UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Rita Kohari, John Radolec, and Mohani Jaikaran, individually and as representatives of a class of similarly situated persons, and on behalf of the MetLife 401(k) Plan (f/k/a the Savings and Investment Plan for Employees of Metropolitan Life and Participating Affiliates),

Plaintiffs,

v.

MetLife Group, Inc., Metropolitan Life Insurance Company, the MetLife Group Benefit Plans Investment Advisory Committee, the Employee Benefits Committee of MetLife Group, Inc., and John and Jane Does 1-20,

Defendants.

Case No. 1:21-cv-6146-JHR-KHP

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CASE CONTRIBUTION AWARDS

TABLE OF CONTENTS

TABLE OF CONTENTS ..... **ii**

TABLE OF AUTHORITIES ..... **iv**

INTRODUCTION **1**

BACKGROUND **2**

I. PROCEDURAL HISTORY 2

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL 3

III. WORK OF CLASS COUNSEL 4

A. Work Conducted to Date 4

B. Remaining Work to Be Performed 5

C. Work of the Class Representatives 6

D. Work of the Administrator, Escrow Agent, and Independent Fiduciary 6

IV. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT 7

ARGUMENT **8**

I. STANDARD OF REVIEW 8

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES 9

A. The Requested Fee is Reasonable in Light of the Time and Labor Expended by Class Counsel 10

B. The Magnitude and Complexity of the Litigation Support the Requested Fee 12

C. Class Counsel Assumed Significant Risks in this Litigation 12

D. Class Counsel Provided High-Quality Representation 14

E. The Requested Fee Is Reasonable in Relation to the Settlement 15

F. Public Policy Supports the Requested Fee 16

III. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES 17

A. The Litigation Expenses Are Reasonable 17

B. The Settlement Administrative Expenses Are Reasonable 18

IV. THE COURT SHOULD APPROVE THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS 19

V. THERE HAVE BEEN NO OBJECTIONS TO THE PROPOSED DISTRIBUTIONS 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Abbott v. Lockheed Martin Corp., No. 06-CV-701, 2015 WL 4398475 (S.D. Ill. July 17, 2015) 11

Andrus v. New York Life Ins. Co., No. 16-Civ.-05698 (S.D.N.Y. June 15, 2017) (ECF No. 83) 16, 19

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) 16

Beach v. JPMorgan Chase Bank, Nat'l Ass'n, No. 17-CV-00563 (S.D.N.Y. Oct. 7, 2020) (ECF No. 232) 16

Beesley v. Int'l Paper Co., No. 06-CV-703, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014) 18, 19

Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm., 504 F. Supp. 3d 265 (S.D.N.Y. 2020) 12, 13, 17, 20

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 8

Carrigan v. Xerox Corp., No. 21-CV-1085, 2024 WL 1639535, at *1 (D. Conn. Apr. 16, 2024) 18

Cates v. Trs. of Columbia Univ., No. 16-CV-06524, 2021 WL 4847890 (S.D.N.Y. Oct. 18, 2021) 1, 16

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 13,14

Clark v. Duke Univ., No. 16-CV-1044, 2019 WL 2579201 (M.D.N.C. June 24, 2019) 15

Clark v. Oasis Outsourcing Holdings Inc., No. 18-CV-81101 (S.D. Fla. Dec. 20, 2018) (ECF No. 23) 16

Dardaganis v. Grace Cap. Inc., 889 F.2d 1237 (2d Cir. 1989) 13

Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704 (2d Cir. 2023) 8, 14

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Hensley v. Eckerhart, 461 U.S. 424 (1983) 10

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In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110 (S.D.N.Y. 2009) 14

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In re M&T Bank Corp. ERISA Litig., No. 16-CV-375 (W.D.N.Y. Sept. 3, 2020) (ECF No. 190) 16

In re Marsh ERISA Litig., 265 F.R.D. 128 (S.D.N.Y. 2010) ..... *passim*

In re Rite Aid Corp. Secs. Litig., 396 F.3d 294 (3d Cir. 2005) 20

In re Vitamin C Antitrust Litig., No. 06-MD-1738, 2012 WL 5289514 (E.D.N.Y. Oct. 23, 2012) 17, 18

Johnson v. Fujitsu Tech. & Bus. of Am., Inc., No. 16-CV-03698, 2018 WL 2183253 (N.D. Cal. May 11, 2018) 11

Karpik v. Huntington Bancshares Inc., No. 17-CV-1153, 2021 WL 757123 (S.D. Ohio Feb. 18, 2021) 14, 16

Kohari v. MetLife Grp., Inc., No. 21-Civ.-6146, 2022 WL 3029328 (S.D.N.Y. Aug. 1, 2022) 2, 5

Kruger v. Novant Health, Inc., No. 14-CV-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) 11, 15

Larson v. Allina Health Sys., No. 17-CV-03835, 2020 WL 2611633 (D. Minn. May 22, 2020). 16

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Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) 9

Moreno v. Deutsche Bank Ams. Holding Corp., No. 15-Civ.-09936 (S.D.N.Y Mar. 7, 2019) (ECF No. 348) 18

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Reetz v. Lowe's Cos., Inc., No. 18-CV-00075, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021) ... 13

Rozo v. Principal Life Ins. Co., No. 14-CV-00463, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021) 13

Sacerdote v. New York Univ., 328 F. Supp. 3d 273 (S.D.N.Y. 2018) 13

Sims v. BB&T Corp., No. 15-CV-732, 2019 WL 1993519 (M.D.N.C. May 6, 2019) 11, 15, 16

Solis v. OrthoNet LLC, No. 19-CV-4678, 2021 WL 2678651 (S.D.N.Y. June 30, 2021) 11

Spano v. Boeing Co., No. 06-CV-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016) 11, 18

Stevens v. SEI Invs. Co., No. 18-4205, 2020 WL 996418 (E.D. Pa. Feb. 28, 2020) 16

Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini, 258 F. Supp. 2d 254 (S.D.N.Y. 2003) ... 19

Tussey v. ABB, Inc., No. 06-CV-04305, 2019 WL 3859763 (W.D. Mo. Aug. 16, 2019) 15, 18, 20

Vellali v. Yale Univ., No. 16-CV-1345 (D. Conn. July 13, 2023) 13, 14

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Wildman v. Am. Century Servs., LLC, 362 F. Supp. 3d 685 (W.D. Mo. 2019) 13

Yuzary v. HSBC Bank USA, N.A., No. 12 Civ. 3693, 2013 WL 5492998 (S.D.N.Y. Oct. 2, 2013) 10

Statutes, Rules, & Regulations

Amendment to the Prohibited Transaction Exemption, 75 Fed. Reg. 33830 (June 15, 2010) 7

Fed. R. Civ. P. 23(h) 8

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INTRODUCTION

In this ERISA class action, Plaintiffs and Class Counsel[1] obtained a settlement creating a $4.5 million Settlement Fund for 48,817 class members. *See* Decl. Brock J. Specht Supp. Pls.' Mot. Prelim. Approval of Class Action Settlement ("Second Specht Decl."), ECF No. 111, at ¶¶ 3–4. As compensation for their efforts, Class Counsel request attorneys' fees in the amount of $1.5 million (one-third of the Settlement Fund). This amount reflects Class Counsel's time and labor litigating such a large and complex ERISA class action, the considerable risks that Class Counsel assumed in bringing this contingency-fee case borne out of their own investigation, and the high-quality representation they provided. "In similar ERISA excessive fee cases . . . district courts have consistently recognized that a one-third fee is the market rate." *Cates v. Trs. of Columbia Univ.*, No. 16-CV-06524, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) (quotation omitted).

Class Counsel also request reimbursement of $212,031.12 in litigation expenses and $160,000 in settlement administration expenses, which were all reasonable expenses customarily incurred in these types of cases. Finally, Class Counsel request $15,000 service awards for each of the three Class Representatives ($45,000 total) to compensate them for the time that they have invested in the litigation, the benefits they have provided to the Settlement Class, and the reputational risks they undertook in bringing this action against their former employer. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions.

[1] The Court has preliminarily approved Nichols Kaster, PLLP as counsel for the Settlement Class. *See* ECF No. 127 at ¶ 5.

BACKGROUND

I. PROCEDURAL HISTORY

On July 19, 2021, Plaintiffs Rita Kohari, John Radolec, and Mohani Jaikaran filed this action alleging that MetLife[2] (1) breached its ERISA fiduciary duties by applying an imprudent and disloyal preference for MetLife's own index fund products within the MetLife 401(k) Plan ("Plan"), despite their poor performance, high costs, and lack of uptake with fiduciaries of similarly sized plans, and (2) failed to monitor the Plan's fiduciaries. *See* ECF No. 1 at ¶ 21–24. On October 6, 2021, MetLife moved to dismiss the Complaint for failure to state a claim. ECF No. 34. Plaintiffs responded to MetLife's motion on November 3, 2021, ECF No. 36, and MetLife replied on November 24, 2021. ECF No. 39.

On August 1, 2022, the Court denied MetLife's motion to dismiss. *Kohari v. MetLife Grp., Inc.*, No. 21-Civ.-6146, 2022 WL 3029328, at *1 (S.D.N.Y. Aug. 1, 2022) (ECF No. 44). On August 30, 2022, Plaintiffs sought leave to file an amended complaint. ECF No. 49. The Court granted leave that same day, ECF No. 50, and Plaintiff's Amended Complaint was filed effective August 31, 2022. ECF No. 51. The Amended Complaint added additional MetLife-related parties as defendants as well as provided additional information supporting their allegations. *See id.* On September 30, 2022, MetLife answered the Amended Complaint. ECF No. 60. On May 31, 2023, Plaintiffs moved for class certification. ECF No. 75. MetLife opposed that motion. ECF No. 86. When this case settled, the class certification motion was still pending before the Court.

[2] The Complaint named MetLife Group, Inc., Metropolitan Life Insurance Company, the Benefit Plans Investment Advisory Committee, and John and Jane Does 1-20 as defendants. ECF No. 1. These and future defendants in the case are referred to collectively as "MetLife."

On August 31, 2023, Class Counsel and MetLife's counsel engaged in private mediation facilitated by District Judge James F. Holderman (ret.). Declaration of Brock J. Specht, ECF No. 111 ("First Specht Decl."), at ¶ 17. While the Parties were unable to reach a final settlement during the mediation, substantial progress was achieved and counsel for both sides continued to work toward a negotiated resolution following mediation. *Id.* Ultimately, the Parties reached an agreement in principle to resolve the case on a class-wide basis, ECF No. 105, and subsequently drafted the comprehensive Settlement Agreement.

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $4,500,000 to a Qualified Settlement Fund. Settlement Agreement ("Settlement") § 4.2, ECF No. 111-01. After accounting for any Attorneys' Fees and Costs, Settlement Administration Expenses, and Case Contribution Awards approved by the Court, the Net Settlement Fund will be distributed to eligible Settlement Class members in accordance with the Plan of Allocation in the Settlement. *Id.*§ 4.8.

Any Class Member still participating in the Plan will receive their Settlement Amount as a direct credit to their individual Plan account. *Id.* at ¶ 5.3(c). Any Class Member no longer participating in the Plan can elect to either receive their Settlement Amount as a check or a direct rollover payment to a current retirement account. *Id.* at ¶ 5.4. Under no circumstance will any portion of the Gross Settlement Amount revert to MetLife. *Id.* at ¶ 5.7.

The Settlement Agreement permits Class Counsel to request payment of reasonable attorneys' fees, costs, and administrative expenses, to be deducted from the Gross Settlement Amount. *Id.* at ¶ 6.1. In addition, the Settlement permits Class Counsel to request service awards up to $15,000 per Class Representative. *Id.* at ¶ 6.2. The Settlement Agreement is not conditioned

on the award of any such amounts, and the denial of any of these awards shall not prevent the Settlement Agreement from becoming effective, nor shall it be grounds for termination of the Settlement. *Id.* at ¶¶ 6.1–6.2.

On November 20, 2023, Plaintiffs moved for preliminary approval of the Class Action Settlement Agreement.[3] ECF No. 109. On September 16, 2024, the Court held a case management conference and preliminarily approved the Settlement Agreement. ECF Nos. 125, 127.

III. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. To date, Class Counsel have invested over 2,600 hours into this case, and additional work will be required moving forward to implement the Settlement. *See* Decl. Brock J. Specht Supp. Pls.' Mot. Att'ys' Fees & Costs, Admin. Expenses, & Case Contribution Awards ("Third Specht Decl.") at ¶¶ 12, 17. This work is detailed in the accompanying declaration from Class Counsel and is summarized below.

A. Work Conducted to Date

Prior to filing this action, Class Counsel conducted a thorough investigation of the claims that were asserted and the factual bases for those claims. Among other things, this included reviewing publicly available information relating to the Plan, examining Plaintiffs' account statements and other documents, and analyzing the Plan's investments and recordkeeping expenses versus investments and recordkeeping expenses of other plans. Class Counsel drafted and filed a detailed complaint, ECF No. 1, and successfully defeated a motion to dismiss. *See*

[3] The text of the Settlement Agreement and related documents, as approved by the Court, is contained in Exhibit A to the Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, found at ECF No. 111-1 (hereinafter "Settlement").

ECF No. 36 (opposing motion to dismiss); *Kohari*, 2022 WL 3029328, at *1 (ECF No. 44) (denying MetLife's motion to dismiss). Class Counsel subsequently (1) amended the Complaint, ECF No. 51; (2) conducted fact and expert discovery including analysis of over 400,000 pages of documents produced by MetLife, production of 3,000 pages at MetLife's request, requesting discovery from two non-parties, deposing five fact witness, and defending the depositions of the named Plaintiffs, and assisting two testifying experts in drafting their expert reports. Third Specht Decl. at ¶ 11; (3) prepared a mediation statement and participated in mediation with Hon. James Holderman and MetLife, *Id.*; (4) drafted the Settlement Agreement and exhibits (including the Settlement Notices, Former Participant Rollover Form, and the proposed preliminary and final approval orders), *Id.*; (5) moved for preliminary approval of the Settlement, ECF Nos. 109–15; (6) worked with the Settlement Administrator to implement the Settlement, including preparing the Notices and Class Website, Third Specht Decl. at ¶ 11; (7) communicated with both the Class Representatives and other Class Members throughout the case, *Id.*; and (8) prepared the present motion and supporting papers. *Id.*

B. Remaining Work to Be Performed

Class Counsel must perform additional work on behalf of the Class to conclude this matter. This work includes (1) communicating with the Independent Fiduciary to facilitate its review of the Settlement; (2) drafting Plaintiffs' motion for final approval of the Settlement; (3) preparing for and attending the Fairness Hearing; (4) if final approval is granted, supervising the Settlement Administrator and Escrow Agent to ensure proper and efficient distribution of payments to the Class; (5) responding to any additional questions from Settlement Class members; and (6) any other actions necessary to support the Settlement until the conclusion of the Class Period. *Id.* ¶ 17.

C. Work of the Class Representatives

The named Plaintiffs, Rita Kohari, Mohani Jaikaran, and John Radolec, as Class Representatives, worked diligently to advance the interest of the Class Members. Specifically, the Class Representatives all (1) provided information and documents to Class Counsel to help investigate and form this case, (2) reviewed the allegations and the Complaint and Amended Complaint; (3) remained available and accessible to Class Counsel to answer Counsel's questions and stay informed on the status of the case; (4) produced documents in response to MetLife's discovery requests; (5) reviewed and signed answers to MetLife's interrogatories; (6) sat for depositions; and (7) conferred with Class Counsel regarding the potential strengths and weaknesses of the claims asserted in this case, as well as the potential risks and rewards of the Settlement compared to the pursuit of further litigation. *See* Decl. Rita Kohari, ECF No. 112, at ¶ 3; Decl. Mohani Jaikaran, ECF No. 113, at ¶ 3; Decl. John Radolec, ECF No. 114, at ¶ 3.

D. Work of the Administrator, Escrow Agent, and Independent Fiduciary

The Settlement requires the time, resources, and expertise of two non-parties to administer. JND Legal Administration will serve as both the Settlement Administrator and Escrow Agent. ECF No. 127 at ¶ 7. In these roles, JND will be responsible for (1) reviewing the Settlement Class member information provided by Defendants; (2) preparing and distributing the Class Notices; (3) searching for valid addresses for any Settlement Class members whose Class Notices were returned as undeliverable; (4) reviewing and processing rollover claim forms submitted by Former Participant Class Members; (5) establishing a telephone support line and email address for Settlement Class members, and responding to questions from Settlement Class members; (6) creating and maintaining the Settlement Website; (7) distributing the notices to government officials required by the Class Action Fairness Act ("CAFA"); and (8) managing the

project and communicating with the parties regarding the status of settlement administration. Third Specht Decl. at ¶ 22; Settlement at ¶¶ 3.1–3.7. If the Settlement receives final approval, JND will implement the Settlement's plan of allocation, prepare the necessary tax filings for the Qualified Settlement Fund and process IRS reporting for Settlement payments to Settlement Class members, and facilitate delivery of settlement payments to Settlement Class members, all as provided by the Settlement. *See* Third Specht Decl. at ¶ 22; Settlement at ¶¶ 4.4–4.10.

MetLife has engaged Fiduciary Counselors Inc. to act as Independent Fiduciary for the Settlement. Third Specht Decl. at ¶ 23. The Independent Fiduciary will review the Settlement, and independently determine whether it is in the best interest of the Plan to approve and authorize this Settlement in exchange for the relief provided. Settlement at ¶ 2.2 . This independent fiduciary review is required by DOL regulations as well as by Paragraph 2.2 of the Settlement Agreement. *Id.*; 68 Fed. Reg. 75632, *as amended by* 75 Fed. Reg. 33830. The fee for this service will be $15,000. Third Specht Decl. at ¶ 23.

IV. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT

In consideration of the work summarized above and associated expenses, Article 6 of the Settlement Agreement provides that Class Counsel may seek (1) attorneys' fees of up to one-third of the Settlement Fund; (2) litigation expenses; (3) payment of Administrative Expenses, including the expenses of the Settlement Administrator, Escrow Agent, and Independent Fiduciary; and (4) a $15,000 service award for each of the three Class Representatives. Settlement at ¶¶ 6.1–6.2. Consistent with the above, Plaintiff seeks the following amounts in connection with this motion:

- Attorneys' fees: $1,500,000 (one-third of the Gross Settlement Amount)
- Litigation Expenses: $212,031.12
- Administrative Expenses: $160,000 (inclusive of the below expenses)
    - Settlement Administrator and Escrow Agent: $145,000

  - Independent Fiduciary: $15,000
- Class Representative service awards: $45,000 ($15,000 each)

ARGUMENT

I. STANDARD OF REVIEW

When counsel obtain a class settlement, 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 Settlement Agreement and applicable law authorize the requested distributions.

"It is well-established under the common fund doctrine that attorneys who create a fund for the benefit of a class of plaintiffs are entitled to reasonable compensation from that fund." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723 (2d Cir. 2023) (quotation omitted); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[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 attorney's fee from the fund as a whole."). Courts typically employ either the "percentage of the fund" method or the "lodestar" method to compute fees. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (holding "that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases"). But "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citation and quotation omitted).

The percentage method is especially appropriate here when the percentage fee so closely mirrors the lodestar fee. The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger*, 209 F.3d at 50 (quotation omitted). But courts may consider the hours submitted by counsel as a "cross-check"

on the reasonableness of the requested percentage. *Id.* The key consideration in awarding fees under either methodology is what is reasonable under the circumstances. *Id.* at 47. Class Counsel's requested percentage fee ($1.5 million) is within 8% its current lodestar fee ($1.4 million), a number which will only rise as Class Counsel closes out this case. *See* Third Specht Decl. at ¶¶ 15, 17. Where similar fees are supported by either method of calculation available to the Court, utilizing the percentage method best serves the interests of judicial economy. *See Goldberger*, 209 F.3d at 50.

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 settlement administrative expenses, *see Henry v. Little Mint, Inc.*, No. 12 Civ. 3996, 2014 WL 2199427, at *17 (S.D.N.Y. May 23, 2014) (ordering settlement administration expenses to be paid "from the Settlement Fund"). Finally, class representative service awards serve the purposes of Rule 23 and may be awarded to compensate efforts undertaken on behalf of class members. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150–51 (S.D.N.Y. 2010) (awarding $15,000 case contribution awards to each of the three named plaintiffs). Such awards compensate class representatives for their work on behalf and to the benefit of the class, as well as provide reimbursement for the risks and litigation tasks they take on. *See id.* For all the reasons set forth below, the Court should approve the requested distributions, which are customary in a class action such as this.

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

In awarding attorneys' fees, courts in the Second Circuit consider a list of factors set forth in *Goldberger*: "(1) the time and labor expended by counsel; (2) the magnitude and complexity of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at

50. "Generally, the factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded.'" Manual for Complex Litigation (Fourth) § 14.121 (2004) (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6, at 547, 550 (4th ed. 2002) (omission and alteration in original)); *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained.").

A. The Requested Fee is Reasonable in Light of the Time and Labor Expended by Class Counsel

Throughout the case, Class Counsel worked diligently to achieve this favorable result: they thoroughly investigated the matter prior to filing suit, contested a motion to dismiss, prepared an Amended Complaint, conducted extensive fact and expert discovery, engaged in ongoing settlement negotiations with MetLife including formal mediation, took the lead in drafting the Settlement Agreement and accompanying exhibits, and submitted multiple filings and appeared for several conferences with the Court in connection with the Settlement. *See supra* Section III.A; Third Specht Decl. at ¶ 11. To date, Class Counsel's lodestar is already $1,413,107.50. *Id.* at ¶ 15.

By the time this action is concluded and all work is complete, Class Counsel's lodestar will likely be closer to $1,500,000, and may even exceed that amount. Following this motion, Class Counsel will continue to oversee the Settlement's administration, respond to class member inquiries, confer with the Independent Fiduciary that has been retained to review the Settlement, *see supra* Section III.**Error! Reference source not found.**, draft and file a motion for final approval, attend the fairness hearing, and take any other measures necessary to effectuate the Settlement. *See* Third Specht Decl. at ¶ 17. This additional work should be considered by the Court in connection with the present motion. *See Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ.

3693, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) ("[W]here 'class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower' because the award includes not only time spent prior to the award, but after in enforcing the settlement." (alteration in original) (quotation omitted)).

Further, the hourly rates used to calculate Class Counsel's lodestar are "reasonable and are comparable to fees that have been recently approved in [other] ERISA class action[s]." *Sims v. BB&T Corp.*, No. 15-CV-732, 2019 WL 1993519, at *3 (M.D.N.C. May 6, 2019) (addressing and approving Nichols Kaster's billing rates); *see also Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-CV-03698, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (describing Nichols Kaster's billing rates as "reasonable"). Nichols Kaster's billing rates for ERISA actions range from $675 to $950 per hour for attorneys with more than 10 years of experience, $450 to $675 per hour for attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks. *See* Third Specht Decl. at ¶ 13 & Ex. 1. These rates harmonize with (and are slightly less than) the rates approved for other experienced ERISA litigators. *See, e.g., Kruger v. Novant Health, Inc.*, No. 14-CV-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (adopting rates of $460 to $998 per hour based on years of experience); *Spano v. Boeing Co.*, No. 06-CV-743, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-701, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (adopting rates of $447 to $974 per hour based on years of experience).

"[T]he trend in the Second Circuit is to apply the percentage method and loosely use the lodestar method as a baseline or as a cross check." *Solis v. OrthoNet LLC*, No. 19-CV-4678, 2021 WL 2678651, at *4 (S.D.N.Y. June 30, 2021). "Typically, courts use multipliers of 2 to 6

times the lodestar." *Id.* (quotation omitted). The requested one-third fee in this case represents a multiplier of 1.06, which falls well below the reasonable range. *See id.* Where Class Counsel is requesting a fee that is nearly in line with its current lodestar and below that deemed reasonable by the Second Circuit,[4] Class Counsel's efforts justify the requested fee.

B. The Magnitude and Complexity of the Litigation Support the Requested Fee

Courts recognize that "ERISA 401(k) fiduciary breach class actions are extremely complex and require a willingness to risk significant resources in time and money, given the uncertainty of recovery and the protracted and sharply-contested nature of ERISA litigation." *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 269 (S.D.N.Y. 2020). "Class Counsel thus must be knowledgeable about this complex and developing area of law, aware of numerous merits and procedural pitfalls, willing to risk dismissal at any stage, and prepared to pursue many years of litigation. This case was no exception." *Id.* at 270. Here, the class size was substantial, involving more than 48,000 Class Members. Second Specht Decl. at ¶ 3. Based on their experience litigating similar ERISA cases, see Third Specht Decl. at ¶¶ 4–5, Class Counsel were uniquely able to navigate this case's size and complexity and achieve a successful result for their clients and the Class. This supports their fee request. *See Bekker*, 504 F. Supp. 3d at 270 ("The complexity of such litigation is enormous and supports Plaintiff's fee request.").

C. Class Counsel Assumed Significant Risks in this Litigation

"'The level of risk associated with litigation ... is "perhaps the foremost factor" to be considered' in ascertaining a reasonable fee in a common-fund action." *Id.* at 270 (omission in original) (quoting *McDaniel v. County of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010)). Class

[4] According to the Second Circuit, "a multiplier of 3.5 ... has been deemed reasonable." *Wal-Mart Stores*, 396 F.3d at 123.

Counsel here assumed significant risks by taking this case on a contingent fee basis. As the Second Circuit has stated:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974).

Without settlement, Class Counsel would have faced considerable litigation risks. *See In re Marsh*, 265 F.R.D. at 148 ("[T]he risk for Plaintiffs' Counsel in this ERISA company stock case was significant. Moreover, in addition to the risks discussed above, Plaintiffs' Counsel had to contend with the traditional risks inherent in any contingent litigation."). "The risk of zero recovery here was present from the inception of this case. Dismissals have been obtained in cases alleging imprudent investment selection in 401(k) plans." *Bekker*, 504 F. Supp. 3d at 270. While Plaintiffs are confident that they would have prevailed, the Court might have declined to certify the proposed class, as Plaintiff's Motion for Class Certification was pending at the time settlement was reached, or, if the case proceeded to trial, MetLife might have prevailed.[5]

Even if Plaintiffs proved a fiduciary breach, they still faced potential hurdles in proving losses. As the Second Circuit has recognized, there are inherent "uncertainties in fixing damages" in cases such as this. *Dardaganis v. Grace Cap. Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989); *see also Sacerdote*, 328 F. Supp. 3d at 280 (finding that "while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning

[5] *See, e.g.*, *Vellali v. Yale Univ.*, No. 16-CV-1345, slip op. at 2 (D. Conn. July 13, 2023) (ECF No. 622); *Reetz v. Lowe's Cos., Inc.*, No. 18-CV-00075, 2021 WL 4771535, at *1 (W.D.N.C. Oct. 12, 2021), *aff'd sub nom. Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171 (4th Cir. 2023); *Rozo v. Principal Life Ins. Co.*, No. 14-CV-00463, 2021 WL 1837539, at *24 (S.D. Iowa Apr. 8, 2021), *aff'd*, 48 F.4th 589 (8th Cir. 2022); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711–12 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018), *aff'd in part, rev'd in part,* 9 F.4th 95 (2d Cir. 2021).

lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that . . . the Plans suffered losses as a result."). For example, in a recent ERISA class action trial in a neighboring District, the jury found that, even though defendants had breached their fiduciary duty, no damages resulted. *See Vellali*, No. 16-CV-1345 (ECF No. 622).[6]

Further, the risks here were even greater because this case did not follow a government investigation or action, but rather was uncovered by Class Counsel's own investigation. *See Grinnell Corp.*, 495 F.2d at 471 (holding that, when evaluating risk of litigation, court should consider whether "a relevant government action [has] been instituted"); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009), *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) ("Plaintiffs did not have the benefit of a Government investigation, and laboriously knitted this case together with painstaking attention to detail."). In short, "the significant litigation risk present in this case meant that class counsel had taken on a venture with a high risk of failure, and that the risk should be compensated." *Fikes Wholesale*, 62 F.4th at 727.

D. Class Counsel Provided High-Quality Representation

Several courts have acknowledged Nichols Kaster's expertise in ERISA class action litigation.[7] Bloomberg has also recognized that "Nichols Kaster has been the driving force

[6] "A Connecticut federal jury on Wednesday delivered an across-the-board win to Yale University in a dispute surrounding the administration of a $5.5 billion retirement plan, deciding that although the plaintiffs proved Yale breached some of its duties, those breaches did not result in any damages to the class." Aaron Keller, *Yale Beats ERISA Class Action in Conn. Federal Court*, Law360 (June 28, 2023), https://www.law360.com/articles/1694200/yale beats-erisa-class-action-in-conn-federal-court.

[7] *See, e.g., Karpik v. Huntington Bancshares Inc.*, No. 17-CV-1153, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021) ("To that end, [Nichols Kaster] is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this."); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-Civ.-9936, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017) ("Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans . . . .").

behind [the] flurry of litigation over proprietary mutual funds." Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg L. (Oct. 14, 2016), https://news.bloomberglaw.com /employee-benefits/deutsche-bank-cant-shake-401-k-fee-lawsuit. Nichols Kaster has won favorable pretrial rulings on dispositive motions and/or class certification in over a dozen ERISA cases, recently tried three ERISA class actions, successfully litigated an appeal before the First Circuit in *Putnam*, and has negotiated numerous ERISA class action settlements in addition to the present settlement. *See* Third Specht Decl. at ¶ 5. Class Counsel's experience and qualifications are further summarized in the accompanying declaration. *Id* at ¶¶ 2–9; *see also* ECF No. 111-2 (providing a firm resume for Nichols Kaster). Based on their experience, the firm's attorneys have been interviewed by several media outlets in connection with their ERISA work. Third Specht Decl. at ¶ 6. This experience was crucial to the outcome obtained here and gave Plaintiffs credibility at the bargaining table. The quality of the representation, therefore, also supports the requested fee.

E. The Requested Fee Is Reasonable in Relation to the Settlement

The requested fee award of one-third of the Settlement Fund mirrors awards in similar ERISA class actions. *See, e.g.*, *Tussey v. ABB, Inc.*, No. 06-CV-04305, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases."); *Kruger*, 2016 WL 6769066, at *2 ("[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." (alteration in original)); *Clark v. Duke Univ.*, No. 16-CV-1044, 2019 WL 2579201, at *3–4 (M.D.N.C. June 24, 2019) (approving attorneys' fees "reflecting one-third of the monetary recovery provided to class members in the settlement agreement" as "more than reasonable"); *Sims*, 2019 WL 1993519, at *2 ("Class Counsel's request for a fee . . . reflecting one-third of the

monetary recovery provided to class members in the settlement agreement, is reasonable . . . ."). And courts routinely approve a one-third fee, which is "the market rate" for "ERISA excessive fee cases" like this. *Cates*, 2021 WL 4847890, at *7; *see, e.g.*, *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 17-CV-00563, slip op. at ¶¶ 2–3 (S.D.N.Y. Oct. 7, 2020) (ECF No. 232) (approving one-third fee to Nichols Kaster in ERISA class action); *In re M&T Bank Corp. ERISA Litig.*, No. 16-CV-375, slip op. at ¶ 1 (W.D.N.Y. Sept. 3, 2020) (ECF No. 190) (same); *Karpik*, 2021 WL 757123, at *13 (same); *Larson v. Allina Health Sys.*, No. 17-CV-03835, 2020 WL 2611633, at ¶¶ 4–5 (D. Minn. May 22, 2020) (same); *Stevens v. SEI Invs. Co.*, No. 18-4205, 2020 WL 996418, at *13–14 (E.D. Pa. Feb. 28, 2020) (same); *Sims*, 2019 WL 1993519, at *2 (same); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-CV-81101, slip op. at ¶ 1 (S.D. Fla. Dec. 20, 2018) (ECF No. 23) (same); *Andrus v. New York Life Ins. Co.*, No. 16-Civ.-05698, slip op. at ¶ 1 (S.D.N.Y. June 15, 2017) (ECF No. 83) (same).

F. Public Policy Supports the Requested Fee

"Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers. The ERISA statute itself specifically encourages private enforcement." *Marsh*, 265 F.R.D. at 149–50. Class actions such as this are "'a most effective weapon in the enforcement' of federal statutes that provide for both governmental and private rights of action." *Id.* at 150 (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) in the context of private securities litigation). One recent study found that because of litigation like this, "the average share of assets paid to fees for 401(k) participants in mutual funds has declined over the last 15 years" and that "these declines have been accompanied by corresponding decreases in 401(k) administrative and recordkeeping costs."[8]

[8] George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. Ret. Rsch. at B.C., *401(k) Lawsuits: What Are the Causes and Consequences?* 5 (2018), https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf; *see also* Ashlea Ebeling,

Given this impact, "[c]ounsel's fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases, like this one, that serve the public interest." *Bekker*, 504 F. Supp. 3d at 270. "A fee that is too low would create poor incentives to bring a class action case such as this and would discourage lawyers from seeking plan improvements like the ones included in this settlement." *Id.* at 270–71.[9] This is especially true where, as here, the government took no enforcement action against MetLife and "[w]ithout the efforts of Plaintiffs' Counsel, the participants in [the] Plan would not have obtained any relief at all." *Marsh*, 265 F.R.D. at 150.

III. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES

A. The Litigation Expenses Are Reasonable

"It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *Marsh*, 265 F.R.D. at 150. "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (quotation omitted). "The expenses that may be reimbursed from the common fund encompass 'all reasonable' litigation-related expenses." *Marsh*, 265 F.R.D. at 150 (quoting *Trustees v. Greenough*, 105 U.S. 527, 533 (1882)). Here, the requested litigation expenses are of a type normally incurred in complex class actions such as this. *See Bekker*, 504 F. Supp. 3d at

401(k) Fees Continue To Drop, Forbes (Aug. 31, 2015), https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop ("In part in response to 401(k) fee litigation, employers have been aggressively negotiating fees and changing investment fund line-ups to include low-cost funds."); Rebecca Moore, *Most DC Plans Have Fixed-Fee Recordkeeping Arrangements*, PlanAdviser (Sept. 22, 2016), https://www.planadviser.com/most-dc-plans-have-fixed-fee-recordkeeping-arrangements ("Since 2012, investment management fees have dropped from 52 basis points (bps) to 42 bps. Recordkeeping fees have declined from $92 per participant to $57 per participant.").

[9] *See also In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-CV-2548, 2019 WL 4734396, at *3 (S.D.N.Y. Sept. 23, 2019) (quotation omitted) (holding that attorneys' fees should provide "lawyers with sufficient incentive to bring common fund cases that serve the public interest"); *Hicks v. Morgan Stanley & Co.*, No. 01-Civ.-10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (quotation omitted) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.").

271 ("The costs and expenses are the types of costs and expenses that are routinely reimbursed by paying clients, such as experts' fees, travel, mediation fees, and photocopying costs."); *see also In re Vitamin C*, 2012 WL 5289514, at * 11 (awarding expenses such as deposition and research costs). And the requested expense amount of $212,031.12, *see* Third Specht Decl. at ¶ 19, is far less than the expense amounts approved in similar cases. *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-Civ.-09936, slip op. at 5–6 (S.D.N.Y Mar. 7, 2019) (ECF No. 348) (approving $759,779.30 in litigation expenses to Nichols Kaster).[10] The Court should therefore approve these litigation expenses.

B. The Settlement Administrative Expenses Are Reasonable

As Settlement Administrator and Escrow Agent, JND Legal Administration ("JND") has provided and will provide services that are essential to carrying out the Settlement, including disseminating the Settlement Notice, creating and maintaining the Settlement Website, reviewing claims, preparing tax filings, and distributing payment. Class Counsel requests $145,000 as reasonable settlement administration expenses, coming to approximately $2.97 per class member. While JND has estimated that total costs could be as high as $215,000, Class Counsel believes that final costs will be substantially lower. Third Specht Decl. at ¶ 22. Thus, Class Counsel only seeks per capita expenses in line with what it believes is reasonably necessary to administer the settlement, based on its experience with similar ERISA class action settlements. *Id.* These costs are in line with what courts routinely approve in such cases. *See, e.g.*, *Carrigan v. Xerox Corp.*, No. 21-CV-1085, 2024 WL 1639535, at *1 (D. Conn. Apr. 16, 2024) (approving $106,895.23 in settlement administration expenses for an ERISA class of around 36,000

[10] *See also, e.g.*, *Tussey*, 2019 WL 3859763, at *5–6 (approving $2,256,805 in litigation expenses in ERISA class action); *Spano*, 2016 WL 3791123, at *4 (approving $1,813,198.85 in litigation expenses); *Beesley v. Int'l Paper Co.*, No. 06-CV-703, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (approving $1,563,046.39 in litigation expenses).

members for a per capita cost of $2.97); *Andrus*, No. 16-Civ.-05698 (ECF No. 74), slip op. at 8, 14 (requesting $47,7542 in settlement administration expenses for an ERISA class of around 16,000 members for a per capita cost of $2.98), *approved*, ECF No. 83, slip op. at ¶ 3. Class Counsel will monitor the administration of the settlement and absorb as its own expense any administrative expenses in excess of $145,000. Third Specht Decl. at ¶ 22.

Finally, Class Counsel requests $15,000 as payment for the Independent Fiduciary. DOL regulations call for review of the Settlement by the Independent Fiduciary, as it is a "critically important" benefit to plan participants. *See Marsh*, 265 F.R.D. at 139. Both the total amount of these expenses and the underlying components are reasonable and customary in ERISA cases such as this. This Court should therefore approve the $15,000 for the Independent Fiduciary, for total settlement administration expenses in the amount of $160,000.

IV. THE COURT SHOULD APPROVE THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS

"Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation." *Marsh*, 265 F.R.D. at 150. Courts reason that such awards are compensatory in nature, reimbursing class representatives who "take on a variety of risks and tasks when they commence representative actions." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003). Not only did the Class Representatives invest significant time in actively participating in the litigation, *see supra* Section III.C, but they also assumed significant reputational risks by suing their current or former employer. *See Beesley*, 2014 WL 375432, at *4 ("ERISA litigation against an employee's current or former employer carries unique risks and

fortitude, including alienation from employers or peers."). And, notably, the requested award amount ($15,000) lines up with what courts have awarded in similar ERISA class actions.[11]

V. THERE HAVE BEEN NO OBJECTIONS TO THE PROPOSED DISTRIBUTIONS

Finally, it is worth noting that there have been no objections to the distributions allowed under the Settlement as of the date of this motion. The Settlement Notices that the Court approved disclosed to the Class that Class Counsel and the Class Representative would seek these distributions. *See* ECF No. 111-1 at 48 ("Class Counsel will apply to the Court for an award of reasonable attorneys' fees (not to exceed one-third of the settlement fund), plus their costs and settlement administrative expenses."); ECF No. 127 at ¶ 8 (approving notice). In response, no class member out of more than 48,000 has lodged an objection. This further supports the fairness of the Settlement and the reasonableness of the requested distributions. *See Wal-Mart Stores*, 396 F.3d at 118 (finding that "the absence of substantial opposition is indicative of class approval"); *Tussey*, 2019 WL 3859763, at *5 (approving one-third fee, noting that "no class member filed an objection to any portion of the Settlement or Class Counsel's request for attorneys' fees, the reimbursement of expenses, and compensation awards to the Class Representatives"). The absence of objections is particularly relevant here, where the class includes sophisticated professionals at one of the country's largest providers of financial services and products. *See In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (noting minimal objections to fee request was a "rare phenomenon," especially when "a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" (quotation omitted)).

[11] *See Bekker*, 504 F. Supp. 3d at 271 (approving service award of $20,000 to the named plaintiff); *Marsh*, 265 F.R.D. at 151 (approving service award of $15,000 to each of the three named plaintiffs).

CONCLUSION

For the reasons above, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions from the Settlement Fund.

Dated: November 22, 2024

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024 a true and correct copy of the foregoing was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: November 22, 2024

/s/ Brock J. Specht
Brock J. Specht