERTIFICATE OF SERVICE

I certify that, on April 9, 2021, I caused to be served a copy of the foregoing motion, along with supporting exhibits, on counsel for Defendant AdvoCare International, L.P. via the Court's ECF system.

J. Benjamin King
J. Benjamin King