

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JUBRIL PECOU and ASHLEY SCHIEFER,
individually and as representatives of a class of
similarly situated persons, and on behalf of the
Bessemer Trust Company 401(k) and Profit
Sharing Plan,

Plaintiffs,

v.

BESSEMER TRUST COMPANY and
PROFIT SHARING PLAN COMMITTEE OF
BESSEMER TRUST COMPANY,

Defendants.

Case No. 1:22-cv-01019-MKV

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

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INTRODUCTION

In this ERISA class action, Plaintiffs and Class Counsel¹ obtained a settlement creating a \$5.0 million Qualified Settlement Fund for approximately 2,600 Class Members. As compensation for their efforts, Class Counsel request attorneys' fees in the amount of \$1,666,666.67 (one-third of the Qualified Settlement Fund). This amount reflects Class Counsel's time and labor litigating this 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 ERISA breach-of-fiduciary cases like this, courts in the Second Circuit "routinely approve fee awards of one-third of the common fund." *Cates v. Trustees of Columbia Univ. in City of New York*, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) (collecting cases).

Class Counsel also request reimbursement of \$27,756.38 in litigation expenses and \$32,640.04 in settlement administration expenses, which were all reasonable expenses customarily incurred in these types of cases. Finally, Class Counsel request \$7,500 service awards for each of the two Settlement Class representatives to compensate them for the time 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, Named Plaintiffs, serving as Settlement Class representatives, 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. 66* ¶ 4.

BACKGROUND

I. PROCEDURAL HISTORY

On January 26, 2022, Plaintiff Jubril Pecou filed a Complaint in the District of New Jersey alleging that Defendants breached their ERISA fiduciary duties by, among other things, causing the Plan and its participants to invest in expensive and underperforming Old Westbury mutual funds. *See Pecou v. Bessemer Trust Company, et al*, No. 2:22-cv-00377-JXN-JSA (D.N.J. Jan. 26, 2022). Defendants subsequently requested that the matter be voluntarily dismissed and refiled in the Southern District of New York based on a venue-selection clause in the plan document. Counsel for Plaintiff Pecou and the Defendants stipulated to a dismissal of that action without prejudice, and that the instant action in the Southern District of New York would be treated as if it had been initiated on January 26, 2022. *See id. at ECF No. 4*. The claims asserted in Plaintiff Pecou's Complaint in this District are identical to the claims originally asserted in the District of New Jersey.

On August 26, 2022 the operative Amended Complaint was filed (*ECF No. 46*), adding Ms. Schiefer as an additional Plaintiff. Defendants moved to dismiss the Amended Complaint on September 23, 2022, and that motion was fully briefed and submitted on November 11, 2022.

Prior to the close of briefing on the motion to dismiss, Plaintiffs and Defendants (the "Parties") jointly requested that the Court stay any decision until after they had engaged in a private mediation. The Court agreed to this request, and on January 6, 2023, the Parties engaged in a full-day, in-person mediation before Mr. Robert A. Meyer. The Parties reached a settlement-in-principle, and then prepared the Motion for Preliminary Approval of Class Action Settlement and the Settlement Agreement, which were granted and preliminarily approved by the Court on August 15, 2023. *ECF No. 66*.

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Defendants contributed a Settlement Amount of \$5,000,000 to a Qualified Settlement Fund. *Settlement Agreement* (“*Settlement*”) ¶ 3.7, *ECF No. 62-01*. 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 members² in accordance with the Plan of Allocation in the Settlement. *Id.* ¶¶ 9.3, 11.

Current Participant Settlement Class members will have their Plan accounts automatically credited with their share of the Net Settlement Fund. *Settlement* ¶ 9.3; *Plan of Allocation* ¶ 2.1-2.4, *ECF No. 62-02*. Former Participant Settlement Class members will receive a direct payment by check unless they elect to have their distribution rolled over to an individual retirement account or other eligible employer plan. *Settlement* ¶ 9.3; *Plan of Allocation* ¶ 3.1. Under no circumstances will any monies revert to Defendants. *Plan of Allocation* ¶ 6.2. Any uncashed checks shall be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan. *Id.*

Plaintiffs filed a motion seeking preliminary approval of the Settlement on March 10, 2023 (*ECF No. 60*), and the Court preliminarily approved the Settlement on August 15, 2023. *ECF No. 66*.

III. CLASS COUNSEL’S WORK

Although this action settled relatively early in the litigation process, Class Counsel has expended significant time and effort prosecuting this action and achieving the Settlement on behalf

² The certified Settlement Class is defined as follows:

All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the “Class Period”), except a Person who a member of the Profit-Sharing Committee of Bessemer Trust Company during the Class Period.

ECF No. 66 ¶ 4.

of the Settlement Class. To date, Class Counsel has invested approximately 868.6 hours into this case, and additional work will be required moving forward while seeking Final Approval and implementation of the Settlement. *See Decl. of Brock Specht in Supp. of Pls.' Mot. For Approval of Atty's' Fees and Costs, Admin. Expenses, and Case Contribution Awards ("Second Specht Decl.")* ¶¶ 11-17. This work is detailed in the accompanying declaration from Class Counsel and is summarized below.

A. Work Conducted to Date

Before filing this action, Class Counsel thoroughly investigated the claims that were asserted and their factual bases. Among other things, this included reviewing publicly available information about the Plan, examining Plaintiffs' account statements and other documents, and analyzing the Plan's investments' performance, utilization, and expenses versus other plans' investments. *Second Specht Decl.* ¶ 11. Thereafter, Class Counsel (1) drafted the Complaint and Amended Complaint; (2) drafted responses to Defendants' letter motion to dismiss the Complaint; (3) responded to Defendants' motion to dismiss the Complaint; (4) drafted and briefed Plaintiff's contested motion for leave to amend the Complaint; (5) responded to Defendants' motion to dismiss the Amended Complaint; (6) engaged in arms-length settlement negotiations reaching a settlement-in-principle; and (7) consulted with Settlement Class representatives throughout the case. *Id.*

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) reviewing and revising the Settlement Agreement and exhibits thereto (including the Plan of Allocation, Class Notices, and the proposed preliminary approval order); (2) preparing Plaintiffs' Preliminary Approval Motion papers; (3) meeting with Defendants in connection with the Settlement; (4) reviewing the final

drafts of the Class Notice prepared by the Settlement Administrator and ensuring that they were timely disseminated; (5) working with the Settlement Administrator to create a Settlement Website and telephone line for Settlement Class members who seek additional information about the Settlement; (6) communicating with Settlement Class members; and (7) 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 Plaintiffs' motion for final approval of the Settlement and respond to objections, if any. *Second Specht Decl.* ¶ 17. Class Counsel will also communicate with the Independent Fiduciary that has been engaged to review the Settlement³ 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 Settlement Class members. *Id.* In addition, Class Counsel will continue to respond to questions from Settlement Class members and take other actions necessary to support the Settlement until the conclusion of the Class Period. *Id.*

C. Settlement Class Representatives' Work

The Settlement Class representatives (Jubril Pecou and Ashley Schiefer) have also worked to advance the Settlement Class members' interests. Specifically, they (1) reviewed the allegations in the Complaint and Amended Complaint; (2) provided information and documents to Class Counsel to assist in the action's investigation and prosecution; (3) made themselves available to answer questions from Class Counsel and to stay informed of the action's status; (4) conferred

³ 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). The Settlement Agreement also required review by an Independent Fiduciary. *Settlement* ¶ 3.4.

with Class Counsel regarding their claims' potential strengths and weaknesses and the potential risks and rewards of Settlement compared to pursuing further litigation; and (5) submitted individual declarations in support of the Settlement. *See Decl. of Jubril Pecou in Supp. of Pls.' Mot. for Prelim. Approval of Class Action Settlement ("Pecou Decl.")* ¶ 3, ECF No. 63; *Decl. of Ashley Schiefer in Supp. Of Pls.' Mot. for Prelim. Approval of Class Action Settlement ("Schiefer Decl.")* ¶ 3, ECF No. 64.

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

The Settlement also requires time, resources, and expertise from non-parties. *See Second Specht Decl.* ¶¶ 22-23; *Settlement* ¶¶ 3.2.1, 3.2.3-3.2.5, 9.2.1-9.2.4, 9.3.3-9.3.5. Analytics Consulting, LLC ("Analytics"), the approved Settlement Administrator, disseminated the CAFA Notice, disseminated Class Notices to Settlement Class members, and established the Settlement Website and telephone support line as provided by the Settlement. *Second Specht Decl.* ¶ 22. Analytics will also review the rollover forms submitted by Former Participant Settlement Class members, calculate payments to Settlement Class members under the Plan of Allocation, and facilitate distribution of payments to Settlement Class members if the Settlement receives final approval. *Id.* In addition, as Escrow Agent, Analytics will invest the monies in the Qualified Settlement Fund while approval of the Settlement and distributions to Settlement Class members are pending. *See Settlement* ¶¶ 8.1.1-8.1.2. Upon final approval of the Settlement, Analytics will release these funds and execute the investment and tax qualification mandates in the Settlement Agreement. *Id.* ¶¶ 9.2.1-9.2.2; *Plan of Allocation* ¶¶ 2.1-2.4, 3.1. Finally, the Independent Fiduciary (Fiduciary Counselors Inc.) will review the Settlement, and independently determine whether it is in the Plan's best interest to release its claims against Defendants in exchange for the

relief provided. *Settlement* ¶ 3.4. As noted above, both DOL guidance and the Settlement call for this Independent Fiduciary review. *See supra* at n.3.

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

In consideration of the work summarized above and associated expenses, Article 11 of the Settlement Agreement provides that Plaintiffs may seek (1) Attorneys' Fees; (2) litigation costs; (3) payment of Settlement Administration Expenses, including the expenses of the Settlement Administrator, Escrow Agent, and Independent Fiduciary; and (4) a \$7,500 Case Contribution Awards for each Settlement Class representative. *Settlement* ¶¶ 11.1-11.2.2. Accordingly, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys' Fees: \$1,666,666.67 (33.3% of the Settlement Amount)
- Litigation Expenses: \$27,756.38⁴
- Total Settlement Administrative Expenses: \$32,640.04 (inclusive of the below expenses)⁵
 - Settlement Administrator and Escrow Agent: \$17,640.04
 - Independent Fiduciary: \$15,000
- Settlement Class representative Case Contribution Awards: \$15,000 in total (\$7,500 for each Settlement Class representative).

ARGUMENT

I. STANDARD OF REVIEW

When counsel obtains 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 authorizes 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);

⁴ *Second Specht Decl.* ¶ 19; *Decl. of Edward W. Ciolko in Supp. of Pls.’ Mot. For Approval of Atty’s’ Fees and Costs, Admin. Expenses, and Case Contribution Awards* ¶ 3.

⁵ *Second Specht Decl.* ¶¶ 22-23.

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). 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 [the] litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (internal citation and quotation 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, 418 (2d Cir. 2010))).⁶

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.*, 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

⁶ The use of the percentage method dispenses with the “cumbersome, enervating, and often surrealistic process of lodestar computation.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (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 is what is reasonable under the circumstances. *Id.* at 47.

plaintiffs). 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. 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) (“[T]he most critical factor is the degree of success obtained.”).

A. Class Counsel’s Time and Labor Support the Requested Fee

While this case settled early, Class Counsel worked diligently to achieve this favorable result: they thoroughly investigated the matter prior to filing suit, drafted the Complaint and Amended Complaint, briefed a contested motion for leave to amend the Complaint, contested a letter motion to dismiss the Complaint, contested a motion to dismiss the Amended Complaint, engaged in ongoing settlement negotiations with Defendants, reviewed and revised the Settlement Agreement and accompanying exhibits, and submitted multiple filings with the Court in connection with the Settlement. *See supra* at 3-6. To date, Class Counsel and co-counsel’s lodestar is already \$483,117.50. *Second Specht Decl.* ¶ 15; *Ciolko Decl.* ¶ 2.

By the time this action is concluded and all work is complete, this lodestar will likely be closer to \$493,000, and may exceed that amount. Following this motion, Class Counsel will continue to oversee the Settlement's administration, respond to Settlement Class member inquiries, confer with the Independent Fiduciary that has been retained to review the Settlement (*see supra* at n.3.), draft and file a motion for final approval, attend the Fairness Hearing, and take any other measures necessary to effectuate the Settlement. *See Second Specht Decl.* ¶ 17. 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) (“Where 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.” (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.*, 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.*, 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 for attorneys with 10 or more years of experience, \$450 to \$500 per hour for attorneys with less than 10 years of experience, and \$250 per hour for paralegals and clerks. *See Second Specht Decl. Ex. I.* 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.*, 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., 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (adopting rates of \$447 to \$974 per hour based on years of experience).

“The trend in the Second Circuit is to apply the percentage method and loosely use the lodestar method as a baseline or cross check.” *Solis v. OrthoNet LLC*, 2021 WL 2678651, at *4 (S.D.N.Y. June 30, 2021). “Typically, courts use multipliers of 2 to 6 times the lodestar.” *Id.* The requested one-third fee in this case represents a multiplier of 3.5, which falls well within the reasonable range. In sum, 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 approximately 2,600 Settlement Class members. *See Decl. of Brock J. Specht in Supp. of Pls.’ Mot. for Prelim. Approval of Class Action Settlement*, ECF No. 62, ¶ 3. Based on their experience litigating similar ERISA cases (*see infra* at 13-14), Class Counsel were uniquely able to navigate this case’s size and complexity and achieve a successful result for their clients and the Settlement 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

“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 (quoting *McDaniel v. Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010)). Class 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 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 dismissed the claims, either now on the pleadings—as Defendants’ motion to dismiss was pending when settlement was reached—or later on a motion for summary judgment. And, if the case proceeded to trial, Defendants might still have prevailed.⁷

⁷ *See, e.g., Vellali v. Yale Univ.*, No. 3:16-CV-1345 (AWT), ECF No. 622 (D. Conn. July 13, 2023); *Reetz v. Lowe’s Cos., Inc.*, No. 518-CV-00075-KDBDCK, 2021 WL 4771535, at *1 (W.D.N.C. Oct. 12, 2021), *aff’d sub nom. Reetz v. Aon Hewitt Inv. Consulting, Inc.*, No. 21-2267, 2023 WL 4552593 (4th Cir. July 17, 2023); *Rozo v. Principal Life Ins. Co.*, No. 4:14-cv-00463, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), *aff’d in part, rev’d in part*, 9 F.4th 95 (2d Cir. 2021).

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 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 proved that . . . the Plans suffered losses as a result.”). For example, in a recent ERISA class action trial, the jury found that, even though defendants had breached their fiduciary duty, no damages resulted. *See Vellali*, No. 3:16-cv-1345 (AWT), ECF No. 622.

Further, the risks here were even greater because this case did not follow a government investigation or action, but rather was initiated 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) (“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 Have Provided High-Quality Representation

Several courts have acknowledged Nichols Kaster’s expertise in ERISA class action litigation.⁸ Bloomberg has recognized that “Nichols Kaster has been the driving force behind [the]

⁸ *See, e.g., Karpik v. Huntington Bancshares Inc.*, 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.*, 2017

flurry of litigation over proprietary mutual funds.” Jacklyn Wille, *Deutsche Bank Can’t Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016). 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. *Second Specht Decl.* ¶¶ 3-6. Class Counsel’s experience and qualifications are further summarized in the accompanying declaration. *See id.* ¶¶ 3-9. Based on their experience, the firm’s attorneys have been interviewed by several media outlets in connection with their ERISA work. *Id.* ¶ 9. This experience was crucial to the outcome obtained here and gave Plaintiffs credibility at the bargaining table. The quality of 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 Qualified Settlement Fund mirrors awards in similar ERISA class actions.⁹ And courts routinely approve a one-third fee, which is “the market rate” for ERISA breach of fiduciary duty cases like this. *Cates*, 2021 WL 4847890, at *7.¹⁰

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” and encourages private enforcement. *Marsh*, 265 F.R.D.

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[.]”).

⁹ *See Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) (“Class Counsel’s requested one-third fee is common in these cases.”); *Kruger*, 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.” (quotation omitted)); *Clark v. Duke Univ.*, 2019 WL 2579201, at *5 (M.D.N.C. June 24, 2019); *Sims*, 2019 WL 1993519, at *2.

¹⁰ *See Goldstein et al v. Mutual of Am. Life Ins. Co.*, No. 1:22-cv-07862, ECF No. 76 at ¶ 1 (S.D.N.Y. Oct. 5, 2023) (approving one-third fee to Nichols Kaster in ERISA class action); *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, ECF No. 232 (S.D.N.Y. Oct. 7, 2020) (same); *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); *see also Karpik*, 2021 WL 757123, at *13 (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*, 2019 WL 1993519, at *2 (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).

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.”¹¹

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. A fee that is too low would create poor incentives to bring a class action case such as this[.]” *Bekker*, 504 F. Supp. 3d at 270-71.¹² This is especially true where, as here, the government took no enforcement action against Defendants and “without 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. Indeed, Plaintiffs here are “acting in lieu of enforcement by the U.S. Department of Labor, thus saving scarce public resources.” *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *4 (S.D.N.Y. Sept. 23, 2019).

¹¹ George S. Mellman & 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), 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.”), <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.”), <https://www.planadviser.com/most-dc-plans-have-fixed-fee-recordkeeping-arrangements/>.

¹² *See also In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *3 (S.D.N.Y. Sept. 23, 2019) (Attorneys’ fees should provide “lawyers with sufficient incentive to bring common fund cases that serve the public interest.”); *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.”).

III. THE COURT SHOULD APPROVE THE REQUESTED COSTS AND EXPENSES BECAUSE THEY ARE REASONABLE

A. The Litigation Costs Incurred Here 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, and “[c]ourts in the Second Circuit normally grant expenses requests in common fund cases as a matter of course[.]” *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.” *Marsh*, 265 F.R.D. at 150. Here, the requested litigation expenses are of a type normally incurred in complex class action such as this. *See Bekker*, 504 F. Supp. 3d at 271 (“The costs and expenses are the types of costs and expenses that are routinely reimbursed by paying clients, such as . . . travel, mediation fees, and photocopying costs.”). And the requested expense amount of \$27,756.38 is far less than the expense amounts approved in similar cases. *See, e.g., Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-cv-09936, ECF No. 348 at 5-6 (S.D.N.Y. Mar. 7, 2019) (approving \$759,779.30 in litigation expenses to Nichols Kaster). The Court should therefore approve these litigation expenses.

B. The Settlement Administration Expenses Incurred Here are Reasonable

As Settlement Administrator and Escrow Agent, Analytics has provided services that are essential to carry out the Settlement, including disseminating the Class Notice, reviewing Former Participant Settlement Class member rollover forms, and distributing payment. The cost of providing services (\$17,670.04) is reasonable in light of the services provided and comes to \$6.80 per class member.

Further, DOL guidance calls 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. *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 ¶ 3 (approving administrative expense for same types of services). The Court should therefore approve the requested Settlement Administration Expenses in the amount of \$32,640.04.

IV. THE COURT SHOULD APPROVE THE REQUESTED SETTLEMENT CLASS REPRESENTATIVE CASE CONTRIBUTION 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 v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003). This is especially true in cases involving an employer. *See Berkson v. Gogo LLC*, 2016 WL 1375803, at *1 (E.D.N.Y. Apr. 5, 2016) (noting plaintiffs incur significant personal risk when bringing employment-related claims). And, notably, the requested Case Contribution Award amount (\$7,500) lines up with what courts in the Second Circuit have awarded in similar ERISA actions. *Kindle v. Dejana*, 308 F. Supp. 3d 698, 718 (E.D.N.Y. 2018) (approving service award of \$10,000 to named plaintiff); *Bekker*, 504 F. Supp. 3d at 268 (approving service award of \$20,000 to named plaintiff); *Marsh*, 265 F.R.D. at 151 (approving service award of \$15,000 to each of the three named plaintiffs); *see also Copley v. Bactolac Pharmaceutical, Inc.*, 2023 WL 2470683, at *10 (E.D.N.Y. Mar. 13, 2023) (“Courts in this Circuit have approved service awards of up to \$100,000 each and courts routinely approve settlements containing service awards of \$5,000 or more per class representative”).

Despite the early resolution, Plaintiffs have contributed significantly to this case. This includes reviewing the allegations in the Complaint and Amended Complaint, providing information and documents to Class Counsel to assist in the investigation and litigation, answering questions posed by Class Counsel, staying informed of the action's progress, making themselves available for communication during mediation, conferring with Class Counsel regarding the risks and rewards of Settlement compared to pursuing additional litigation, and submitting individual declarations in support of the Settlement.

In addition to their contributions, Plaintiffs incurred significant reputational risk pursuing an action against their former employer within the financial services industry. *See Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *2, 5 (N.D. Cal. Feb. 16, 2011) (acknowledging that serving as a named plaintiff “could impact future employment in the financial services industry”); *Feinberg v. T. Rowe Price Group, Inc.*, 610 F. Supp. 3d 758, 774 (D. Md. 2022) (acknowledging that the named plaintiffs “exposed themselves to risk of adverse career consequences” in pursuing litigation against their financial services industry employer).

Lastly, that this action was resolved prior to undertaking costly and time-consuming discovery has no impact on awarding the requested Case Contribution Awards. *See Bezio v. General Elec. Co.*, 655 F. Supp. 2d 162, 165, 169 (N.D.N.Y. 2009) (granting service awards in ERISA action that settled prior to motion to dismiss ruling). Accordingly, Plaintiffs “should be compensated for their efforts on behalf of the Class, which has benefited greatly from their representation.” *Marsh*, 265 F.R.D. at 151.

CONCLUSION

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

Respectfully Submitted,

Dated: December 5, 2023

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s/ Brock J. Specht

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023 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: December 5, 2023

s/ Brock J. Specht
Brock J. Specht