UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Yvonne Becker, Christopher Nobles, Rosa Ramirez, Valerie Seyler, and Jannien Weiner,

Plaintiffs,

v.

Wells Fargo & Co.; Employee Benefit Review Committee; Wells Fargo Bank, National Association; and John and Jane Does, 1-20,

Defendants.

Case No. 0:20-cv-02016 (KMM/BRT)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSE REIMBURSEMENT, SETTLEMENT ADMINISTRATION EXPENSES, AND CASE CONTRIBUTION AWARDS

CLASS ACTION

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I. INTRODUCTION

In light of the Settlement that they have achieved for the participants of the Wells Fargo & Company 401(k) Plan (the "Plan"), Named Plaintiffs and Class Counsel respectfully petition the Court to approve: (1) attorneys' fees to Class Counsel in the amount of $10,833,333 (one-third of the $32,500,000 Settlement Fund); (2) reimbursement of $180,668 in litigation expenses advanced by Class Counsel; (3) the payment of Settlement Administration Expenses to third parties not to exceed $416,000; and (4) Case Contribution Awards in the amount of $15,000 to each of the Named Plaintiffs who served as Class representatives.[1]

As discussed below, the requested distributions are reasonable and appropriate. Class Counsel's requested one-third (1/3) fee is consistent with the amount typically awarded in complex ERISA cases such as this. *See, e.g., Krueger v. Ameriprise Fin., Inc*., 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) ("In such cases, courts have consistently awarded one-third contingent fees.").[2] Based on extensive work performed by counsel and the substantial recovery they obtained for the Class, this standard one-third fee is amply

[1] The concurrently-filed Memorandum in Support of Plaintiffs' Motion for Final Approval of Settlement ("Final Approval Mem.") sets forth why the Settlement is an excellent result for the Class and should be approved. Capitalized terms shall have the meaning assigned to them in the Class Action Settlement Agreement & Release ("Settlement Agreement") (ECF No. 248-1), unless otherwise specified herein.

[2] *See also, e.g., Tussey v. ABB, Inc*., 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases"); *Kruger v. Novant Health*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter") (citation omitted).

justified on the facts of this case. Indeed, the Independent Fiduciary retained to assess the reasonableness of the Settlement and the requested attorneys' fees concluded that "the fee request is . . . reasonable in light of the effort expended by Plaintiffs' counsel in the Litigation and the amount of the recovery." Yau Decl. Ex. 1 ("Gallagher Report"), at 4.[3]

Likewise, the requested expenses (both litigation and settlement administration expenses) are typical and reasonable in comparison to other cases.[4] Finally, the proposed $15,000 service awards are authorized under the Settlement and smaller than the awards approved in other similar cases in this District.[5] Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions. As of the date of this motion,[6] no Settlement Class member has objected to the proposed attorneys' fees, expense reimbursement, settlement administration expenses or case contribution awards.

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[3] The Declaration of Michelle C. Yau in Support of Plaintiffs' Motion for Final Approval of Settlement and Plaintiffs' Motion for Attorney's Fees, Expense Reimbursements, Settlement Administration Expenses, and Case Contribution Awards ("Yau Declaration" or "Yau Decl."), including Exhibits 1-6, is filed contemporaneously herewith.

[4] *See, e.g.*, *Krueger*, 2015 WL 4246879, at *4 (approving $782,209.69 in expenses); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1069 (D. Minn. 2010) (approving reimbursement of $245,720 in expenses to class counsel).

[5] *See, e.g.*, *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *4 (holding that a $25,000 award for each named plaintiff was appropriate); *Figas v. Wells Fargo & Co.*, No. 08-cv-04546, ECF No. 295 at 2 (Aug. 9, 2011) (holding that a $20,000 award for the named plaintiff was appropriate).

[6] Specifically, as of June 30, 2022, 10 a.m. CT, no objections had been filed to the Settlement nor the requested attorneys' fees, expense reimbursement, settlement administration expenses, or case contribution awards.

Defendants take no position on this motion.[7]

II. BACKGROUND

A. Brief History of Case

1. Summary of the Litigation

On March 13, 2020, Plaintiff Yvonne Becker filed this action in the Northern District of California, where she resides and where Wells Fargo is headquartered. (ECF No. 1 ¶¶ 6, 12-13). Defendants included Wells Fargo, one of the largest financial institutions in the country.

The Complaint alleged that Defendants—fiduciaries of the Plan—breached their ERISA fiduciary duties of prudence and loyalty and violated ERISA's prohibited transactions provisions by, *inter alia*, failing to prudently and loyally select and monitor the Plan's investment options and by picking several Wells Fargo-affiliated funds for the Plan's investment lineup. Plaintiff further asserted that the foregoing ERISA violations resulted in losses to the Class in the form of unnecessarily high fees and/or underperformance.

Defendants filed a motion to transfer the Action to the District of Minnesota on May 8, 2020. (ECF No. 41). That motion was fully briefed on July 3, 2020. (ECF No. 50; *see also* Yau Decl. ¶¶ 7-8). On September 21, 2020, Judge Tigar granted Defendants' motion to transfer venue. (ECF No. 59). Plaintiffs filed a petition for a writ of mandamus on

[7] As stated in the Settlement Agreement, Defendants' position on these matters is that they are left to the sound discretion of the Court. This memorandum of law explains Plaintiffs' views of the Action and Settlement and the statements herein should not be attributed to Defendants.

September 22, 2020, and on October 13, 2020, the Ninth Circuit called for briefing on the writ of mandamus which was completed on November 2, 2020. Yau Decl. ¶¶ 9-10. On April 1, 2021, the Ninth Circuit denied the writ of mandamus. *In re Becker*, 993 F.3d 731 (9th Cir. 2021).

While the mandamus petition was pending, Defendants moved to dismiss the original complaint on February 4, 2021. (ECF No. 97). The motion to dismiss was fully briefed on April 2, 2021 (ECF No. 120), and the Court held oral argument on April 16, 2021 (ECF No. 127). Thereafter, on May 12, 2021, the Court issued a Memorandum Opinion and Order denying Defendants' motion to dismiss. (ECF No. 134).

On June 2, 2021, Plaintiff Becker, joined by Plaintiffs Christopher Nobles and Rosa Ramirez, filed an Amended Class Action Complaint. (ECF No. 143). On September 28, 2021, Plaintiffs Becker, Nobles and Ramirez, joined by Valerie Seyler and Jannien Weiner, also participants in the Plan, filed the operative Second Amended Class Action Complaint. (ECF No. 178).

2. Discovery Undertaken

As discussed in further detail below, over the last 17 months, the Parties have conducted extensive discovery, including the production and review of over 100,000 documents (spanning 1.5 million pages), which totaled 338 gigabytes. Yau Decl. ¶¶ 19-20. By comparison, in a similar case, *Feinberg v. T Rowe Price*, No. 17-cv-00427 (D. Md.), the document discovery totaled just 16 gigabytes. *Id*. Thus, the total documents obtained here is 21 times the volume as in a recent similar case. *Id*.

The Parties also completed depositions of several defense fact witnesses and all five

of the Class Representatives. *Id*. ¶ 23. In the meantime, the Court has held numerous conferences and motion arguments with the Parties and, independently, the Parties have met and conferred over sixty times in an attempt to resolve disputes without motion practice (which was indeed achieved for the vast majority of issues). *Id.* ¶¶ 17-18. Magistrate Judge Thorson has commended the lawyers in the Action for their ability to craft numerous compromises to avoid motion practice and to manage a complex ERISA class action. *Id*.

3. Settlement Negotiations

In November of 2021, the Parties held their first mediation session with Robert A. Meyer, an experienced and highly respected mediator, who has successfully resolved numerous ERISA cases and other class actions. *Id*. ¶ 37. Class Counsel prepared a confidential mediation analysis including detailed liability and loss analyses based on several meetings with Plaintiffs' damages expert. *Id*. Class Counsel also had several pre-mediation meetings and calls with Mr. Meyer. *Id*. Nonetheless, the Parties were unable to resolve the case during the mediation in November, and discovery continued apace. *Id*. ¶ 38.

On January 5, 2022, the Parties engaged in a second all-day mediation supervised by Mr. Meyer, after which the Parties reached an arm's length, class-wide resolution of the matter (subject to this Court's approval). *Id.* ¶ 39. The principal terms of the Settlement were memorialized in a term sheet executed late in the evening of January 5, 2022. *Id*. Thereafter, the Parties negotiated the comprehensive Settlement. *Id*. The terms of the Settlement are memorialized in the Settlement Agreement. ECF 248-1.

B. Settlement Terms and Preliminary Approval

The Settlement provides for a $32.5 million cash payment to resolve all claims alleged in this Action on behalf of the Settlement Class. Settlement Agreement § 3.7. After accounting for any Count-approved attorneys' fees and expenses, Settlement Administration Expenses, Case Contribution Awards, and taxes and tax-related expenses, the Net Settlement Amount will be distributed to eligible Settlement Class members in accordance with the proposed Plan of Allocation. *Id.* § 1.24; ECF No. 248-2 ("POA").[8]

Plaintiffs filed a motion seeking preliminary approval of the Settlement on April 1, 2022. (ECF No. 246). The Court granted that motion on April 25, 2022. (ECF No. 256) ("Preliminary Approval Order"). Plaintiffs are filing the present motion 21 days in advance of the deadline for objections, pursuant the Court's Preliminary Approval Order. *Id.* § 17. To date, no objections to the Settlement or the requested distributions have been received from any member of the Settlement Class. Yau Decl. ¶ 78.

III. WORK PERFORMED TO LITIGATE CASE

A. Work of Class Counsel

The success of this Action was far from preordained. Class Counsel worked for two years—in the face of opposition by a well-funded adversary and sophisticated defense counsel—to litigate this case and overcome numerous challenges. This work is detailed in

[8] Under the Plan of Allocation, Current Participants will have their Plan accounts automatically credited with their settlement payments. POA ¶¶ 16-20. Former Participants will automatically have their settlement payments sent to them by check unless they timely submit a Rollover Form to have their payment deposited in an individual retirement account or other eligible employer plan. *Id.* ¶¶ 21-24.

the accompanying Yau Declaration and Exhibits 3-6 thereto.

1. Work Conducted to Date

Class Counsel vigorously litigated this case on behalf of the Class. Among other things, Class Counsel:

a) conducted an in-depth investigation of the Plan and the Plan's investment options that were affiliated with Wells Fargo prior to filing this action, in which Class Counsel:

- analyzed numerous financial documents concerning the Plan, which were obtained through statutory requests for documents from Wells Fargo, from the Department of Labor or the Securities and Exchange Commission, and financial databases such as Bloomberg (Yau Decl. ¶ 4);
- analyzed the fees and performance of the Wells Fargo proprietary funds in which the Plan was invested and compared those funds to objective benchmarks and other available non-proprietary fund options, in consultation with a damages expert (*id.* ¶¶ 5, 30); and
- reviewed relevant case law (*id.*);

b) drafted and filed the original complaint and two additional amended complaints (*id.* ¶¶ 6, 13);

c) responded to Defendants' motion to transfer, and then filed and briefed a petition for a writ of mandamus with the Ninth Circuit Court of Appeals (*id.* ¶¶ 7-10);

d) successfully opposed Defendants' motion to dismiss, including participating in oral argument on April 16, 2021 (*id*. ¶ 11);

e) conducted fact discovery, in which Class Counsel:

- served forty-nine (49) requests for the production of documents pursuant to Rule 34, thirty-five (35) interrogatories, and forty-nine (49) requests for admission (*id*. ¶ 14);
- met and conferred with Defendants over sixty (60) times in an attempt to resolve disputes without motion practice on, *inter alia*: custodians and search terms; Defendants' initial disclosures; Defendants' discovery responses; Defendants' affirmative defenses; Defendants' privilege logs; and the scope of the Rule 30(b)(6) depositions and fact depositions (*id*. ¶ 17);[9]
- responded to thirty-eight (38) requests for production of documents and twenty-seven (27) interrogatories served by Defendants on the Named Plaintiffs (*id*. ¶ 21);
- served ten (10) third-party subpoenas for documents and one deposition subpoena (*id*. ¶ 15);
- met and conferred at least twenty-five (25) times with counsel for the subpoenaed third parties in an effort to resolve their objections

[9] Magistrate Judge Thorson has commended the lawyers in the Action for their ability to craft numerous compromises to avoid motion practice and to manage a complex ERISA class action. Yau Decl. ¶ 18.

without motion practice (*id*. ¶ 16);

- received, from both Defendants and third parties, approximately 1.5 million pages of documents (*id*. ¶ 19);
- moved to compel further discovery based on disputes that were not resolved during the meet and confer process, including disputes involving search terms and custodians, and Defendants' interrogatory responses (*id*. ¶ 25);
- participated in twelve (12) status conferences/hearings in front of Magistrate Judge Thorson[10] (*id*. ¶ 26);
- employed three (3) full-time attorneys to manage, organize, review and code documents produced in discovery (*id*. ¶ 20);
- took and defended nine (9) depositions and prepared to take five (5) additional depositions during the month of January 2022, had the case not settled (*id*. ¶¶ 23-24);

f) consulted extensively with prospective and retained experts and prepared for expert reports to be served in 2022 (*id*. ¶¶ 29-30);

g) prepared a motion for class certification and brief in support thereof that was due to be filed the day after the second mediation in which the parties reached a signed term sheet (*id*. ¶ 28);

[10] ECF Nos. 80, 86, 116, 133, 155, 160, 184, 186, 190, 220, 243. There is not minute entry for the June 10, 2021, status conference with Magistrate Thorson at 1:30 p.m. CT, which lasted 51 minutes based on the contemporaneous notes of Counsel.

h) prepared a motion to amend the complaint and brief in support thereof that was due the week after the second mediation (*id.* ¶ 27);

i) participated in two full-day mediations with Defendants (*id.* ¶¶ 5, 30); and

j) consulted with the Named Plaintiffs throughout the course of the case (*id.* ¶ 69).

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (a) drafting the Settlement and exhibits thereto; (b) drafting, discussing with Defense Counsel, and revising the Plan of Allocation to ensure that it reflected a fair and administrable methodology for calculating the settlement recovery of Class members; (c) evaluating the data necessary to effectuate the Plan of Allocation and developing a process for updating the data during the settlement administration process; (d) drafting and filing Plaintiffs' Preliminary Approval Motion papers; (e) soliciting and reviewing eight detailed proposals/bids from potential settlement administrators including Angeion, AB Data, Rust, Analytics, JND, Epiq, KCC, and CPT; (f) conducting extensive negotiations with the top three candidates to ensure that the settlement administration expenses were reasonable and known in advance; (g) drafting, editing and reviewing the final drafts of the long form Class Notice, the Summary Class Notice for publication, and Former Participant Rollover Form, and ensuring that they were timely disseminated; (h) working with the Settlement Administrator to create a settlement website and telephone support line for Settlement Class members; (i) communicating with Settlement Class members; (j) communicating with the Independent Fiduciary and providing it with information in connection with its review of the proposed release on

behalf of the Plan; and (k) preparing the present motion and the Final Approval papers. *Id.* ¶ 42.

2. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Among other things, Class Counsel will: (a) draft and file the last Court submission concerning the Settlement due on July 31, 2022; (b) continue to respond to questions from Settlement Class members; (c) attend the Fairness Hearing on August 10, 2022 and address any objections or questions from the Court; and (d) if final approval is granted, supervise the distribution of payments to Settlement Class members. In addition, Class Counsel will continue to take any other actions necessary to support the Settlement until it is Final. *Id.* ¶ 43.

B. Work of Class Representatives

The Named Plaintiffs also have worked to advance the interests of the Class. Among other things, the Named Plaintiffs: (a) reviewed the allegations in the Complaints bearing their names; (b) provided information to counsel in connection with the lawsuit; (c) responded to discovery; (d) were deposed; (e) communicated with Class Counsel regarding the litigation and Settlement; and (f) reviewed the Settlement Agreement. *Id.* ¶ 70. *See also* Declarations of Named Plaintiffs Yvonne Becker, Christopher Nobles, Rosa Ramirez, Valerie Seyler, and Jannien Weiner filed contemporaneously herewith.

C. Work of Settlement Administrator, Escrow Agent, and Independent Fiduciary

In order to be administered and effectuated, the Settlement also requires time, resources, and expertise from several non-parties.

After extensive vetting by Class Counsel and Defendants, Analytics Consulting,

LLC ("Analytics") was selected to be the Settlement Administrator and approved by the Court in its Preliminary Approval Order. *Id.* ¶ 11. Thereafter, Analytics disseminated the Settlement Notices to Class members and established the settlement website and telephone support line. Analytics Decl. ¶¶ 7-17. Analytics also will review the Rollover Forms submitted by Former Participant Class members and coordinate distribution of payments to Class members in the event that the Settlement receives final approval. *Id.* ¶¶ 18-20.

After the consideration of several potential escrow agents, EagleBank was selected as the approved Escrow Agent. Thereafter, EagleBank set up a secure and insured Escrow Account and confirmed receipt of $32.5 million from Wells Fargo on May 10, 2022. Yau Decl. ¶ 67. EagleBank will hold the monies in the Escrow Account while approval of the Settlement and distributions to Settlement Class members are pending. Settlement Agreement § 1.17. Upon final approval, the Escrow Agent will release these funds and Analytics will distribute those funds to Settlement Class members in accordance with the POA. *Id.* §§ 8.1, 9.1-9.2.

Finally, Gallagher Fiduciary Advisors, LLC ("Gallagher")—the Independent Fiduciary—has reviewed the Settlement's terms, the Plan of Allocation, the attorneys' fee request of $10,833,333, the expense reimbursement request, and the proposed Case Contribution Awards of $15,000 requested for each of the Named Plaintiffs and concluded that "[t]he settlement terms, including the scope of the release of claims; the amount of cash received by the [P]lan; the proposed attorney's fee award of one third of the

settlement; and any other sums to be paid from the recoveries, are reasonable[.]"[11] Gallagher Report at 2. This Independent Fiduciary review is called for by DOL regulation PTE 2003-39, which generally requires that a settlement be "reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone." 68 Fed. Reg. 75,632, at 75,636. In addition, it is also required by Section 3.4 of the Settlement Agreement.

D. Requested Attorneys' Fees and Costs, Settlement Administration Expenses, and Class Representative Awards

In consideration of the work summarized above and associated expenses, the Settlement provides that Plaintiffs may seek (1) attorneys' fees; (2) expenses; and (3) Case Contribution Awards for the Class representatives. Settlement Agreement §§ 3.2.5, 11. Accordingly, Plaintiffs seek Court approval of the following distributions in connection with this motion:

- Attorneys' fees: $10,833,333 (one-third of the gross settlement amount);
- Litigation expenses advanced by Class Counsel: $180,668;[12]
- Settlement Administration Expenses (itemized below);
    - Settlement Administrator (Analytics): capped at $400,000, which is 1.2% of the gross settlement fund (Analytics Decl. ¶ 6).

[11] Prior to reaching this conclusion, the Gallagher team reviewed numerous documents related to the litigation and the Settlement, and also interviewed Class Counsel, and Defense Counsel, and the JAMS mediator. Gallagher Report at 1.

[12] The $180,668 in expenses for which reimbursement is sought is based on the expenses detailed in the Yau Decl. ($155,156) and Exhibits 3-6 thereto: Riley Decl. ($14,038), Hoidal Decl. ($10,114), Wasow Decl. ($860), and Stris Decl. ($500).

- Escrow Agent (EagleBank): $500 annually and estimated to be no more than $1,000 (Yau Decl. ¶ 67).
- Independent Fiduciary (Gallagher): $15,000 (*Id.* ¶ 68);

- Case Contribution Awards to Class representatives: $15,000 each ($75,000 total).

IV. ARGUMENT

A. Standard of Review

When counsel obtain a settlement for a class, courts "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the requested distributions are authorized both under the Settlement, *see supra* Section III.D, and by applicable law.

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) (collecting cases). Likewise, "reasonable expenses of litigation" may be recovered from a common fund, *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391–92 (1970), as well as administrative expenses of settlement, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008) (finding that costs paid to settlement administrator are "expenses that would normally be charged to a fee paying client" and thus recoverable in connection with a class settlement) (citation omitted). Finally, class representative service awards may be awarded in ERISA cases to

compensate class representatives for their time and effort. *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017). In summary, the requested distributions are customary in a class action suit such as this and should be approved for the reasons set forth below.

B. The Court Should Approve the Requested Attorneys' Fees

1. The Eighth Circuit Favors the Percentage-of-the-Fund Approach in Common Fund Cases

There are two accepted methods for awarding fees to plaintiffs' counsel whose efforts create a common fund for the benefit of class members: the percentage-of-the-fund method and the lodestar/multiplier method. *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). Although district courts have the discretion to employ either method, *see id.*, the Eighth Circuit has cited with approval the Report of the Third Circuit Task Force on court-awarded attorneys' fees, which recommended use of the percentage method in common fund cases such as this. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 (8th Cir. 1996) (citing *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force (Arthur R. Miller, Reporter) 108 F.R.D. 237 (1985)) ("the Task Force recommended that the percentage of the benefit method be employed in common fund situations").

Thus, "[t]he 'percentage-of-the-fund' method is the preferred method for calculating attorney's fees in common fund actions in this Circuit." *Cromeans v. Morgan, Keegan & Co., Inc.*, 2015 WL 5785576, at *2 (W.D. Mo. Sept. 16, 2015), report and recommendation adopted, 2015 WL 5785508 (W.D. Mo. Oct. 2, 2015); *see also West v. PSS World Med., Inc.*, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (citing *Johnston*, 83 F.3d at 244-46) ("[T]he Eighth Circuit has held that in common fund cases such as this

one, where attorney fees and class members' benefits are distributed from one fund, a percentage-of-the-benefit method may be preferable to the lodestar method for determining reasonable fees.").

District courts have discretion to use the lodestar method to "cross-check" the reasonableness of a percentage fee but are not required to do so. *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017) ("Although not required to do so, the court verified the reasonableness of its award by cross-checking it against the lodestar method."). Ultimately, it makes no difference here because the fee requested is reasonable under both the percentage-of-the-fund and lodestar/multiplier approaches.

2. Class Counsel's Request for a One-Third (1/3) Fee Is Reasonable

Class Counsel's fee request of $10,833,333 represents one-third (1/3) of the Settlement Fund ($32,500,000), and a modest multiplier of approximately 1.6 on Class Counsel's lodestar ($6,762,251). Both the fee percentage and the multiplier are well within the range approved by the Eighth Circuit in other class actions. *See Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (approving fee of 1/3 of the settlement fund, representing a 1.82 multiplier) ("[T]he award was in line with other awards in the Eighth Circuit. Indeed, courts have frequently awarded attorneys' fees ranging up to 36% in class actions."); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming 36% fee); *Krueger*, 2015 WL 4246879, at *1 (awarding fee of one-third of settlement fund in ERISA case); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1065 (D. Minn. 2010) (awarding 33% fee and 2.26 multiplier); *see also Rawa*, 934 F.3d at 870-71 (approving 5.3 multiplier—more than three times the multiplier requested here).

Moreover, the relevant factors for analyzing attorneys' fees also support approval of the requested amount. Specifically, courts in this District consider the following factors in assessing the reasonableness of a percentage fee award:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Krueger, 2015 WL 4246879, at *1 (quoting *Yarrington*, 697 F. Supp. 2d at 1062). Each of these factors supports the reasonableness of the requested fee.

a. The Benefit Conferred on the Class

As discussed in Plaintiffs' Motion for Final Approval, the Settlement represents an enormous benefit to the Class. The Settlement recovery of $32.5 million is substantial not only in absolute dollars, but also as a percentage of the value of claims as it recovers 40% of all alleged fee damages estimated by Plaintiffs' damages expert. ECF No. 248 (Yau Decl. in Supp. of Mot. for Prelim. Approval) ¶ 27. This is an exceptionally high percentage recovery in a complicated ERISA case with significant litigation risk. *See, e.g.*, *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *5-6 (N.D. Cal. May 11, 2018) (approving a $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages.") (citation omitted).[13]

[13] *See also Toomey v. DeMoulas Super Markets, Inc.*, No. 19-cv-11633, ECF No. 95 at 10 (D. Mass, Mar. 24, 2021), approved at ECF No. 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Beach v. JPMorgan Chase Bank, N.A.*, No. 17-cv-00563, ECF No. 211 (S.D.N.Y. May 22, 2020), approved

Moreover, Defendants' view is that, even if Plaintiffs prevailed on their claims, Plaintiffs are not entitled to the $81 million in alleged fee damages because Plaintiffs may not seek the entire fee amounts the Plan paid; rather the only plausible damages are the fees retained by Wells Fargo. Yau Decl. ¶¶ 33-34, Defendants argue that, for the following Funds, all fees were paid to third parties and not kept by Wells Fargo (or were paid by Wells Fargo and not paid by the Plan at all): Wells Fargo State Street Target CITs,[14] Wells Fargo Causeway CIT, Wells Fargo Federated CIT, and Wells Fargo Stable Value Fund. Thus, in Defendants' view, there are zero fee damages for those CITs. *Id.* With respect to the Wells Fargo Emerging Growth and Wells Fargo Money Market Fund fees, Defendants argue that, even if Plaintiffs prevailed on their claims, Plaintiffs are only entitled to the profits Wells Fargo obtained from these fees, not the entire fee. *Id.* If both these arguments were credited, then Plaintiffs' damages expert estimated that the value of the alleged fee damages would be just $15 million. *Id.* While Plaintiffs believe in their damages experts' analysis that the alleged fee damages were indeed $81 million, there are substantial risks that Defendants' damages theories could prevail, which would result in a recovery of as low as $15 million. In the face of a potential recovery as low as $15 million—assuming

2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (16% of alleged losses); *Price v. Eaton Vance Corp.*, No. 18-cv-12098, ECF No. 32 at 12 (D. Mass. May 6, 2019), approved at ECF No. 57 (D. Mass. Sept. 24, 2019) (23% alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858, at *7 (C.D. Cal. July 30, 2018) (25% of estimated losses). *See also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses") (citation omitted).

[14] "CIT(s)" refers to Collective Investment Trust(s).

Plaintiffs first prevailed on class certification and liability—a settlement of $32.5 million represents a truly remarkable recovery.

b. The Risk to Which Class Counsel Was Exposed

Class Counsel faced significant risk in bringing this litigation on behalf of the Class. Prior to the present action, another case involving ERISA claims against Wells Fargo for the use of proprietary funds in its 401(k) plan was dismissed. *See Meiners v. Wells Fargo & Co.*, 2017 WL 2303968 (D. Minn. May 25, 2017), *aff'd*, 898 F.3d 820 (8th Cir. 2018). Moreover, a similar case against American Century arising from the use of proprietary funds in its 401(k) plan resulted in a bench ruling in favor of the defendants at trial, after the plaintiffs (like the Plaintiffs here) had defeated a motion to dismiss. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019).[15]

Because Class Counsel took this matter on a fully contingent basis, they risked non-payment for over 10,000 hours of work (worth over $6.7 million in attorneys' fees), and non-reimbursement of nearly $200,000 in out-of-pocket expenses, had the case been unsuccessful. The substantial risk that Class Counsel's work could have gone

[15] In other ERISA cases involving allegations of improper selection and/or retention of investment options, post-trial judgments also have generally favored defendants. *See Reetz v. Lowe's Cos., Inc.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021) (post-trial judgment in favor of Defendant Aon Hewitt on all claims); *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017) (post-trial judgment in favor of defendants on all claims), *aff'd in part, vacated in part, remanded*, 907 F.3d 17 (1st Cir. 2018); *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892 (S.D. Fla. Aug. 7, 2007) (judgment entered against plaintiffs and in favor of defendants on all claims). *Cf. Ramos v. Banner Health*, 461 F. Supp. 3d 1067 (D. Colo. 2020) (post-trial judgment in favor of defendants on all counts except failure to monitor recordkeeping costs, but rejecting plaintiffs' expert's damages estimate of $19.4 million and awarding just $1.7 million in damages), *aff'd, Ramos v. Banner Health*, 1 F.4th 769, 774 (10th Cir. 2021).

uncompensated (and their expenses unreimbursed) further supports the requested fee and modest multiplier. *See Caligiuri*, 855 F.3d at 866 (affirming one-third fee and multiplier of "less than two" where "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk") (citation omitted); *Yarrington*, 697 F. Supp. 2d at 1066-67 (finding 33% fee and "modest 2.26 multiplier" reasonable where "Class Counsel took this case on a contingency basis, working without pay for nearly six years.").

c. The Difficulty and Novelty of the Legal and Factual Issues

The difficulty and novelty of the issues in this case also support the requested fee. As Judge Susan Richard Nelson observed in a similar case in this District (also involving proprietary funds), "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger*, 2015 WL 4246879, at *1. Due to their complexity, ERISA cases like this can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time).[16] "Given the risk, the difficulty and novelty of the issues involved, and Class Counsel's demonstrated willingness to pursue this action for four years of intense, adversarial litigation . . . these factors also weigh in favor of Plaintiffs' fee request." *Krueger*, 2015 WL 4246879, at *1; *see also Schultz v. Edward D. Jones & Co., L.P.*, 2019 WL 7833682, at *1 (E.D. Mo. Apr. 22, 2019), *aff'd*

[16] *See also Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on September 11, 2006).

sub nom. McDonald v. Edward D. Jones & Co., L.P., 791 F. App'x 638 (8th Cir. 2020) (citing "the complexities of ERISA class litigation" in awarding 1/3 fee and 1.6 multiplier).

d. The Skill of the Lawyers

To effectively prosecute a complex ERISA action such as this, counsel must have "specialized knowledge and expertise." *Pledger v. Reliance Tr. Co.*, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021); *see also Savani v. URS Pro. Sols. LLC*, 121 F. Supp. 3d 564, 573 (D.S.C. 2015) ("Very few plaintiffs' firms possess the skill set or requisite knowledge base to litigate . . . class-wide, statutorily-based claims for pension benefits"). Class Counsel here were well-suited for the challenge.

Cohen Milstein Sellers & Toll, PLLC ("Cohen Milstein") is a national leader in class action litigation and has a dedicated ERISA practice that is also nationally recognized. Yau Decl. ¶¶ 72-73. Cohen Milstein has been named as one of the ten "Most Feared Plaintiffs Firms" by Law360, and its dedicated group of ERISA class action specialists has been named Employee Benefits Practice Group of the Year two of the last three years. *Id.* In numerous cases, Cohen Milstein has achieved excellent results for its clients. *Id.* ¶ 74; ECF No. 248-3 (Cohen Milstein resume). Lead counsel Michelle Yau chairs the ERISA practice group at Cohen Milstein and was named a MVP in the area of Employee Benefits by Law360. *Id.* ¶ 73; *see also id.* Ex. 2 (Law360 article entitled *MVP: Cohen Milstein's Michelle C. Yau*). Ms. Yau began her career as an Honors attorney at the Department of Labor and has specialized in ERISA fiduciary breach cases involving complex financial transactions or investments for the last two decades. *Id*. She is a frequent speaker on ERISA issues, appearing on panels for the American Bar Association, the Practicing Law Institute,

and others. *Id.*

Keller Rohrback LLP ("Keller Rohrback") has played a major role in developing the law and recovering hundreds of millions of dollars for retirement plan participants nationwide through ERISA class actions. In addition to litigating ERISA cases, lawyers at Keller Rohrback have testified before Congress, served as editors of numerous employee benefits books and manuals, and written ERISA articles, amicus briefs, and comments to regulatory agencies overseeing ERISA plans. Erin Riley, the lead partner from Keller Rohrback in this Action, has been practicing ERISA for over 20 years. She has worked on numerous ERISA-related articles and amicus briefs, frequently speaks at employee benefits conferences, is the lead editor (employee/retiree-side) of the principal ERISA treatise (Employee Benefits Law), and was elected by the Board of Governors of the American College of Employee Benefits Counsel, one of the highest honors for ERISA counsel. *Id.* Ex. 3 (Declaration of Erin M. Riley); ECF No. 248-4 (Keller Rohrback resume).

Zimmerman Reed LLP ("Zimmerman Reed") is a nationally recognized leader in complex and class action litigation, including ERISA cases, and has been appointed as lead counsel in some of the largest and most complex cases in the District of Minnesota and in federal courts across the country. June Hoidal is the lead partner from Zimmerman Reed in this Action and is the co-chair of the firm's Public Client practice group. She brings a depth of experience representing individuals who suffer losses as a result of securities, consumer protection, and antitrust violations, including previously securing a settlement for investors alleging losses due to Wells Fargo's securities lending program. *Id.* Ex. 4

(Declaration of June M. Hoidal); ECF No. 248-5 (Zimmerman Reed resume).

Class counsel's experience and skill were instrumental in successfully opposing Defendants' motion to dismiss, pushing the case through discovery, and negotiating the present settlement on terms that were favorable to the Class. "Class Counsel's unique experience representing plaintiffs like Class Members in this case supports Plaintiffs' fee request." *Pledger*, 2021 WL 2253497, at *7.

e. The Time and Labor Involved

Class Counsel have invested substantial time and effort in this litigation. As discussed above, this included (1) extensively investigating the claims that were asserted; (2) preparing the initial complaint and subsequent amended pleadings; (3) litigating a motion to transfer; (4) successfully opposing a motion to dismiss; (5) preparing and responding to written discovery requests; (6) reviewing of over 1.5 million pages of documents; (7) taking multiple depositions; (8) defending the depositions of each of the Named Plaintiffs; (9) meeting and conferring with Defendants sixty (60) times regarding various discovery issues; (10) appearing at a dozen hearings with Magistrate Judge Thorson; (11) consulting with experts; (12) attending two full-day mediation sessions; (13) preparing additional motion papers that were imminently due in the event the second mediation failed; (14) negotiating the Settlement Agreement; (15) preparing Plaintiffs' preliminary approval motion papers; (16) soliciting bids for settlement administration and overseeing the administration of the Settlement; and (17) consulting with the Named Plaintiffs and answering questions from Class members. *See supra* Section III.A. As of the date of this motion, Class Counsel have collectively dedicated over 10,000 hours to the

case, resulting in a total lodestar of $6,762,251. The requested fee therefore represents a modest multiplier of 1.6 (to account for contingent fee risk), which is well within acceptable bounds. *See supra* Section IV.B.2 (intro); *infra* Section IV.B.3. Moreover, additional work remains to be done before final approval can be granted, monies can be distributed, and the matter can be resolved. This further demonstrates the reasonableness of the requested fee.

f. The Reaction of the Class (and the Independent Fiduciary)

The reaction of Class members to the Settlement has been quite positive so far. There are 575,109 Settlement Class members who were sent individual notice of the Settlement, which included information regarding the proposed attorneys' fees. Analytics Decl. ¶ 8; Ex. 1 (court approved Class Notice). To date, not a single one of them has filed an objection to the Settlement or the proposed attorneys' fees. *Id.* ¶ 21. Moreover, in all of the calls and emails that Class Counsel has had with Settlement Class members thus far, no one has expressed concerns with any aspect of the Settlement or the proposed attorneys' fees. *Id.* "That this sizeable class did not give rise to a single objection on the fees request further justifies the full award." *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1340 (S.D. Fla. 2007); *see also In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (lack of objections is "strong evidence of the propriety and acceptability" of fee request) (quoting *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992)).[17]

[17] In the event that any objections are filed after the date of this motion, Plaintiffs will address them in due course.

Further, as part of its Independent Fiduciary review, Gallagher concluded that "[t]he fee request is . . . reasonable in light of the effort expended by Plaintiffs' counsel in the Litigation and the amount of the recovery." Gallagher Report at 4. This additionally confirms the reasonableness of the requested fee.

g. Percentages Awarded in Similar Cases

In this Circuit, attorneys' fees of one-third (1/3) of the Settlement Fund are the norm in ERISA class actions. *See, e.g.*, *McDonald v. Edward D. Jones & Co., L.P.*, 791 F. App'x 638, 640 (8th Cir. 2020) (affirming judgment that awarded the class counsel attorneys' fees of 1/3 of the settlement fund); *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases"); *Krueger*, 2015 WL 4246879, at *2 ("In such cases, courts have consistently awarded one-third contingent fees."). The same is true in other circuits. *See, e.g.*, *Cates v. Trs. of Columbia Univ. in City of N.Y.*, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) (collecting ERISA cases with one-third fee awards) ("Courts in this District routinely approve fee awards of one-third of the common fund or more."); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *12 (E.D. Pa. Feb. 28, 2020) ("In complex ERISA cases, courts in this Circuit and others also routinely award attorneys' fees in the amount of one-third of the total settlement fund."); *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020) ("In numerous prior settlements of 401(k) fee cases, class counsel have been awarded one-third of the monetary recovery to the plans."); *Kruger v. Novant Health*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA

401(k) fee case such as this matter") (citation omitted); *Will v. Gen. Dynamics Corp*., 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The Court finds that the market for complex plaintiffs' attorney work in this [ERISA] case and similar cases is a contingency fee. The Court further agrees that a one-third fee is consistent with the market rate.").

In awarding a one-third attorneys' fees request Judge Nelson explained "class counsel's fees should reflect the important public policy goal of 'providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.'" *Larson v. Allina Health Sys.*, 2020 WL 2611633, at *2 (D. Minn. May 22, 2020) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000)). She further noted that "[w]hile court-awarded fees must be reasonable, if they are set too low, there will be insufficient incentive for attorneys to bring large class action cases." *Id.* (citing *In re Veeco Instruments Inc. Sec. Litig*., 2007 WL 4115808, at *3, 8 (S.D.N.Y. Nov. 7, 2007)). Thus, the percentage fee awards in similar ERISA cases, both in this Circuit and in others, further support Class Counsel's request for a one-third (1/3) fee.

3. A Lodestar "Cross-Check" Confirms the Reasonableness of the Fee

In this Circuit, district courts may, but need not, perform a lodestar "cross-check" to assess the reasonableness of a percentage fee. *Keil*, 862 F.3d at 701. Here, a lodestar cross-check further supports Class Counsel's fee request.

As noted above, Class Counsel have invested over 10,000 hours investigating and

litigating this matter, for a total lodestar of $6,762,251 at their normal billing rates.[18] Given the fact that Class Counsel undertook the representation on a contingent fee basis, the associated multiplier of 1.6 is reasonable. *See Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 951 (D. Minn. 2016) ("[T]he percentage approach typically yields a fee some number of times higher than that revealed by the lodestar method. Such a multiplier is justified for a number of reasons, including the risks inherent in contingent-fee litigation, which is the typical manner in which class actions are started.") (citations omitted).

The Eighth Circuit has held that a "multiplier of less than two . . . is below the range of multipliers commonly accepted in other cases" and "well within the range of multipliers awarded in this circuit." *Caligiuri*, 855 F.3d at 866 (citation omitted). Accordingly, courts in this District and elsewhere in the Eighth Circuit have repeatedly approved multipliers in ERISA cases similar to the multiplier sought here. *See, e.g.*, *Lechner v. Mut. of Omaha Ins. Co.*, 2021 WL 424421, at *2 (D. Neb. Feb. 8, 2021) (approving one-third fee representing 1.88 multiplier); *Schultz*, 2019 WL 7833682, at *1 (approving one-third fee representing 1.6 multiplier); *Yarrington*, 697 F. Supp. 2d at 1067 (D. Minn. 2010) (approving 33% fee

[18] The hourly rates used to calculate Cohen Milstein's lodestar have been found to be "reasonable given Class Counsel's experience." *Baird v. BlackRock Inst'l Tr. Co., N.A.*, 2021 WL 5113030, at *7 (N.D. Cal. Nov. 3, 2021). This is also true of Keller Rohrback's and Zimmerman Reed's lodestar. *See Beach v. JPMorgan Chase Bank*, No. 17-cv-563, ECF No. 232 (S.D.N.Y. Oct. 7, 2020) (awarding Keller Rohrback's then-current attorneys' rates between $400 and $1,035 in lodestar crosscheck, detailed in ECF No. 225-6); *In re: CenturyLink Sales Pracs. & Sec. Litig.*, 2020 WL 7133805, at *13 (D. Minn. Dec. 4, 2020) (finding that Zimmerman Reed's rates of $450–$895 "appear reasonable for this District" in granting attorneys' fee motion). And these rates are in line with the rates approved by this Court and other courts in similar actions. *See Pledger*, 2021 WL 2253497, at *7 (adopting rates of $490 to $1,060 per hour based on years of experience). *See also* Yau Declaration and Exhibits 3-6 thereto.

representing "modest 2.26 multiplier" as "reasonable, given the risks of continued litigation, the high-quality work performed, and the substantial benefit to the Class"); *Xcel Energy*, 364 F. Supp. 2d at 1002 (awarding 2.16 multiplier to ERISA counsel). Indeed, courts in the Eighth Circuit have approved multipliers of at least 5.6—more than three times the multiplier sought in this case. *See Nelson v. Wal-Mart Stores, Inc.*, 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009) (approving multiplier of 2.5 and citing cases within the Eighth Circuit approving multipliers of up to 5.6).

As demonstrated above, Class Counsel here took on a case that posed substantial risk, performed high-quality work, and achieved an excellent result for the Class. Under these circumstances, a modest multiplier of 1.6 is more than reasonable. Moreover, the lodestar figure understates the amount of time Class Counsel will devote to this case, as Class Counsel will need to spend additional time preparing for and attending the Fairness Hearing and overseeing the administration of the Settlement, and that time is not included in the lodestar figure. Thus, the actual multiplier on a one-third (1/3) fee ultimately will be less than 1.6.

C. Plaintiffs' Litigation Expenses and Settlement Administration Expenses Are Reasonable and Should Be Reimbursed

The Court also should approve the requested litigation expenses. "It is well established that counsel who create a common fund like the one at issue are entitled to the reimbursement of litigation costs and expenses, which include such things as expert witness costs, mediation costs, computerized research, court reports, travel expenses, and copy, telephone, and facsimile expenses." *Krueger*, 2015 WL 4246879, at *3; *see*

also Yarrington, 697 F. Supp. 2d at 1067 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.") (citation omitted); *In re Resideo Techs., Inc., Sec. Lit.*, 2022 WL 872909, at * 7 (D. Minn. Mar. 24, 2022) ("Counsel in common fund cases may recover those expenses that would normally be charged to a fee paying client.") (citation omitted).

Here, Class Counsel advanced $180,668 in out-of-pocket litigation expenses in prosecuting this action. These expenses are fully documented in the Yau Declaration and exhibits which are submitted in connection with this motion. The reimbursed expenses are all charges that are reflected in the accounting records maintained by Class Counsel and are the type of expenses for which attorneys routinely charge their hourly clients. Accordingly, they should be reimbursed here. The expenses include, for example: costs associated with expert witnesses, mediation fees, court filing fees, deposition expenses, costs connected with the creation and maintenance of an electronic database for documents, online research fees, photocopying, postage, and travel expenses. These are precisely the types of expenses that have been approved in other cases. *Id.* at *7-8. Moreover, the total amount sought, $180,668, is less than in other complicated ERISA class actions. *See Krueger*, 2015 WL 4246879, at *4 (approving $782,209.69 in expenses); *Yarrington*, 697 F. Supp. 2d at 1069 (approving reimbursement of $245,720 in expenses to class counsel). All of these expenses were reasonably and necessarily incurred in the prosecution of this litigation and should be reimbursed.

The requested settlement administration expenses also are reasonable. The

Settlement Notice, website and telephone support, and payment distribution services provided by Analytics are essential to carry out the Settlement. The cost of providing those services has been capped at $400,000[19] and is reasonable given that (i) it reflects just 1.2% of the value of the gross settlement fund; (ii) it is comparable to the settlement administration costs approved by other courts in similar ERISA class settlements; and (iii) it was based on a competitive bidding process including eight other well-known settlement administration firms. *See Reetz v. Lowe's Cos., Inc.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021) (approving settlement administration costs of $160,545, reflecting 1.3% of the gross settlement value). The Escrow Agent expense of $500 annually ($1,000 in total) is also reasonable as it represents just 0.003% of the gross settlement fund, and it is in line with escrow expenses approved in similar class cases. *See Intravaia v. Nat'l Rural Elec. Coop. Ass'n*, No. 19-cv-00973, ECF No. 114 ¶ 3 (Feb. 25, 2021) (finding $2,500 fee for Escrow Agent to be reasonable in connection with handling of $10 million settlement fund, or 0.025%). Finally, review of the Settlement by the Independent Fiduciary is required by DOL regulations and is deemed to be a "critically important" benefit to plan participants. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 139 (S.D.N.Y. 2010). The fee for the Independent Fiduciary's services here ($15,000) is in line with or lower than fees approved for similar services in other ERISA class actions. *See Intravaia*, No. 19-cv-00973, ECF No. 114 ¶ 3 (approving $40,000 fee for independent fiduciary).

[19] Analytics Decl. ¶ 6 ("As part of [the] bidding process, Analytics agreed to 'cap' settlement administration costs at $400,000 for this Settlement to provide Class Counsel certainty.").

Accordingly, the requested Settlement Administration Expenses, not to exceed $416,000, should be approved.

D. The Case Contribution Awards for the Class Representatives Are Reasonable

Finally, Plaintiffs respectfully request Case Contribution Awards in the amount of $15,000 each for their service as Class representatives. "Courts often grant service awards to named plaintiffs in class action suits to 'promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.'" *Caligiuri*, 855 F.3d at 867 (quoting *Yarrington*, 697 F.Supp.2d at 1068); *see also Hashw*, 182 F. Supp. at 951 ("Courts have recognized the propriety of such awards, for without a named plaintiff there can be no class action.") (citation omitted). In evaluating such awards, courts in this District consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Krueger*, 2015 WL 4246879, at *3 (citations omitted).

Based on these factors, the requested service awards are reasonable. The Settlement provides significant benefits to the Class, those benefits could not have been achieved without the Named Plaintiffs' participation, and the significant time and effort they expended in support of the litigation. Among other things, this included producing documents and responding to interrogatories, sitting for depositions, keeping abreast of major case developments through consultation with Class Counsel, and weighing the merits of the proposed Settlement.

The awards requested here are less than those awarded in this District in comparable

ERISA cases. *See, e.g.*, *Krueger*, 2015 WL 4246879, at *4 (awarding $25,000 to each class representative in ERISA case); *Figas v. Wells Fargo & Co.*, No. 08-cv-04546, ECF No. 295 at 2 (Aug. 9, 2011) (awarding $20,000 to named plaintiff). Moreover, the Case Contribution Awards for all five Named Plaintiffs, taken together, amount to just 0.23% of the $32.5 million Settlement, and thus will not materially impact the recovery of the absent Class members. This further supports approval of the requested awards in this case.

V. CONCLUSION

For all of the reasons set forth above, Plaintiffs respectfully request that the Court grant their motion and approve the requested attorneys' fees, expense reimbursements, Settlement Administration Expenses, and Case Contribution Awards.

Dated: June 30, 2022

By: */s/ Michelle C. Yau*

COHEN MILSTEIN SELLERS & TOLL PLLC
Michelle C. Yau, *pro hac vice*
Ryan A. Wheeler, *pro hac vice*
1100 New York Ave. NW, Suite 500
Washington, DC 20005
Tel: (202) 408-4600
myau@cohenmilstein.com
rwheeler@cohenmilstein.com

ZIMMERMAN REED LLP
June P. Hoidal (MN No. 033330X)
Charles R. Toomajian (MN No. 0397879)
1100 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
Tel: (612) 341-0400
june.hoidal@zimmreed.com
charles.toomajian@zimmreed.com

KELLER ROHRBACK L.L.P.
Erin Riley, *pro hac vice*
1201 Third Ave, Suite 3200
Seattle, WA 98101
Tel: (206) 623-1900
eriley@kellerrohrback.com

Counsel for Plaintiffs and the Preliminarily Approved Settlement Class