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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

DISCOUNT SLEEP OF OCALA, LLC d/b/a MATTRESS WAREHOUSE, individually, and as a Representative of a Class of all similarly situated others, and DALE W. BIRCH, individually and as a Representative of a Class of all similarly situated others,

Plaintiffs,

v.

CITY OF OCALA, FLORIDA, a political subdivision of the State of Florida,

Defendant.

_____/

Case No.: 2014 CA 000426

ORDER DISBURSING COMMON FUND

This cause came before the Court for hearing on May 10, 2022, on Plaintiffs' Motion to Disburse Attorneys' Fees, Costs, Class Representatives' Service Awards, and Class Refunds and Incorporated Memorandum of Law ("Motion to Disburse"). The Court having reviewed the Court file, duly considered class members' responses and objections, the evidence, and arguments of counsel, and being fully advised in the premises, finds:

I. Facts and Case History.

1. Between 2006 and 2010, the City of Ocala ("City") enacted several ordinances that established, repealed, and then re-established its fire fee to offset a portion of the general operating costs of its fire department.

2. On September 12, 2013, Bowen|Schroth was hired to challenge the City's fire fee.

3. On December 3, 2013, Plaintiff Discount Sleep of Ocala, LLC, sent a letter to the City requesting it cease collection and refund the fire fee.

4. On February 20, 2014, Class Representatives filed a class action lawsuit challenging the City's fire fee as an unconstitutional tax imposed in violation of Article VII, Section 1(a) of the Florida Constitution. Class Representatives requested the trial court declare the fire fee unlawful and order class wide refunds to the greatest extent permitted under law.

5. On March 31, 2014, the City filed a Motion to Dismiss alleging, among other things, the statute of limitations barred the suit.

6. On February 16, 2015, the trial court dismissed the case with prejudice on statute of limitations grounds. Class Representatives appealed the ruling.

7. On June 17, 2016, the Fifth District Court of Appeal ("Fifth DCA"), reversed the trial court's dismissal, ruling as a matter of law Ordinance 2010-43 "triggered a new four-year statute of limitations period."[1]

8. On June 21, 2016, seeking to certify a class of all those who paid the fire fee from February 20, 2010, Class Representatives filed a Second Amended Motion for Class Certification and Memorandum of Law and Request for Hearing.

9. On January 18, 2017, the trial court denied Class Representatives' class certification motion on ten different grounds.[2]

10. On February 16, 2017, Class Representatives appealed and on January 5, 2018, the Fifth DCA issued an 18-page opinion reversing the trial court's order denying class certification.[3]

11. On June 26, 2019, after a bench trial, the trial court entered final judgment in favor of the City ruling the City's fire fee was a valid user fee. The Class Representatives appealed the ruling on July 3, 2019.

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[1] *Discount Sleep of Ocala, LLC v. City of Ocala*, 200 So. 3d 156, 157 (Fla. 5th DCA 2016) ("Discount I").
[2] See Findings of Fact, Conclusions of Law and Order Denying Plaintiffs' Second Amended Motion for Class Certification (Docket Entry 195) ("Order").
[3] See *Discount Sleep of Ocala, LLC, et al v. City of Ocala*, 245 So. 3d 842 (Fla. 5th DCA 2018)("Discount II").

12. On June 19, 2020, in a 14-page appellate decision, the Fifth DCA reversed the trial court's final judgment and ruled the City's fire fee was an unconstitutional tax and remanded the case to this Court for establishment of a common fund to refund the illegally collected tax.[4]

13. After considerable post-appellate decision motion practice, on September 8, 2020, the City sought to invoke the Florida Supreme Court's discretionary jurisdiction and filed its jurisdictional brief on October 1, 2020. Class Representatives filed their response on October 30, 2020. On November 16, 2020, the Florida Supreme Court declined to accept discretionary jurisdiction.

14. Following additional motion practice, hearings and litigation, on October 11, 2021, this Court ordered the City to fund the Common Fund in the amount of $79,282,909.44 to pay for fees, costs, and refunds.

15. On December 31, 2021, Plaintiffs filed their Motion to Disburse requesting the Court order the City to disburse the Common Fund. Plaintiffs requested, and this Court ordered, the Class should have an opportunity to be heard regarding the proposed final disbursement of the Common Fund. This Court approved the Notice of Final Hearing to Disburse Refunds, Attorneys' Fees, Costs, and Class Representative Service Awards ("Notice") and held a hearing on the Motion to Disburse on May 10, 2022.

II. The Requested Fee Is Fair and Reasonable.

A. Class Counsel is awarded $6,393,188.37 in attorneys' fees (approximately 8.06%) from the $79,282,909.44 Common Fund.

In Discount II, the Fifth DCA reiterated the long-held principle that "attorneys in class actions are entitled to attorneys' fees from [the] common fund in class action tax challenges."[5] "Common-fund cases are consistent with the American Rule, because the attorney's fees come from the fund, which belongs to the class."[6] The "right of an attorney to receive fees under the common fund doctrine is based on the

[4] See *Discount Sleep of Ocala, LLC, et al v. City of Ocala*, 300 So. 3d 316, 322 (Fla. 5th DCA 2020)("Discount III").
[5] *Discount II*, 245 So. 3d at 854.
[6] *In re Home Depot, Inc.*, 931 F. 3d 1065, 1079 (11th Cir. 2019).

theory that the successful efforts of the attorney benefits the class entitled to receive the fund and equity requires that each class member bear his or her pro rata share of the cost of recovering the fund."[7] Class Counsel is hereby awarded $6,393,188.37 in attorneys' fees (approximately 8.06% of Common Fund).

B. Class Counsel's Lodestar of $1,376,652.00 is reasonable.

In determining Class Counsel's reasonable attorneys' fee award, the Court must utilize the criteria and guidelines for reasonable fees the Florida Supreme Court articulated in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). In Rowe, the federal lodestar approach was adopted as an objective means to assist courts in calculating reasonable attorney fee awards.[8] Under the lodestar approach, the Court must first determine the number of hours reasonably expended in the litigation, then the reasonable hourly rate for the prevailing attorney's services, and then multiply the reasonable number of hours by the reasonable hourly rate.[9] Rowe also identified the following eight criteria (hereafter the "Rowe Factors") courts should consider in determining the reasonableness of legal fees: (1) (a) the time and labor required, (b) the novelty and difficulty of the question involved, and (c) 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.

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[7] *Community Nat'l Bank v. Rishoi*, 567 So. 2d 1053, 1055 (Fla. 5th DCA 1990).
[8] *Rowe*, 472 So. 2d at 1150.
[9] *Id.* at 1150-51.

C. Application of the Rowe Factors.

i. Rowe Factor 1(a): The Time and Labor Required.

The achieved outcome in this case required substantial time and effort. Attorney fee experts Donald E. Hemke and J. Theodore Shatt testified that over the last 8 years Bowen|Schroth dedicated more than 4,000 hours of work to this case. Class Counsel prepared hundreds of documents which required compilation, review, and analysis of thousands of pages of information. Class Counsel was involved in extensive, complex, and detailed motion practice, conducted discovery, including dozens of public records requests, prepared, and argued at numerous hearings, defended the depositions of the Class Representatives, and participated in a total of 11 depositions of City Council members, City officials, experts and other witnesses. Class Counsel monitored City Council meetings as they related to this action. The parties vigorously litigated every issue for over eight years including three comprehensive appeals.

Considering the time and labor this action required, the hours Class Counsel expended on this case from September 12, 2013, through November 1, 2021, are reasonable. No evidence against the number of hours Class Counsel spent on this case was presented to the Court. Although Class Counsel dedicated 4,007.75 hours to this case during the aforementioned period, fee expert Donald E. Hemke testified that 51.7 of the hours billed were for travel time between Class Counsel's office and Ocala, 12.3 of the hours billed were for administrative/clerical time, and 88.05 of the hours billed related to preparing to establish and establishing the amount of Class Counsel's claim for reasonable attorneys' fees. Fee expert Donald E. Hemke recommended a reduction of 152.05 hours for those billing entries from Class Counsel's compensable hours. The Court finds expert Donald E. Hemke's recommendation reasonable and awards Class Counsel compensation for 3,855.70 hours as follows:

Biller's Name	Biller's Initials	Role	Hours Sought
Derek A. Schroth	DAS	Lead Counsel	1,735.85
Jason M. Radson	JMR	Former Partner	2.10
Lennon E. Bowen, III	LEB	Senior Partner	7.4
James A. Myers	JAM	Partner	1,112.20
Zachary T. Broome	ZTB	Partner	31.3
Sasha O. Garcia	SG	Partner	511
Amy Hasselbring	AH	Paralegal	351
Todd J. Mazenko	TJM	Former Partner	5.10
Kevin B. Rossi	KBR	Associate	68.70
Elizabeth Bradley	EB	Law Clerk	12.90
Jonathan Graham	JG	Law Clerk	16.2
Debra Morton	DM	Paralegal	.40
Jennifer Sampson-Young	JSY	Paralegal	.30
Kathy Dillinger	KD	Paralegal	1.25

ii. Rowe Factor 1(b): The Novelty and Difficulty of the Question Involved.

In determining the number of hours reasonably expended on the litigation, "the novelty and difficulty of the question involved should be considered."[10] It is "common knowledge that class action suits have a well-deserved reputation as being most complex."[11] A class action that presents a case of first impression is particularly so,[12] as cases of first impression "generally require more time and effort on the attorney's part."[13] This case presented various novel complex questions of law and difficult issues necessitating dozens of pages of appellate analysis for resolution in three different appeals.

Until Discount I, no Court had applied Section 2.04, Florida Statutes, to a municipal tax challenge. The Fifth DCA agreed with Class Representatives' statutory interpretation of Section 2.04, stating:

[10] *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403 (Fla. 1999).
[11] *Cotton v. Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977).
[12] *Pinto v. Princess Cruise Lines, Ltd.*, 513 F.Supp.2d 1334, 1342 (S.D. Fla. 2007).
[13] *Johnson v. Georgia Highway Exp., Inc.*, 488 F. 2d 714, 718 (5th Cir. 1974).

"[W]ithout express revival, Ordinance 2010-43 could not reinstate prior ordinances governing the imposition of fire service fees. See § 2.04, Fla. Stat. (2014). Therefore, while Ordinance 2010-43 repealed Ordinance 6015, it also triggered a new four-year statute of limitations on May 4, 2010."[14] This novel and difficult issue was resolved in Class Representatives' favor.

Discount II is the seminal case on class action law in the Fifth District and is the only appellate decision to apply Florida class action law and the necessity doctrine in the taxpayers' favor.[15] Discount III created new precedent in Florida local government law. Until Discount III, no Florida appellate court had declared a user fee for public fire safety services to be an unlawful tax. Discount III is the only class action case from the Fifth DCA (i) invalidating a municipal user fee as an illegal tax, (ii) rejecting the voluntary payment defense, and (iii) analyzing the Gulesian[16] good faith defense. Discount III is also the first appellate case to analyze a local government user fee as a funding mechanism for public safety fire services.

iii. Rowe Factor 1(c) and 7: The Skill Required to Adequately Perform the Legal Service Properly and the Ability of the Attorneys.

The prosecution and management of a complex class action requires expert legal skills and abilities. When determining fees, the Court should consider "the skill and acumen required to successfully investigate, file, [and] litigate ... a complicated class action lawsuit such as this one"[17] and the "experience, reputation, and ability of the lawyer or lawyers performing the services."[18] This complex case, characterized by difficult and novel factual and legal issues, required considerable litigation skills and legal acumen.

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[14] *Discount I*, 200 So. 3d at 157.
[15] *Discount II*, 245 So. 3d at 857.
[16] *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973).
[17] *David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362 at *8 n.15 (S.D. Fla. April 15, 2010).
[18] *Rowe*, 472 So. 2d at 1150.

Court Appointed Lead Class Counsel, Derek A. Schroth, has class action and appellate experience.[19] Mr. Schroth is a board-certified expert in City, County, and Local Government Law and Business Litigation. He is one of only two Florida attorneys certified as an expert in both fields. Mr. Schroth is General Counsel for the Lake County Sheriff's Office, City Attorney for the City of Eustis, Town Attorney for the Town of Lady Lake, and a quasi-judicial hearing officer for the City of Orlando and the City of Tampa. The Fifth DCA in Discount II determined Lead Class Counsel was able to effectively advocate for and represent the Class and that his prior experience in a similar case was "competent, substantial evidence of adequacy."[20] Both attorney fee experts testified Bowen|Schroth and its lawyers are well-known for local government expertise in the Central Florida legal community.

In evaluating the quality of Class Counsel's work, it is also important to consider the quality of the opposition the Class Representatives' attorneys faced."[21] For this factor, the Court may draw on past experience as a lawyer and observations from the bench of the representation quality of other lawyers.[22] Here, Class Counsel faced a Defendant with tremendous financial and legal resources. The City has an annual budget over $800,000,000.00 and had 12 skilled lawyers perform work on this case from 4 highly experienced and prominent law firms. Class Counsel's skill and ability supports the requested lodestar fee.

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[19] E.g. *Owner-Operator Inc. Drivers Ass'n, Inc. v. 4 Points Logistics, LLC*, No. 5:05-cv-440-OC-10GRJ, 2007 WL 2071389 (M.D. Fla. 2007); *Gagnon v. Service Trucking, Inc.*, 266 F.Supp.2d 1361 (M.D. Fla. 2003), vacated by agreement of the parties in *Gagnon v. Service Trucking, Inc.*, No. 5:02-CV-342-OC-10GRJ, 2004 WL 290743 (M.D. Fla. 2004); *Harris v. Wildwood Villages, LLC*, No. 12-1348 (Fla. 5th Cir. Ct. March 17, 2017); *Weaver v. City of Wildwood*, 22 Fla. L. Weekly Supp. 537b (Fla. 5th Cir. Ct. 2014); *Richardson v. City of Fruitland Park*, No. 14-400 (Fla. 5th Cir. Ct. April 14, 2014); *Sunlake Homeowners Ass'n, Inc. v. American Land Lease, Inc.*, No. 05-707 (Fla. 5th Cir. Ct. April 12, 2007); *Shamrock Homes, Inc. v. City of Eustis*, No. 01-1073 (Fla. 5th Cir. Ct. September 27, 2001), *Discount Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316 (Fla. 5th DCA 2020).

[20] *Discount II*, 245 So. 3d at 854.

[21] *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001).

[22] *Johnson*, 488 F.2d at 718.

iv. Rowe Factor 2: Preclusion of Other Employment.

Once "employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes."[23] Since being hired in 2013, Class Counsel has dedicated over 4,000 hours of time to prosecuting this case. Both attorney fee experts testified Class Counsel were precluded from taking on new cases and turned down opportunities to work on other cases to devote the necessary amount of energy, time, and resources to successfully prosecute this case. The Court finds Class Counsel's preclusion of other employment supports the requested lodestar fee.

v. Rowe Factor 3: The Customary Fee for Similar Work in the Community.

"The party who seeks the fees carries the burden of establishing the prevailing 'market rate,' i.e., the rate charged in that community by lawyers of reasonably comparable skill, experience, and reputation, for similar services."[24] Attorney fee expert testimony indicates the following hourly rates are representative of the customary rates in Florida's Fifth Judicial Circuit for knowledgeable and capable attorneys with complex litigation experience.

Title	Base Rates
Lead Counsel	$450/hour
Partner	$300-$350/hour
Associate	$200/hour
Law Clerk	$150/hour
Paralegal	$135/hour

Attorney fee expert testimony confirms the below rates conform with the customary rates charged in the area for similar complex work. Class Counsel's rates are customary and reasonable for similar complex work in the legal community.

[23] *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1209 (S.D. Fla. 2006).
[24] *Rowe*, 472 So. 2d at 1150.

Biller Name	Biller's Initials	Role	Hourly Rate
Derek A. Schroth	DAS	Lead Counsel	$450
Jason M. Radson	JMR	Former Partner	$350
Lennon E. Bowen, III	LEB	Senior Partner	$450
James A. Myers	JAM	Partner	$325
Zachary T. Broome	ZTB	Partner	$325
Sasha O. Garcia	SG	Partner	$300
Amy Hasselbring	AH	Paralegal	$135
Todd J. Mazenko	TJM	Former Partner	$325
Kevin B. Rossi	KBR	Associate	$200
Elizabeth Bradley	EB	Law Clerk	$150
Jonathan Graham	JG	Law Clerk	$150
Debra Morton	DM	Paralegal	$135
Jennifer Sampson-Young	JSY	Paralegal	$135
Kathy Dillinger	KD	Paralegal	$135

vi. Rowe Factor 4: The Amount Involved and the Results Obtained.

The recovery of over $79 million dollars from a municipality is an unprecedented result. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award.[25] This result supports the lodestar fee because due to Class Counsel's diligent prosecution of this case through trial[26] and three appeals, each class member will be refunded over 91% of the illegal tax that member paid to the City.

[25] *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Ressler v. Jacobson*, 149 F.R.D. 651, 655 (M.D. Fla. 1992) ("It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained").

[26] The fact class action cases rarely proceed through trial led the California Supreme Court to recently label such a case "an exceedingly rare beast." *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 920 (Ca. 2014). Class actions settled prior to trial tend to net "between 5.5% and 6.2% of the class members' estimated losses.' *In re Rite Aid Corp. Securities Litigation*, 146 F.Supp.2d 706, 715 (E.D. Penn. 2001); see also Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, U.S. Chamber Institute of Legal Reform (2013) (finding the vast majority of cases studied produced little to no benefit to class members).

Class Counsel also generated significant benefits for the Class beyond the creation of a sizeable common fund. "[F]or purposes of calculating the attorney's fee award, courts usually consider not only the compensatory relief, but also the economic value of any prospective injunctive relief obtained for the Class." After the decision in Discount III, the City stopped charging the unlawful tax on July 21, 2020. The amount involved, $79,282,909.44, and the results obtained, an order for a $79,282,909.44 Common Fund, support Class Counsel's requested lodestar fee.

vii. Rowe Factor 5: Time Limitations Imposed by the Client or the Circumstances.

"Priority work that delays the lawyer's other legal work is entitled to some premium."[27] "In considering this factor, many courts have found that time pressures warrant an increased fee award."[28] Class actions require heightened judicial oversight and Class Counsel had to prioritize this case ahead of other active cases to fulfill their duty to the Class and comply with requirements imposed by the trial and appellate courts. This factor supports Class Counsel's requested lodestar fee.

viii. Rowe Factor 6: Nature and Length of the Professional Relationship with the Client.

For this factor, the Court may consider whether a lawyer in private practice might vary his fee for similar work in light of an existing client relationship.[29] However, "a higher fee may be warranted in class actions where counsel for the class had no prior relationship with the named plaintiffs."[30] Although this case is the first time Lead Class Counsel represented the Class Representatives, Attorney Bowen with Bowen|Schroth has previously represented Plaintiff, Discount Sleep of Ocala, LLC, and has represented its owner, Michael Woeber, in several matters since 2006. This factor neither supports nor opposes the requested lodestar fee.

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[27] *Johnson*, 488 F.2d at 718.
[28] *Allapattah*, 454 F.Supp.2d at 1215.
[29] *Johnson*, 488 F.2d at 719.
[30] *Allapattah*, 454 F.Supp.2d at 1216.

ix. Rowe Factor 8: Whether the Fee is Fixed or Contingent.

Determination of a reasonable fee in common fund cases "must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high."[31] The attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award.[32]

Class Counsel handled this case on a contingent basis for more than 8 years. Class Counsel's fee agreement states, in part: "In the event there is no recovery, you are not responsible for the firm's costs or reimbursing the firm for any such expenses advanced by the firm on your behalf. If we do not recover money, you will not owe us anything." By accepting the case, Class Counsel agreed to risk incurring significant expenses through protracted litigation against experienced well-funded litigators with no assurance of any compensation. The fee in this case was 100% contingent on the result Class Counsel achieved. No evidence against Class Counsel's awarded lodestar amount was presented to the Court. The Court finds this factor and all other Rowe factors support Class Counsel's requested lodestar fee of $1,376,652.00 as set forth below.

Biller's Name	Role	Hours Sought	Hourly Rate	Total
Derek A. Schroth	Lead Counsel	1,735.85	$450	$781,132.25
Jason M. Radson	Former Partner	2.10	$350	$735.00
Lennon E. Bowen, III	Senior Partner	7.4	$450	$3,330.00
James A. Myers	Partner	1,112.20	$325	$361,465.00
Zachary T. Broome	Partner	31.3	$325	$10,172.50
Sasha O. Garcia	Partner	511	$300	$153,300.00
Amy Hasselbring	Paralegal	351	$135	$47,385.00
Todd J. Mazenko	Former Partner	5.10	$325	$1,657.50
Kevin B. Rossi	Associate	68.70	$200	$13,040.00

[31] *Pinto*, 513 F.Supp.2d at 1338.
[32] *Id.* at 1339.

Elizabeth Bradley	Law Clerk	12.90	$135	$1,741.50
Jonathan Graham	Law Clerk	16.2	$150	$2,430.00
Debra Morton	Paralegal	.40	$135	$54.00
Jennifer Sampson-Young	Paralegal	.30	$135	$40.50
Kathy Dillinger	Paralegal	1.25	$135	$168.75
	Total Hours:	3,855.70	Total Lodestar:	$1,376,652.00

D. Class Counsel are entitled to a 5x Lodestar Multiplier for work performed from September 12, 2013, through November 16, 2020, and a 2.5x multiplier for work performed from November 17, 2020, through October 11, 2021.

Following the calculation of the lodestar, the Court is to consider "whether a multiplier is needed in the case to give effect to the contingency factor and in recognition of the substantial benefit class counsel conferred upon the class members."[33] A contingency fee multiplier "ensure[s] that lawyers, who take a difficult case on a contingency basis, are adequately compensated."[34] "The point being, the lodestar amount, which awards an attorney for the work performed on the case, is properly analyzed through the hindsight of the actual outcome of the case, whereas the contingency fee multiplier, which is intended to incentivize the attorney to take a potentially difficult or complex case, is properly analyzed through the same lens as the attorney when making the decision to take the case."[35] The Florida Supreme Court in Kuhnlein v. Dep't of Revenue, 662 So. 2d 309, 315 (Fla. 1995) established the standard for awarding multipliers in cases like the case before this Court, stating:

> "First, we find that the instant case presents another distinct class of attorney-fee cases, in addition to those presented in *Quanstrom,* in which a multiplier is appropriate. Next, we set the *maximum* multiplier available in this common-fund category of cases at 5. By allowing for this increased maximum multiplier, we recognize that it is appropriate in common-fund cases, as differentiated from fee-shifting cases where the multiplier is capped at a 2.5 multiplier pursuant to *Quanstrom,* to place greater emphasis on the monetary results achieved. Furthermore, a multiplier which increases fees to five times the accepted hourly rate is sufficient to

[33] *Kuhnlein*, 662 So. 2d at 315.
[34] *Joyce v. Federated Nat'l Insurance Co.*, 228 So. 3d 1122, 1132 (Fla. 2017).
[35] *Id.* at 1133.

> alleviate the contingency risk factor involved and attract high level counsel to common fund cases while producing a fee which remains within the bounds of reasonableness. We emphasize that 5 is a maximum multiplier, and what multiplier, if any, applies depends on the particular case. Based upon the record before us, we conclude that class counsel in this case is entitled to the maximum multiplier available."[36]

Attorney fee expert testimony confirms Class Counsel's risk justifies the maximum multiplier award in this case. Courts acknowledge a "financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid."[37] "Courts have recognized that the novelty, difficulty and complexity of the issues involved are significant factors in determining a fee award."[38] At the outset, this difficult case presented years of work with a low probability of success. Challenging the fire fee more than seven years after it was first enacted raised the possibility that this case would be dismissed on statute of limitations grounds. As a case of first impression, new precedent would have to be established and the presumption of validity rebutted. The City's ordinances enacting the fire fee were "clothed with a presumption of constitutionality."[39] Due to the sheer magnitude of this case and the potential financial impact to the City, the City would mount a vigorous defense of all issues throughout the duration of the case. A 2015 Cornell study of appellate outcomes concluded plaintiffs achieve reversal of adverse trial court judgments only 21% of the time.[40]

"Both Rowe and Quanstrom ... make clear that where the chances of success at the outset of litigation is less than 50-50, a multiplier at or near the maximum is indicated."[41] Class Counsel's risk

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[36] *Kuhnlein*, 662 So. 2d at 315.
[37] *Francisco v. Numismatic Guaranty Corp. of America*, 2008 WL 649124 at *13 (S.D. Fla. 2008).
[38] *Spann v. J.C. Penney Corporation*, 211 F. Supp. 3d at 1263-64 (internal citations omitted).
[39] *Blue Cross Blue Shield of Fla. Inc. v. Outpatient Surgery Ctr. of St. Augustine*, 66 So. 3d 952, 953 (Fla. 1st DCA 2011).
[40] Theodore Eisenberg and Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12-1 Journal of Empirical Legal Studies 100 (2015).
[41] *In re Bluegreen Corp. S'holder Litig.*, 2015 WL 6866226 at *3 (Fla. 15th Cir. Ct. Sept. 22, 2015). See also *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828, 834 (Fla. 1990) ("A maximum contingency fee multiplier is warranted if success was unlikely at the outset of a case").

analysis at the outset of this case was justified. This case repeatedly concerned complex difficult issues without controlling precedent. Class Representatives faced a real risk of losing this case and actually lost this case at the trial level three different times. Class Counsel was aware of and bore such risks and vigorously prosecuted this case regardless of the possibility such costs and time would not be reimbursed if Class Representatives were unsuccessful in this litigation. According to fee expert Donald E. Hemke, Class Counsel's probabilities of a complete win at the appellate level three distinct times, as in this case, were less than 3 percent. Considering the risks and the result obtained for the Class, a five multiplier is warranted in this case for work performed from September 12, 2013, through November 16, 2020, because the contingency risk remained high until the Florida Supreme Court declined to exercise its discretionary jurisdiction to review Discount III.

A two and half multiplier is warranted for work performed from November 17, 2020, through October 11, 2021, because after the Florida Supreme Court declined jurisdiction, the risk of non-payment still existed as the City continued to raise arguments for a final jury trial. The Court finds a total attorneys' fee award of $6,393,188.37 as set forth below noting the correct multiplier is reasonable.

Time Period	Lodestar Amount	Multiplier	Reasonable Attorneys' Fee
9/12/2013 – 11/16/2020	$1,188,926.25	5.0	$5,944,630.25
11/17/20 – 10/11/2021	$173,888.25	2.5	$434,720.62
10/12/2021 – 11/1/2021	$13,837.50	1.0	$13,837.50
		Total	$6,393,188.37

In addition, Class Counsel's requested fee is consistent with the fee awards in similar cases. In Kuhnlein, the Florida Supreme Court found class counsel was entitled to the maximum multiplier of 5 given the contingency factor and in recognition of the substantial benefit class counsel conferred upon the class members. Kuhnlein involved a challenge by state residents of the constitutionality of certain fees. The class sought a declaratory judgment that the fees were an unconstitutional tax. The Florida Supreme Court ruled the fee was void from its inception because the legislature acted outside its constitutional

power and the only clear and certain remedy was a full refund to all who have paid the illegal tax. In Greenwald v. City of Punta Gorda, Case No. 93-1806-CA-3 (20th Judicial Circuit, Charlotte County), aff'd, Appeal No. 95-4375 (Fla. 2d DCA 1995), Class Counsel's fee expert, Donald E. Hemke, was awarded a fee multiplier of 4.7 "in light of the fact that class attorneys undertook representation on a contingency fee basis, that class attorneys undertook substantial risk that they would not be paid, that payment to class attorneys has been delayed up to three years, and that class attorneys obtained 'the best of all possible. . .results in obtaining a full refund. . .and in the City agreeing not to pursue unpaid and future accruing [ready-to-serve] fees." Kuhnlein, Dreidame,[42] and Greenwald were factually and legally similar to this case (class action recoveries against governments for illegal taxes). Although not required under Kuhnlien, the evidence and testimony show the relevant market required a contingency multiplier for Class Representatives to obtain competent counsel.

Class Counsel's fee request is also reasonable under the federal percentage approach. The Eleventh Circuit held "attorney's fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."[43] The "majority of common fund fee awards fall between 20% to 30% of the fund."[44] As the Middle District noted in Ressler, "[a]wards of 30% or more of a settlement fund are not uncommon."[45] No evidence against the reasonableness of the total fee awarded to Class Counsel in this case was presented to the Court. The Court awards Class Counsel a total fee award

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[42] *Dreidame v. Village Center Community Development District*, 2008 WL 7079074 (Fifth Circuit, Lake County 2008) (noting that "a multiplier of five (5) [would be] proper" in settling a similar class action case against the development district and that "based on the risk factor alone, the multiplier would have to be five"); See also *Ramos v. Phillip Morris Companies*, 743 So. 2d 24, 32-33 (Fla. 3d DCA), review dismissed, 743 So. 2d 14 (Fla. 1999) (multiplier of 5 awarded); *In re Bluegreen Corp. Shareholder Litigation*, 2015 WL 6866226 at *11-12 (15th Judicial Circuit, Palm Beach County 2015) (multiplier of 5 awarded).

[43] *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

[44] *Id.*

[45] See e.g. *In re Rio Hair Naturalizer Products Liability Litigation*, 1996 WL 780512 (E.D. Mich. 1996) ("fee awards in common fund cases. . .typically rang[e] from 20 to 50 percent of the fund"); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 249-250 (S.D. Ohio 1991) ("[t]he percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund created"); *In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) ("[t]raditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions").

of $6,393,188.37 which is less than 8.1% of the $79,282,909.44 Common Fund and which the Court finds reasonable.

III. Class Counsel Is Entitled To Non-Taxable Costs of $68,723.33 From The Common Fund.

Class Counsel advanced costs and expenses to bring this case to a successful conclusion. The party recovering judgment shall recover all of his or her legal costs and charges. . . ."[46] Having prevailed on all aspects of this case, Class Representatives are the prevailing party in this action and are entitled to recover taxable costs from the City. The City paid those taxable costs after a judgment was entered. No evidence against the non-taxable costs Class Counsel seeks reimbursement for was presented to the Court. The remaining $68,723.33 in non-taxable costs shall be reimbursed to Class Counsel from the $79,282,909.44 Common Fund.[47]

IV. Class Representatives Are Each Awarded $50,000.00.

Under Florida law, class action service awards are appropriate compensation for class representatives. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."[48] Class Representatives are "identified as a class litigant in public records (potentially affecting credit reports and disclosures for financing), [are] subject to fiduciary duties to the class, may be deposed and

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[46] Section 57.041 (1), Florida Statutes (2021).

[47] See Affidavit of Non-Taxable Costs.

[48] *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding total incentive awards of $1,200,000.00, or 1.2% of the $93,000,000 common fund); see also e.g. *Weaver v. City of Wildwood*, 22 Fla. L. Weekly Supp. 537b (Fla. 5th Cir. Ct. 2014) (awarding total incentive awards of $5,000, or 1.06% of the $471,682 common fund); *Dreidame v. Village Center Comm. Dev. Dist.*, 2008 WL 7079074 (Fla. 5th Cir. Ct. 2008) (awarding total incentive awards of $300,000, or .7% of the $41,224,168 in monetary benefits); *Frank v. North Broward Hospital District*, 2015 WL 4389917 (Fla. 17th Cir. Ct. 2015) (awarding total incentive awards of $96,000, or 0.69% of the $3,635,000 common fund); *Dewar v. Koesov & Assoc., PA*, 2015 WL 3948560 (Fla. 20th Cir. Ct. 2015) (awarding total incentive awards of $10,000, or 1.13% of the $884,250 common fund); *Allapattah*, 454 F.Supp.2d 1185, 1241 (S.D. Fla. 2006) (awarding total incentive awards of $15,000,000, or 1.5% of the $1.075 billion common fund).

required to produce records, must meet with counsel and appear in court,"[49] and must engage in the litigation proceedings. [50]

Prior to this case, Class Representatives never served as a plaintiff in a class action. In addition to accepting the responsibility of being a class representative in a multimillion-dollar case and subjecting themselves to significant public attention, Class Representatives actively engaged and participated in the prosecution of this case. Class Counsel's billing records show each Class Representative devoted considerable time to this case, including, but not limited to, assisting counsel by providing information necessary to prepare the initial complaint and other pleadings, maintaining regular communication with Class Counsel about case developments to stay apprised of the progress of the litigation, responding to written discovery requests, gathering and producing documents, preparing for depositions, and testifying at trial. Class representatives also faced substantial financial risks because at the beginning of the case they were served with a notice and motion for sanctions under Section 57.105, Florida Statutes and on March 24, 2017, were served with a proposal for settlement. Had the Class Representatives not succeeded in winning the entire case for the entire class, they would have been responsible for the City's attorneys' fees and costs. No evidence against the reasonableness of the service award amount Class Representatives request was presented to the Court. The Court awards service awards to each Class Representative of $50,000.00.[51]

V. The City Shall Refund Each Class Member's Pro Rata Portion of the Illegal Tax.

First Distribution

Within 60 days from the date of this Order, the City shall pay refunds and mail refund checks to all class members, except those class members with an undeliverable address as defined below.

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[49] *Altamonte Springs Imaging, L.C. v. State Farm Mut. Auto. Ins. Co.*, 12 So. 3d 850, 857 (Fla. 3d DCA 2009).
[50] See *Roth v. GEICO General Ins. Co.*, 2020 WL 10818393 at *3 (S.D. Fla. 2020) (citing *Altamonte Springs Imaging, L.C. v. State Farm Mut. Auto. Ins. Co.*, 12 So. 3d 850 (Fla. 3d DCA 2009) ("Florida law permits incentive awards in class actions").
[51] The service award is in addition to each Class Representatives' prorated refund for the illegal tax paid to the City.

Each refund check to each class member shall be equal to 91.5972% of the illegal tax collected from that class member since February 20, 2010, rounded down to the nearest whole cent. For example, if a class member paid $1,000.00 in illegal taxes, then that class member would receive a refund check of $915.97 (1,000 x 0.915972 = 915.972). Prior to mailing each check, the City shall verify each class member's current mailing address through the United States Postal Service, Experian, Xverify, Accurint, or another nationally recognized address verification service. For those class members for which the City cannot verify their last know addresses, the City shall use a claims administration process to allow those class members with unverifiable addresses to receive their refund checks, as detailed more fully below.

The City shall send each check with a notice which states: "The enclosed check represents a refund of over 91% of the illegal tax collected from you by the City of Ocala as part of your utility bill. The City was ordered to pay you this refund as the result of a lawsuit filed against the City by Discount Sleep of Ocala, LLC, d/b/a Mattress Warehouse, and Dale W. Birch. This refund check is only valid for 180 days from the date of issuance." Any checks not cashed after 180 days from the date of issuance are void ("expiration period"). The envelope containing each refund check shall state in bold "Court ordered City of Ocala refund check enclosed."

The City is not obligated to mail checks to class members whose Notice of Final Hearing to Disburse Refunds, Attorneys' Fees, Costs and Class Representative Service Awards was returned by the United States Postal Service as undeliverable. The City shall retain all proof from the United States Postal Service that a class member's mail was returned as undeliverable.

Those class members with an undeliverable address have a right to claim their refunds in writing through the attached claim form or a form substantially similar to the attached form which may be submitted to the City by regular mail or electronic mail. The claims period shall begin July 1, 2022, and end on July 1, 2023. Upon the City's verification that a claimant is a class member owed a refund, the City shall pay the refund owed within 60 days from the day the claim is received in the same manner as

prescribed above. During the claims period, the City shall prominently display on its homepage (ocalafl.org), in English and Spanish, a link which states "City Utility Customer Refund Information" and directs customers to information about the Court ordered refund which shall include a description, in English and Spanish, on how to make a claim and shall include the attached Court approved claim form or a form substantially similar to the attached Court approved form.

The City shall maintain the following information for each refund check: (a) date issued, (b) payee name(s), (c) amount paid, (d), mailing address, and (e) date cashed or cleared ("Class Refund Payment Information").

Second Distribution

Any refunds remaining with the City after the expiration of the claims period, i.e., after July 1, 2023, including funds from uncashed checks, shall be subject to a second distribution to those class members who have cashed their refund checks as part of the "First Distribution." The remaining funds shall be reapportioned and a *pro rata* distribution of up to 8.4028% of the amount said class member paid, for a maximum total of a 100% refund to each class member between the First and Second Distribution. The Second Distribution shall occur within 60 days from the claims expiration period, i.e., after July 1, 2023, in the same manner as the First Distribution herein ordered.

Any refunds remaining with the City after April 30, 2024, shall be applied to the City's general fund for fire services for the benefit of the Class. No later than June 3, 2024, the City shall file with the Court the Class Refund Payment Information and this case shall be closed after a hearing if warranted in the Court's discretion.

The Court hereby,

ORDERS and **ADJUDGES**:

1. Plaintiffs' Motion to Disburse is GRANTED.

2. Within ten (10) days from the date of this Order, the City shall disburse the sum of $6,561,911.70 to Bowen|Schroth from the $79,282,909.44 Common Fund to pay $6,393,188.37 in attorney's fees to Class Counsel, reimburse Class Counsel for $68,723.33 in non-taxable costs, and to pay each Class Representative $50,000.00.

3. The City shall retain $100,000.00 in the Common Fund for Class Counsel's fees, costs and expenses incurred after November 1, 2021, to be disbursed after motion and hearing in the Court's discretion.

4. Within sixty (60) days from the date of this Order, the City shall disburse class member refunds from the remaining $72,620,997.74 in the Common Fund as ordered by the Court.

5. This Court retains jurisdiction to oversee and manage all aspects of this class action case.

DONE and **ORDERED** this 16 day of May, 2022, in Ocala, Marion County, Florida.

ROBERT W. HODGES
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed through the Florida Court's E-portal this 16 day of May, 2022, which will send electronic notice and copies to counsel.

Carolyn Matthews

CLAIM FOR REFUND OF UNLAWFUL FEES

My Name: _____

My Mailing Address: _____

_____

I am aware as a result of litigation in the case of Discount Sleep of Ocala, LLC, et al., v. City of Ocala (Case No. 2014 CA 000426), the City of Ocala was ordered to pay refunds to members of the class certified in that case ("Class").

I attest I am a class member of the Class, and I paid the City of Ocala unlawful fire fees at least once between the dates of February 20, 2010, and July 21, 2020. I request a refund of those unlawful fees I paid. I understand the refund amount will be reduced by the Class members' pro rata share of fees and costs.

The address of the property to which utility service was provided during that time I paid the fire fee was:

_____
Address

_____
City, State, Zip Code

_____
Signature

_____
Printed Name