UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Tushar Bhatia, individually and as the representative of a class of similarly situated persons, and on behalf of the McKinsey & Company, Inc. (PSRP) Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. (MPPP) Money Purchase Pension Plan, Plaintiff, v. McKinsey & Company, Inc. and MIO Partners, Inc., Defendants.	No. 1:19-cv-1466-GHW-SN **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. PROCEDURAL HISTORY 3

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL 4

III. WORK OF CLASS COUNSEL 6

A. Work Conducted to Date 6

B. Remaining Work to Be Performed 8

C. Work of the Class Representative 8

D. Work of the Administrator, Escrow Agent, and Independent Fiduciary 9

IV. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT 10

ARGUMENT 10

I. STANDARD OF REVIEW 10

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES 12

A. The Requested Fee is Reasonable in Relation to the Settlement 12

B. The Magnitude and Complexity of the Litigation Support the Requested Fee 15

C. Class Counsel Assumed Significant Risks 15

D. Class Counsel Provided High-Quality Representation 18

E. Public Policy Supports the Requested Fee 18

F. The Fee Is Reasonable in Light of the Time and Labor Expended 19

III. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES 22

A. Litigation Expenses 22

B. Administrative Expenses 23

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARD 23

V. THERE HAVE BEEN NO OBJECTIONS TO THE PROPOSED DISTRIBUTIONS 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Abbott v. Lockheed Martin Corp.,
2015 WL 4398475 (S.D. Ill. July 17, 2015) 12, 13, 15, 20, 24

Andrus v. New York Life Ins. Co.,
ECF No. 83 (S.D.N.Y. June 15, 2017) 2, 13, 23

AT&T Mobility, v. Concepcion,
563 U.S. 333 (2011).....17

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985).....18

Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.,
2012 WL 2064907 (S.D.N.Y. June 7, 2012) 24

Beach v. JPMorgan Chase Bank,
No. 1:17-cv-00563-JMF, ECF No. 232 (S.D.N.Y. Oct. 7, 2020).....2, 13

Beesley v. Int'l Paper Co.,
2014 WL 375432 (S.D. Ill. Jan. 31, 2014).....23, 24

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980).....10

Brotherston v. Putnam Invs., LLC,
907 F.3d 17 (1st Cir. 2018).....17

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974).....16, 17, 20

Clark v. Oasis Outsourcing Holdings Inc.,
No. 18-81101, ECF No. 23 (S.D. Fla. Dec. 20, 2018).....2

Conley v. Sears, Roebuck & Co.,
222 B.R. 181 (D. Mass. 1998) 20

Cosgrove v. Sullivan,
759 F. Supp. 166 (S.D.N.Y. 1991) 20

Dardaganis v. Grace Capital Inc.,
889 F.2d 1237 (2d Cir. 1989).....17

Fastener Dimensions, Inc. v. Mass. Mut. Life Ins. Co.,
2014 WL 5455473 (S.D.N.Y. Oct. 28, 2014) 24

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014) 16

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000) 11, 12

Henry v. Little Mint, Inc.,
2014 WL 2199427 (S.D.N.Y. May 23, 2014) 11

Hensley v. Eckerhart,
461 U.S. 424 (1983) 12

Hicks v. Morgan Stanley Co.,
2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005) 19

Hyun v. Ippudo USA Holdings,
2016 WL 1222347 (S.D.N.Y. Mar. 24, 2016) 11

In re Colgate-Palmolive Co. ERISA Litig.,
36 F. Supp. 3d 344 (S.D.N.Y. 2014) 13, 14

In re Currency Conversion Fee Antitrust Litig.,
263 F.R.D. 110 (S.D.N.Y. 2009) 17

In re Enron Corp. Sec., Derivative & ERISA Litig.,
586 F. Supp. 2d 732 (S.D. Tex. 2008) 22

In re Global Crossing Sec. and ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 21

In re J.P. Morgan Stable Value Fund ERISA Litig.,
2019 WL 4734396 (S.D.N.Y. Sept. 23, 2019) 19

In re M&T Bank Corp. ERISA Litig.,
No. 1:16-cv-375, ECF No. 190 (W.D.N.Y. Sept. 3, 2020) 2, 13

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

In re Prudential Sec. Inc. Ltd. Partnerships Litig.,
912 F. Supp. 97 (S.D.N.Y. 1996) 15

In re Rite Aid Corp. Sec. Litig.,

362 F. Supp. 2d 587 (E.D. Pa. 2005) 21

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2005) 21, 25

In re Vitamin C Antitrust Litig.,
2012 WL 5289514 (E.D.N.Y. Oct. 23, 2012) 22

Intel Corp. Investment Policy Committee v. Sulyma,
140 S. Ct. 768 (2020) 16

Johnson v. Fujitsu Bus. & Tech. of Am., Inc.,
2018 WL 2183253 (N.D. Cal. May 11, 2018) 20

Kifafi v. Hilton Hotels Ret. Plan,
999 F. Supp. 2d 88 (D.D.C. 2013) 22

Krueger v. Ameriprise Fin., Inc.,
2015 WL 4246879 (D. Minn. July 13, 2015) 2, 3, 15, 24

Kruger v. Novant Health, Inc.,
2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) ..... *passim*

Lamps Plus, Inc. v. Varela,
139 S. Ct. 1407 (2019) 16

Larson v. Allina Health System,
No. 0:17-cv-03835, ECF No. 132 (D. Minn. May 22, 2020) 2

McDaniel v. County of Schenectady,
595 F.3d 411 (2d Cir. 2010) 11

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970) 11

Moreno v. Deutsche Bank Americas Holding Corp.,
No. 1:15-cv-09936, ECF No. 348 (S.D.N.Y. Mar. 7, 2019) ..... *passim*

Moreno v. Deutsche Bank Americas Holding Corp.,
2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017) 18

N.E. Carpenters Health Benefits Fund v. First DataBank, Inc.,
2009 WL 2408560 (D. Mass. Aug. 3, 2009) 20

Priceline.com, Inc. v. Silberman,
405 F. App'x 532 (2d Cir. 2010) 17

Putnam Invs., LLC v. Brotherston,
140 S. Ct. 911 (2020) 17

Putnam Invs., LLC v. Brotherston,
No. 15-13825, ECF No. 220 (D. Mass. Apr. 29, 2020) 17

Ramos v. Banner Health,
461 F. Supp. 3d 1067 (D. Colo. 2020) 16

Sacerdote v. New York Univ.,
2018 WL 3629598 (S.D.N.Y. July 31, 2018) 16, 17

Savani v. URS Prof. Solutions LLC,
121 F. Supp. 3d 564 (D.S.C. 2015) 15

Sims v. BB&T Corp.,
2019 WL 1993519 (M.D.N.C. May 6, 2019) 2, 20

Spano v. Boeing Co.,
2016 WL 3791123 (N.D. Ill. Mar. 31, 2016) 12, 13, 20, 23

Steiner v. Am. B'casting Co., Inc.,
248 Fed. Appx. 780 (9th Cir. 2007) 20

Stevens v. SEI Invs. Co.,
2020 WL 996418 (E.D. Pa. Feb. 28, 2020) 2, 20

Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.,
2005 WL 1213926 (E.D. Pa. May 19, 2005) 20, 25

Strougo v. Bassini,
258 F. Supp. 2d 254 (S.D.N.Y. 2003) 24

Tibble v. Edison Int'l,
135 S. Ct. 1823 (2015) 16

Torres v. Gristede's Operating Corp.,
519 F. App'x 1 (2d Cir. 2013) 14

Tussey v. ABB, Inc.,
2019 WL 3859763 (W.D. Mo. Aug. 16, 2019) ..... *passim*

Viafara v. MCIZ Corp.,
2014 WL 1777438 (S.D.N.Y. May 1, 2014) 15, 20

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005).....11, 25

Wildman v. Am. Century Servs., LLC,
362 F. Supp. 3d 685 (W.D. Mo. 2019).....16

Yuzary v. HSBC Bank USA, N.A.,
2013 WL 5492998 (S.D.N.Y. Oct. 2, 2013).....20

Zeltser v. Merrill Lynch & Co., Inc.,
2014 WL 4816134 (S.D.N.Y. Sept. 23, 2014).....21

Rules, Statutes, Regulations

Fed. R. Civ. P. 23(h).....10, 11

68 Fed. Reg. 75,632 (Dec. 31, 2003).....8

Other Authorities

4 Alba Conte & Herbert B. Newberg,
Newberg on Class Actions, § 14:6 (4th ed. 2002).....12

Ashlea Ebeling,
401(k) Fees Continue To Drop, FORBES (Aug. 20, 2015).....19

Manual for Complex Litigation (Fourth), § 14.121 (2004).....12

George S. Mellman and Geoffrey T. Sanzenbacher,
401(k) Lawsuits: What Are the Causes and Consequences?,
Center for Retirement Research at Boston College,
Issue in Brief No. 18-8 (May 2018).....19

Rebecca Moore,
Most DC Plans Have Fixed-Fee Recordkeeping Arrangements,
Planadviser, (Sept. 22, 2016).....19

Jacklyn Wille,
Deutsche Bank Can't Shake 401(k) Fee Lawsuit,
Bloomberg BNA, (Oct. 14, 2016).....18

INTRODUCTION

In light of the Settlement that has been achieved for the participants and beneficiaries of the McKinsey & Company, Inc. Profit-Sharing Retirement Plan ("PSRP") and Money Purchase Pension Plan ("MPPP") (the "Plans"), Plaintiff and Class Counsel[1] respectfully petition the Court to award: (1) attorneys' fees in the amount of $7,900,000 (20% of the $39.5 million Settlement Fund); (2) reimbursement of $51,678.31 in litigation expenses; (3) settlement administration expenses in the amount of $82,301; and (4) a service award in the amount of $15,000 to Plaintiff as the Class Representative.

As discussed below, Class Counsel successfully pursued this complicated ERISA class action against Defendants McKinsey & Company, Inc. ("McKinsey") and MIO Partners, Inc. ("MIO") involving a multi-billion-dollar 401(k) plan. Because of their efforts, Class Counsel have achieved a Settlement that provides $39.5 million in relief to the Class, representing approximately 22% of the total amount of fees that MIO received from the Plans in connection with MIO Funds during the class period ($180 million), and approximately 21% of the combined sum of these MIO fees plus the allegedly excessive recordkeeping excess ($9 million). *See Declaration of Kai Richter in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 75 ("First Richter Decl.")* ¶ *8.* Moreover, McKinsey has agreed to additional prospective relief, including (1) independent third-party review of the investment options in the Plans and any communications to participants regarding those investment options; (2) independent third-party fiduciary review and approval of all proposed expense reimbursements by the Plans to McKinsey, MIO, or any other affiliated person or entity; and (3) a request for proposal process for recordkeeping services prior to the end of the current recordkeeping contract. *See First Richter Decl.* ¶ *9.*

[1] Nichols Kaster, PLLP was previously appointed as counsel for the Settlement Class. *See ECF No. 94 at* ¶ *4.*

To date, Class Counsel have received no payment for any of their efforts in this litigation, nor have they received reimbursement for any of the out-of-pocket costs that they have advanced. All compensation to Class Counsel is contingent upon the Court's award of fees and expenses as provided in the Settlement. Likewise, the named Class Representative has not received any compensation for the time he has invested in the litigation, the benefits he has provided to the Settlement Class, or the risks he undertook in bringing this action.

In similar cases, "courts have found that a one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this[.]" *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (quotations and citation omitted).[2] This includes multiple ERISA cases involving Nichols Kaster, PLLP ("Nichols Kaster") as class counsel. *See Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, ECF No. 232 at ¶¶ 2, 3 (S.D.N.Y. Oct. 7, 2020) (approving one-third fee to Nichols Kaster in ERISA class action involving Nichols Kaster as class counsel); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 1 (W.D.N.Y. Sept. 3, 2020) (same); *Larson v. Allina Health System*, No. 0:17-cv-03835, ECF No. 132 at ¶¶ 4–5 (D. Minn. May 22, 2020) (same); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (same); *Sims v. BB&T Corp.*, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (same); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, ECF No. 23 at ¶ 1 (S.D. Fla. Dec. 20, 2018) (same); *Andrus v. New York Life Ins. Co.*, No. 16-05698, ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017) (same). Here, Class Counsel's fee request of 20% is substantially ***less*** than the one-third "market rate", and also substantially less than the 30% fee awarded to class counsel in *Moreno v. Deutsche Bank*, No. 1:15-cv-09936, ECF No. 348 at 1 (S.D.N.Y. Mar. 7, 2019) (approving 30% fee award to Nichols Kaster).

[2] *See also 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 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.").

Likewise, the proposed $15,000 service award is within the bounds of what has been approved in other ERISA cases. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 151 (S.D.N.Y. 2010) (approving service award of $15,000 to each of the three named plaintiffs); *Tussey*, 2019 WL 3859763, at *6 (approving $25,000 service awards); *Kruger*, 2016 WL 6769066, at *6 (same); *Krueger*, 2015 WL 4246879, at *3 (same). Finally, the requested expenses are reasonable and typical for a case such as this. Accordingly, Plaintiff and Class Counsel respectfully request that the Court approve the requested distributions.

BACKGROUND

I. PROCEDURAL HISTORY

On February 15, 2019, Plaintiff Tushar Bhatia filed a Class Action Complaint against McKinsey and MIO, asserting claims for breach of fiduciary duty, prohibited transactions, and equitable restitution under ERISA. *See ECF No. 1.* In summary, Plaintiff alleged that McKinsey adopted certain in-house funds ("MIO Funds") for the Plans that are managed by MIO, and not offered in any other retirement plan. *Id.* ¶¶ *28-31.* Plaintiff alleged that the MIO Funds performed worse than alternative, lower-cost investment options, and that MIO received over $20 to $36 million per year in investment management fees in connection with these funds. *Id.* ¶ *32.* Further, Plaintiff alleged that Defendants failed to appropriately monitor and control the Plans' administrative expenses. *Id.* ¶ *87.*

On April 22, 2019, Defendants filed a Motion to Compel Arbitration, or in the Alternative, to Dismiss Plaintiff's Complaint. *ECF No. 30*. Plaintiff responded to Defendants' motion on May 20, 2019, *ECF No. 35*, and Defendants filed a reply on June 10, *ECF No. 43*. On November 12, 2019, while the motion was pending, the parties agreed to a stay of the litigation for purposes of mediation, which the Court granted on the same date. *ECF No. 55.* As a result, no decision on the motions was entered.

Following entry of the stay,[3] the parties proceeded with targeted discovery to facilitate mediation. *First Richter Decl. ¶ 13.* As part of this process, Defendants produced several thousand pages of documents, including Plan documents and disclosures, relevant minutes from Trustee meetings relating to the Plans, and reports and recommendations relating to the Plans, as well as class data and investment data. *Id.* Class Counsel also engaged an investment expert to consult on appropriate damages comparators and calculation methods. *Id.*

On January 30, 2020, the parties engaged in a full-day, in-person mediation. *Id. ¶ 14.* Although a settlement was not reached during the mediation, the parties continued to negotiate through the mediator over the next several months. *Id. ¶ 15.* After extensive arm's-length negotiations, the parties reached a settlement-in-principle on May 26, 2020. *Id. & ECF No. 64.* The terms of the Settlement are memorialized in the Settlement Agreement that has been preliminarily approved by the Court. *See ECF Nos. 91-01, 94.*

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $39,500,000 to a common Settlement Fund. *Settlement Agreement ("Settlement"), ECF No. 91-01 ¶ 2.30.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service award approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id. ¶ 5.9.* Under the Plan of Allocation, each eligible Class Member[4] will receive a

[3] The stay was extended, at the parties' request, while settlement discussions continued. *See ECF Nos. 59, 61, 63.*

[4] The certified Settlement Class is defined as follows:

> All participants and beneficiaries of the McKinsey & Company, Inc. Profit-Sharing Retirement Plan and the McKinsey & Company, Inc. Money Purchase Pension Plan (the "Plans") at any time from February 15, 2013 through September 18, 2020, excluding the Trustees for the McKinsey Master Retirement Trust and members of the Administrative Committee for the Plans at any time during the Class Period, as well as persons who served on the Shareholders Council of McKinsey & Company, Inc. or the Board of Directors of MIO Partners, Inc. at any time during the Class Period.

See ECF No. 94 at 3.

Settlement Allocation Score for each quarter during the Class Period, which shall be the sum of 15 points (if the eligible Class Member had an Active Account at the end of the quarter) plus 0.0020 points for every dollar invested by the eligible Class Member in MIO funds at the end of the quarter (up to a maximum of 300 points). *Id.* ¶ *6.4.1.*[5] The Net Settlement Amount will then be allocated among eligible Class Members on a pro rata basis in proportion to their *Average Settlement Allocation Score* across all quarters. *Id.* ¶ *6.4.2*.[6]

Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Settlement* ¶ *6.5.* Former Participants will be required to submit a claim form that will allow them to elect to have their distribution rolled over to an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.* ¶ *6.6.* Under no circumstances will any monies revert to Defendants. Any uncashed checks will revert to the Settlement Fund and will be used to defray the Plans' administrative expenses. *Id.* ¶¶ *6.11, 6.12.*

The Settlement also provides for prospective relief. Specifically, McKinsey has agreed that the following procedures shall apply to the management of the Plans on a prospective basis:

- For a period of no less than three years, Defendants shall retain an independent investment consultant to provide ongoing review of the investment options in the Plans, and review and approve any communications to participants regarding the Plans' investment options;
- For a period of no less than three years, all expense reimbursements by the Plans to McKinsey, MIO, or any other affiliated person or entity will be reviewed and approved by an independent fiduciary, who shall have final discretion to approve or reject reimbursements.

[5] The first component of the score is designed to approximate the amount of each eligible Class Member's recordkeeping claim, and the second component is designed to approximate the relative size of the investment claim in comparison to the recordkeeping claim. *First Richter Decl.* ¶ *5.* This scoring system also accounts for the fact that Class Members with larger account balances in MIO Funds had relatively larger investment claims, but were subject to a greater risk of being subject to arbitration if their claims exceeded a threshold amount ($10,000 during the Class Period). *Id.; see also ECF Nos. 82, 85.*

[6] If the dollar amount of the settlement payment to an Authorized Former Participant is calculated by the Settlement Administrator to be less than $5.00, then that Authorized Former Participant's payment or pro rata share shall be zero for all purposes. *Settlement* ¶ *6.4.2.*

- Before the expiration of the current recordkeeping agreement for the Plans, McKinsey will issue a request for proposal for recordkeeping services for the Plans.

Id. ¶ *7.1.*

Plaintiff filed a motion seeking preliminary approval of the Settlement on August 10, 2020. *See ECF No. 73.* The Court held a conference regarding Plaintiff's motion on August 13, 2020, *ECF No. 78*, and subsequently requested additional letter briefing, *ECF No. 80*. After reviewing the letters from Class Counsel and an additional declaration from Plaintiff's expert (Steve Pomerantz, Ph.D.), *see ECF Nos. 81, 82, 85*, the Court held a follow-up conference on September 9, 2020, *see ECF No. 86*. On September 18, 2020, the Court preliminarily approved the Class Action Settlement. *ECF No. 94.*[7]

III. WORK OF CLASS COUNSEL

Although this action settled relatively early in the litigation process, Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. To date, the total amount of time invested by Class Counsel is approximately 1,872 hours, and additional work will be required going forward to implement the Settlement. *See Declaration of Kai Richter in Support of Plaintiff's Motion for Approval of Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Award ("Second Richter Decl.")* ¶¶ *19*, *24.* 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

[7] Prior to the Court's Preliminary Approval Order, the parties submitted an updated version of the Settlement Agreement on September 16, 2020, which addressed matters discussed at the conference on August 13, 2020 and certain typographical errors. *See ECF No. 91-1.* All references to the Settlement Agreement herein are to this updated version.

reviewing publicly available information relating to the Plans, submitting FOIA requests, examining Plaintiff's account statements and other documents, and conducting an analysis of the Plans' investments and recordkeeping expenses versus the investments and recordkeeping expenses of other plans. *First Richter Decl. ¶ 11.* Thereafter, Class Counsel (1) drafted the class action complaint; (2) responded to Defendant's Motion to Compel Arbitration and, in the Alternative, to Dismiss Plaintiff's Complaint; (3) filed a Motion to Strike Improper Evidence and Argument; (4) reviewed over 5,800 pages of documents and additional data regarding the class; (5) engaged an investment expert to consult on appropriate damages comparators and calculation methods; (6) prepared a lengthy mediation statement in advance of mediation; (7) attended an in-person mediation in Atlanta, Georgia; (7) continued negotiating through the mediator for several months until reaching a settlement-in-principle; and (8) consulted with the Class Representative throughout the course of the case. *Second Richter Decl. ¶ 18*.

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) drafting the Settlement Agreement and exhibits thereto (including the Settlement Notices, Former Participant Claim Form, and the proposed preliminary and final approval orders); (2) preparing Plaintiff's Preliminary Approval Motion papers; (3) preparing additional submissions to the Court and working with an expert to analyze the proposed Plan of Allocation; (4) attending two conferences in connection with the Settlement; (5) reviewing the bid received from the Settlement Administrator; (6) reviewing the final drafts of the Settlement Notices prepared by the Settlement Administrator, and ensuring that they were timely mailed; (7) working with the Settlement Administrator to create a settlement website and telephone line for Class Members

who would like additional information about the Settlement; (8) communicating with Class Members; and (9) preparing the present motion. *Id.*

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiff's motion for final approval of the Settlement and respond to any objections. *Second Richter Decl. ¶ 24*. Class Counsel also will communicate with the Independent Fiduciary that has been engaged to review the Settlement,[8] and will provide it with all necessary information in connection with its review. *Id.* Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to eligible Class Members. *Id.* In addition, Class Counsel will continue to respond to questions from Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

C. Work of the Class Representative

Tushar Bhatia, the Class Representative, also has worked to advance the interests of Class Members. Specifically, Mr. Bhatia (1) reviewed the allegations in the Complaint; (2) provided information and documents to counsel to assist in the prosecution of the action; (3) reviewed the briefing in connection with Defendants' Motion to Compel Arbitration, or in the Alternative, to Dismiss; (4) submitted a declaration in opposition to Defendants' motion (ECF No. 36), as well as a second declaration in support of the Settlement; (5) reviewed Plaintiff's mediation statement; (6) traveled from Seattle to Atlanta to attend the mediation, and participated in the mediation in person; (7) reviewed the Settlement Agreement in its entirety; and (8) communicated with counsel throughout the case. *Declaration of Tushar Bhatia in Support of*

[8] A release on behalf of a plan is subject to independent fiduciary review under Prohibited Transaction Class Exemption 2003-39, 68 Fed. Reg. 75,632, as amended (Dec. 31, 2003). Independent fiduciary review is also a condition of settlement under Paragraph 3.1 of the Settlement Agreement.

Plaintiff's Motion for Preliminary Approval of Class Action Settlement, ECF No. 76 ("Bhatia Decl.") ¶ 6.

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

The Settlement also requires time, resources, and expertise from several non-parties. *See Second Richter Decl. ¶¶ 30-32; Settlement ¶¶ 2.24, 2.31, 2.46.*

Analytics Consulting ("Analytics"), the approved Settlement Administrator, disseminated the CAFA Notice, mailed Settlement Notices to Class Members, and established the settlement website and telephone support line as provided by the Settlement. *Second Richter Decl. ¶ 30.* Analytics also will review the claim forms submitted by Former Participants,[9] calculate payments to Class Members pursuant to the Plan of Allocation, and facilitate distribution of payments to Class Members in the event the Settlement receives final approval. *Id.*

The Escrow Agent (Alerus) will invest the monies in the Qualified Settlement Fund while approval of the Settlement and distributions to Class Members are pending. *See Settlement ¶ 5.7.* Upon final approval of the Settlement, Alerus will release these funds and also execute the investment and tax qualification mandates in the Settlement Agreement. *Id. ¶¶ 5.1-5.3, 5.8-10.*

Finally, the Independent Fiduciary (Fiduciary Counselors) will review the Settlement, and independently determine whether it is in the best interest of the Plans to release their claims against Defendants in exchange for the relief provided. *Id. ¶ 3.1.* As noted above, this independent fiduciary review is called for by DOL regulations and is also required by Paragraph 3.1 of the Settlement Agreement. *See supra* at n.8.

[9] Current participants are not required to submit a claim form because their share of the Settlement proceeds can be automatically deposited in their 401(k) account. *See Settlement ¶ 6.5.*

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

In consideration of the work summarized above and associated expenses, Article 8 of the Settlement Agreement provides that Plaintiff may seek (1) attorneys' fees of up to one-fourth of the Settlement Fund; (2) litigation costs; (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 the Class Representative. *Id.* ¶¶ *2.3, 2.5, 2.15, 8.1-8.2*. Consistent with the above, Plaintiff seeks the following amounts in connection with this motion:

- Attorneys' fees: $7,900,000 (20% of the Gross Settlement Amount)[10]
- Litigation Expenses: $51,678.31
- Administrative Expenses: $82,301 (inclusive of the below expenses)
  - Settlement Administrator: $64,801
  - Escrow Agent: $2,500
  - Independent Fiduciary: $15,000
- Class Representative service award: $15,000

ARGUMENT

I. 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 by applicable law as well as the parties' Settlement Agreement.

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 attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472,

[10] Nichols Kaster has agreed to share 15% of any fees awarded with MKLLC Law, 1120 Avenue of the Americas, 4th Floor, New York, NY 10036. This fee sharing agreement was reached following the filing of the present action, after Nichols Kaster was advised that MKLLC Law was preparing to file a similar lawsuit against Defendants. The two firms subsequently agreed to work cooperatively in the interest of coordinating the litigation. In the event that Defendants' motion to compel arbitration, or alternatively, to dismiss the lawsuit was denied, it was contemplated that MKLLC Law would file a notice of appearance and its clients would join the case. However, the matter was resolved prior to a ruling on Defendants' motion.

478 (1980). Courts typically employ either the "percentage of the fund" method or the "lodestar" method to compute fees. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). However, "[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 [the] litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (internal citation omitted). The percentage method is especially appropriate where, as here, "the parties were able to settle relatively early and before any depositions occurred." *Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) (noting that "the percentage method. . . avoids the lodestar method's potential to 'create a disincentive to early settlement.'") (quoting *McDaniel v. County of Schenectady*, 595 F.3d 411 (2d Cir. 2010)).[11]

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, *see Henry v. Little Mint, Inc.,* 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 "serv[e] the purposes of Rule 23" and may be awarded to compensate efforts undertaken on behalf of class members. *In re Marsh ERISA Litig.*, 265 F.R.D. at 151 (awarding case contribution awards in the amount of $15,000 to each of three named plaintiffs). In summary, the requested distributions are customary in a class action such as this, and should be approved for the reasons set forth below.

[11] The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger*, 209 F.3d at 50 (quotations and citations omitted). However, 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 is what is reasonable under the circumstances. *Id.* at 47; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees ….").

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. 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)); *see also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("critical factor is the degree of success").

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

The requested fee is reasonable in relation to the size of the settlement. The $39,500,000 settlement amount in this case represents one of the larger settlements that has been negotiated in a similar ERISA case involving a 401(k) plan. *See First Richter Decl.* ¶ *7.* In the few cases where a larger aggregate amount was negotiated, the class had to endure years of protracted litigation. *Cf.*, *Tussey*, 2019 WL 3859763, at *1-2 ($55 million settlement achieved after 13 years of litigation); *Spano v. Boeing Co.*, 2016 WL 3791123, at *1, 4 (N.D. Ill. Mar. 31, 2016) ($57 million settlement achieved after nine years of litigation); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) ($62 million settlement achieved after 8.5 years of litigation). Here, Class Counsel were able to obtain this result in a far more timely fashion, providing exceptional value to the class.

Based on the result that was obtained, Class Counsel seek a fee of $7,900,000, representing 20% of the settlement amount. This is substantially ***less*** than the one-third "market rate" that typically applies in similar ERISA cases. *See 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") (citing cases). As the court stated in *Kreuger*:

> [I]n comparing the requested fee with fee awards in similar cases, the relevant comparators are ERISA class actions asserting breaches of fiduciary duties in the selection and retention of plan investment options and the reasonableness of defined contribution plan fees. **In such cases, courts have consistently awarded one-third contingent fees**.

2015 WL 4246879, at *2 (emphasis added) (citing numerous cases).

Consistent with this benchmark, several courts have approved one-third fee awards to Class Counsel in similar ERISA cases, including three cases in New York. *See In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 1 (approving one-third fee to Nichols Kaster); *Beach*, No. 1:17-cv-00563-JMF, ECF No. 232 at ¶¶ 2, 3 (same); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 1 (same); *see also* cases cited *supra* at 2. A one-third fee is appropriate "especially when, as here, the fund is not a 'mega' recovery." *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (awarding one-third fee in $35 million ERISA class action settlement involving employee stock ownership plan). Indeed, even in those few ERISA 401(k) cases involving larger aggregate recoveries, the one-third "market rate" has been approved. *See Tussey*, 2019 WL 3859763, at *4; *Spano*, 2016 WL 3791123, at *2; *Abbott*, 2015 WL 4398475, at *2.

While smaller percentage awards are not unprecedented, they typically amount to at least a quarter of the settlement fund. *See, e.g.*, *Moreno*, No. 1:15-cv-09936, ECF No. 348 at 1 (S.D.N.Y. March 7, 2019) (awarding 30% fee to Nichols Kaster); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (awarding 25% fee in connection with $45.9 million ERISA settlement). Indeed, Class Counsel here have never received an award of less than one-fourth of the settlement fund in any ERISA case in which they have applied for approval of their fees. The fact that Class Counsel are limiting their request to 20% in this case (based on the timing of the Settlement) represents an added benefit of the early settlement that

was achieved.[12]

A 20% fee is further supported by the sliding scale approach to class action settlements endorsed by this Court in *Colgate-Palmolive*. There, the Court noted that to "avoid routine windfalls where the recovered fund runs into the multi-millions, . . . courts typically decrease the percentage of the fee as the size of the fund increases." *Id.* at 349. The Court looked to historical data and found a 25% fee award to be appropriate in a $45.9 million ERISA settlement, where much like in this case, Defendants had withdrawn their motion to dismiss as the parties began to engage in mediation and "very little discovery had taken" place. *Id.* at 351. In reaching this result, the Court noted that "fee awards in ERISA cases tend to be higher as a percentage of the settlement fund than in other cases." *Id.* at 351. Specifically, the Court reported that in ERISA cases, the median award was 25% to 28%,[13] with a standard deviation of 5%. *Id.* at 350-51. Thus, the requested fee of 20% falls a full standard deviation ***below*** the bottom end of the reported median for ERISA cases.

Moreover, "[b]eyond just the monetary recovery, this court must also consider the overall benefit to the class, including non-monetary benefits, when evaluating a fee request." *Kruger*, 2016 WL 6769066, at *3. The prospective relief that was negotiated—including independent third-party review of the Plan's investments and expense reimbursements, and a request for proposal for recordkeeping services for the Plans, *see supra* at 5-6—will provide additional value to the class, and further supports the requested fee. *See Moreno*, No. 1:15-cv-09936, ECF No. 348, at *4 (S.D.N.Y. March 7, 2019) (describing similar non-monetary relief as having "significant value for Plan participants"); *Torres v. Gristede's Operating Corp.,* 519 F. App'x 1,

[12] The amount requested does not represent the full amount that Class Counsel could have applied for under the Settlement, which allowed Class Counsel to seek a fee of up to 25% of the settlement fund. *Settlement* ¶ *8.1.*

[13] These figures include all ERISA cases. As noted above, the typical fee in ERISA cases like this involving 401(k) plans is 33%. *See supra* at 2 & 12-13.

5 (2d Cir. 2013) (noting that injunctive and non-monetary relief were relevant factors in assessing success obtained for purposes of fee award).

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

"The size and difficulty of the issues in a case are [also] significant factors to be considered in making a fee award." *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *11 (S.D.N.Y. May 1, 2014) (citing *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 912 F. Supp. 97 (S.D.N.Y. 1996)). Here, the size of the class was substantial, and involved more than 33,000 Plan participants. *See First Richter Decl.* ¶ *3.* Further, it is well-known that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger*, 2015 WL 4246879, at *1; *see also In re Marsh*, 265 F.R.D. at 138 ("Many courts have recognized the complexity of ERISA breach of fiduciary duty" cases); *Abbott*, 2015 WL 4398475, at *2 (noting that ERSIA 401(k) cases are "particularly complex").

Handling a large and complex case such as this requires counsel with specialized skills. *See Savani v. URS Prof. Solutions 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"). In addition to legal expertise, counsel must possess "expertise regarding industry practices." *See Kruger*, 2016 WL 6769066, at *3. Based on their experience in this area (*see infra* at § II.D), Class Counsel were uniquely able to navigate the size and complexity of the case, and achieve a successful result for the class.

C. Class Counsel Assumed Significant Risks

Class Counsel 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) (citation omitted).

In the absence of a Settlement, Class Counsel would have faced significant litigation risks. *See In re Marsh*, 265 F.R.D. at 148 (noting "significant" risk for plaintiffs' Counsel in ERISA case, in addition to "the traditional risks inherent in any contingent litigation"). At the time of Settlement, Defendants' motion to dismiss (and, alternatively, to compel arbitration) was pending. And in the event that Plaintiff prevailed on the motion, success at trial was not assured. In two recent ERISA cases, including one in this District, the defendants were the prevailing party. *See Sacerdote v. New York Univ.*, 2018 WL 3629598 (S.D.N.Y. July 31, 2018); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019).[14]

While the Second Circuit has acknowledged that "risk is not uniform in all class actions," especially in the context of securities fraud class actions, "[t]hat argument does not apply to ERISA class actions like this one." *In re Marsh*, 265 F.R.D. at 147. Unlike securities class actions, which "have been litigated since at least the early 1940s … ERISA is a relatively new statute (1974), and the laws creating 401(k) plans are even newer (1981)." *Id.* Thus "ERISA case law remains thin in comparison to securities and antitrust jurisprudence," *id.*, and remains highly evolving in light of several recent Supreme Court decisions, *see Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020); *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). These risks were heightened in this case in light of the arbitration provision in the PSRP and MPPP Plan Documents, an issue that is itself a rapidly evolving issue in class action litigation. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407

[14] Even when plaintiffs do not lose at trial, there is a substantial risk they will nonetheless lose almost all of the value of their claims. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1079, 1144 (D. Colo. 2020) (following bench trial, ruling in favor of Defendants on most claims, and awarding Plaintiffs only $2.35 million out of an alleged $85 million in losses).

(2019) (holding that class arbitration cannot be compelled where the arbitration provision is "ambiguous"); *AT&T Mobility, v. Concepcion*, 563 U.S. 333, 339 (2011) (stating that the FAA reflects a "'liberal federal policy favoring arbitration'").

Even if Plaintiff proved a fiduciary breach, he 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 Capital 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 lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result.").[15]

Finally, the risks in this case were even greater because it 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 (in evaluating risk of litigation, court considers 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) (noting that "Plaintiffs did not have the benefit of a Government investigation, and laboriously knitted this case together with painstaking attention to detail."). These risks further support the requested fee in light of the contingent nature of the representation.

[15] As a case in point, Class Counsel recently suffered an adverse judgment regarding a loss issue midtrial in an ERISA case against Putnam, later appealed to the First Circuit and prevailed on the same issue, and then settled the case before the trial was completed (following over four years of litigation). *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17 (1st Cir. 2018) (partly vacating judgment against Plaintiffs); *Putnam Invs., LLC v. Brotherston*, 140 S. Ct. 911 (2020) (denying defendants' petition for certiorari); No. 15-13825, ECF No. 220 (D. Mass. Apr. 29, 2020) (approving plaintiffs' motion for preliminary approval).

D. Class Counsel Provided High-Quality Representation

The quality of the representation also supports the requested fee. As Judge Schofield recognized in a similar ERISA case involving Nichols Kaster, "Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017). Indeed, a Bloomberg BNA article stated that "Nichols Kaster has been the driving force behind [the] flurry of litigation over proprietary mutual funds." Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016).

The experience and qualifications of Class Counsel are summarized in the accompanying declaration. *See Second Richter Decl.* ¶¶ *3-16.* In summary, Nichols Kaster has won favorable pretrial rulings on dispositive motions and/or class certification in over a dozen ERISA cases, recently tried two 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. *Id.* ¶¶ *7-8*. Based on their experience, the firm's attorneys have been interviewed by several media outlets in connection with their ERISA work, and Nichols Kaster's undersigned counsel has spoken at multiple national forums on ERISA litigation. *Id.* ¶ *9*. This experience was crucial to the outcome that was obtained, and gave Plaintiff credibility at the bargaining table.

E. Public Policy Supports the Requested Fee

Public policy considerations also support the requested fee. "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers" and encourages private enforcement. *In re Marsh ERISA Litig.*, 265 F.R.D. at 149-50.[16] The salutary impact of private litigation on 401(k) fees has been well-documented. One recent

[16] 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).

study by the Center for Retirement Research at Boston College found that as a result 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."[17]

In light of these important public policy goals and impacts, attorneys' fees should provide "lawyers with sufficient incentive to bring common fund cases that serve the public interest." *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *3 (S.D.N.Y. Sept. 23, 2019); *see also Hicks v. Morgan Stanley Co.*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). This is especially true where, as here, the government took no enforcement action against Defendants and "without the work of [Class] Counsel, the participants in [the Plans] would not have obtained any relief at all." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150.

F. The Fee Is Reasonable in Light of the Time and Labor Expended

The requested fee is also reasonable considering the efforts expended by counsel. As noted above, Class Counsel undertook a thorough investigation of the matter prior to filing suit; contested a dual motion to compel arbitration and to dismiss; conducted early discovery; consulted with an investment expert; engaged in ongoing mediation for several months with the assistance of a well-respected mediator; took the lead in drafting the Settlement Agreement and

[17] George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, Center for Retirement Research at Boston College, Issue in Brief No. 18-8 at 5 (May 2018), available at https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf; *see also* Ashlea Ebeling, *401(k) Fees Continue To Drop*, FORBES (Aug. 20, 2015) ("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."), available at https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop/#6b8caf21164f; Rebecca Moore, *Most DC Plans Have Fixed-Fee Recordkeeping Arrangements*, Planadviser, (Sept. 22, 2016) ("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."), available at https://www.planadviser.com/most-dc-plans-have-fixed-fee-recordkeeping-arrangements/.

accompanying exhibits; and submitted multiple filings and appeared for conferences with the Court in connection with the Settlement. *See supra* at 6-7. As of the date of this motion, Class Counsel's lodestar is already $1,037,857.50.[18] *Second Richter Decl. ¶ 22*. By the time the action is concluded, and all work is complete, Class Counsel's lodestar will likely be closer to $1.1 million, and may exceed that amount.[19]

While the requested fee exceeds the reported lodestar, Class Counsel are entitled to a reasonable multiplier because they took this case on a contingent fee basis and assumed a risk of loss. *See Grinnell Corp.*, 495 F.2d at 470. "Courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Viafara*, 2014 WL 1777438, at *14; *see also Yuzary*, 2013 WL 5492998, at *11 (awarding multiplier of 7.6); *Cosgrove v. Sullivan,* 759 F. Supp. 166, 167 n.1 (S.D.N.Y. 1991) (awarding multiplier of 8.74).[20] The requested fee in this case represents a multiplier of 7.61 based on the work already performed, and will be lower after all work is complete. While this falls on the higher end of the accepted range, several factors

[18] 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*, 2019 WL 1993519, at *3 (addressing and approving Nichols Kaster's billing rates); *see also Johnson v. Fujitsu Bus. & Tech. of Am., Inc.*, 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 $625 to $875 per hour for attorneys with more than 10 years of experience, $425 to $575 per hour for attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks. *See Richter Decl. Ex. 2.* These rates are consistent with (and slightly less than) the rates approved for other experienced ERISA litigators. *See, e.g., Kruger*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience); *Spano*, 2016 WL 3791123, *3 (same); *Abbott*, 2015 WL 4398475, *3 (adopting rates of $447 to $974 per hour based on years of experience). Moreover, these rates fall within the range of reported rates for ERISA practitioners in a respected industry survey (the "Valeo Report"). *See Second Richter Decl. Ex. 3*.

[19] Following this motion, Class Counsel will continue to oversee the administration of the settlement, respond to class member inquiries, confer with the Independent Fiduciary that has been retained to review the Settlement (*see supra* at n.8), draft and file a motion for final approval, attend the fairness hearing, and take any other measures necessary to effectuate the Settlement. *See Second Richter Decl. ¶ 24.* This additional work should be considered by the Court in connection with the present motion. *See Yuzary v. HSBC Bank USA, N.A.*, 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.") (citation and quotation marks omitted).

[20] *See also Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding 20% fee that yielded multiplier of 15.6); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998) (awarding multiplier of 8.9); *N.E. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (awarding multiplier of 8.3). *Steiner v. Am. B'casting Co., Inc.,* 248 Fed. Appx. 780, 783 (9th Cir. 2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); *Stevens*, 2020 WL 996418, at *13 (awarding one-third fee to Nichols Kaster that yielded 6.16 multiplier).

here demonstrate why it is reasonable under the circumstances.

First, as noted above, the recovery is significant compared to similar ERISA class actions involving 401(k) plans. *See supra* at 12; *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005) (weighing size of common fund in awarding large multiplier, noting that recovery was "third largest ever obtained" in action of that type). In achieving this recovery, Class Counsel did not rely "on the fruits of any official investigation." *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (25% fee award yielding 6.96 multiplier was reasonable in part because claims were identified through counsel's own investigation). The result is strictly attributable to Class Counsel's work on behalf of the class.

Second, the size of the multiplier is due largely to the fact that the case settled early. Class Counsel should not be "penalize[ed] … for achieving an early settlement, particularly where, as here, the settlement amount is substantial." *Zeltser v. Merrill Lynch & Co., Inc.*, 2014 WL 4816134, at *10 (S.D.N.Y. Sept. 23, 2014). Without the Settlement, "protracted litigation would require large expenditures of time and money for scores of depositions, massive document productions, discovery disputes, dispositive motions and pre-trial motions and a trial." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). While this would have yielded a lower multiplier, it would not have benefitted the class. To the contrary, class members would have been paid later, and their net recovery would have been lower (assuming the same end result) because of greater litigation expenses and, ultimately, a greater fee as a percentage of the fund. Because the case settled early, Class Counsel have substantially discounted their rate from 33.3% to 20%. This is a significant additional benefit to the class.

Finally, the multiplier reflects, in part, the fact that Class Counsel were able to leverage their experience from prior cases and their expertise in this difficult field. Other firms with less

experience would not have been able to litigate the case nearly as efficiently. Moreover, Class Counsel staffed the case efficiently. Despite the factual complexity of the case, over 74% of the total attorney hours were performed by a core team of three attorneys, comprising two associates and one partner. *See Second Richter Decl. Ex. 2.* Class Counsel's lean and efficient staffing provides further context for the multiplier.[21]

III. THE COURT SHOULD APPROVE THE REQUESTED EXPENSES

In addition to awarding the requested fees, the Court should approve the requested litigation and administrative expenses.

A. Litigation Expenses

"It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150. Thus, "[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012). "The expenses that may be reimbursed from the common fund encompass 'all reasonable' litigation-related expenses." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150. Here, the requested litigation expenses are of a type normally incurred in complex class actions such as this. *See, e.g., In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 ("The principal expenses for which Class Counsel seeks reimbursement are expert witness costs, deposition reporters and transcripts, … copying, travel, research, and court-filings—all of which are appropriate for reimbursement."). Moreover, the requested expense amount of $51,678.31 is far less than the amount of expenses approved in similar cases. *See, e.g., Moreno*, No. 1:15-cv-

[21] *See Kifafi v. Hilton Hotels Ret. Plan*, 999 F. Supp. 2d 88, 102 (D.D.C. 2013) (awarding fee multiplier noting "these four attorneys report a large, but ultimately lean number of hours working on this case given its complexity and duration."); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 785 (S.D. Tex. 2008) (awarding 5.4 multiplier where counsel used a "well organized . . . 'core' team that followed the litigation through").

09936, ECF No. 348 at 5-6 (approving $759,779.30 in litigation expenses to Nichols Kaster).[22]

B. Administrative Expenses

The requested administrative expenses are also reasonable. The Settlement Notice, claims review, and payment distribution services provided by Analytics are essential to carry out the Settlement. The cost of providing those services ($64,801) is reasonable in light of the services provided, and comes to less than $2.00 per class member. The Escrow Agent expense of $2,500 is also reasonable in light of the responsibility of handling and investing a $39.5 million settlement fund. Finally, review of the Settlement by the Independent Fiduciary is called for 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. at 139. Accordingly, the requested settlement administration expenses in the amount of $82,301 should be approved. Both the total amount of these expenses and the underlying components are reasonable and customary in ERISA cases such as this. *See, e.g., Moreno*, No. 1:15-cv-09936, ECF No. 348 at 6 (approving "Class Counsel's request for $106,536 in settlement administration expenses (comprising $64,036 to the settlement administrator, $2,500 to the escrow agent and $40,000 to the independent fiduciary")); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 3 (approving administrative expenses for same types of services).

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARD

This Court also should approve the requested service award to Plaintiff as the Class Representative. "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." *In re Marsh ERISA Litig.*, 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

[22] *See also, e.g.*, *Tussey*, 2019 WL 3859763, at *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.*, 2014 WL 375432 at *4 (S.D. Ill. Jan. 31, 2014) (approving $1,563,046.39 in litigation expenses).

tasks when they commence representative actions." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003).

The requested award in this case is fully consistent with these recognized rationales. First, Mr. Bhatia invested significant time reviewing case materials (pleadings, mediation statement, and the settlement agreement), taking time off from work to travel from Seattle to Atlanta to attend the in-person mediation, and providing documents and communicating with Class Counsel. Second, he assumed significant reputational risks by suing his former employer.[23] Finally, "the protection of retirement funds is a great public interest" and "private attorneys general have a major role to play in ERISA litigation." *Fastener Dimensions, Inc. v. Mass. Mut. Life Ins. Co.*, 2014 WL 5455473, at *9 (S.D.N.Y. Oct. 28, 2014).

The amount of the requested award ($15,000) is also reasonable. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (approving $15,000 service awards); *Strougo*, 258 F.Supp.2d at 264 (collecting cases and granting an award of $15,000 to class representative). Indeed, courts have approved significantly greater awards in other ERISA cases. *See, e.g., Kruger*, 2016 WL 6769066, at *6 (approving $25,000 service awards); *Krueger*, 2015 WL 4246879, at *3 (same); *Abbott*, 2015 WL 4398475, at *4 (same); *Beesley*, 2014 WL 375432, at *4 (same); *see also Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding $50,000 to each of three class representatives in securities case).[24]

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

[23] Bringing a lawsuit against an employer relating to management of a 401(k) plan entails risk that the plaintiff will be viewed unfavorably by the employer or future employers. *See Abbott*, 2015 WL 4398475, at *4.

[24] Although the service awards in *Moreno* were slightly less on an *individual* basis ($10,000), the *aggregate* amount was far greater ($50,000) because there were five class representatives in *Moreno.* Moreover, the amount of the settlement was less ($21.9 million vs. $39.5 million).

approved explicitly disclosed that Class Counsel and the Class Representative would seek these distributions. *See ECF No. 91-1 at 53, 62-63.* In response, no class member out of more than 33,000 has lodged an objection. Indeed, one class member expressed appreciation for Class Counsel's work and support of the settlement. *See Second Richter Decl. Ex. 4.* 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.").[25] The absence of objections is particularly relevant here, where the class includes sophisticated consultants at one of the world's largest consulting firms. *See In re Rite Aid Corp.*, 396 F.3d at 305 (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.").

CONCLUSION

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

Respectfully Submitted,

Dated: December 21, 2020

NICHOLS KASTER PLLP

/s/ Kai Richter
Kai H. Richter, MN Bar No. 0296545*
Carl F. Engstrom, MN Bar No. 0396298*

[25] *See also Stop & Shop*, 2005 WL 1213926, at *18 ("the high lodestar multiplier (15.6) . . . is neutralized with respect to the reasonableness of a percentage fee award of 20% by the extraordinary support Plaintiffs have shown for counsel's request for fees.").

Paul Lukas, MN Bar No. 22084X*
Brandon T. McDonough, MN Bar No. 0393259*
Brock J. Specht, MN Bar. No. 0388343*
Jennifer K. Lee, NY Bar No. 4876272
Michelle L. Kornblit, NY Bar No. 5314794
* admitted *pro hac vice*
4700 IDS Center, 80 S 8th Street
Minneapolis, MN 55402
Telephone: 612-256-3200
Facsimile: 612-338-4878
krichter@nka.com
cengstrom@nka.com
lukas@nka.com
bmcdonough@nka.com
bspecht@nka.com
jlee@nka.com
mkornblit@nka.com

ATTORNEYS FOR PLAINTIFF AND THE SETTLEMENT CLASS