UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Eric Goldstein, Matt Sudol, and Bonnie Zelazek, individually and as representatives of a class of similarly situated persons, and on behalf of the Mutual of America Life Insurance Company Savings Plan,

Plaintiffs,

v.

Mutual of America Life Insurance Company, the Mutual of America Investment Manager Committee, and John and Jane Does 1-20,

Defendants.

Case No. 1:22-cv-7862-GHW-OTW

CLASS ACTION

Memorandum of Law in Support of Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Awards

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INTRODUCTION

In this ERISA class action, Plaintiffs and Class Counsel[1] obtained a settlement creating a $2.75 million Settlement Fund for over 2,000 Class Members. As compensation for their efforts, Class Counsel request attorneys' fees in the amount of $915,750 (one-third of the Settlement Fund). This amount reflects Class Counsel's time and labor litigating such a large and complex ERISA class action, the considerable risks that Class Counsel assumed in bringing this contingency-fee case borne out of their own investigation, and the high-quality representation they provided. "In similar ERISA excessive fee cases, … district courts have consistently recognized that a one-third fee is the market rate." *Cates v. Trustees of Columbia Univ. in City of New York*, No. 1:16-CV-06524-GBD, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021).

Class Counsel also request reimbursement of $18,553.28 in litigation expenses and $35,969 in settlement administration expenses, which were all reasonable expenses customarily incurred in these types of cases. Finally, Class Counsel request $5,000 service awards for each of the three Class Representatives to compensate them for the time that they have invested in the litigation, the benefits they have provided to the Settlement Class, and the reputational risks they undertook in bringing this action against their former employer. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions.

BACKGROUND

I. PROCEDURAL HISTORY

On September 14, 2022, Plaintiffs filed this action alleging that Mutual of America breached its ERISA fiduciary duties by (1) hiring itself as the Plan's recordkeeper and charging the Plan fees that significantly exceeded what unaffiliated vendors charge for comparable services;

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[1] The Court has preliminarily approved Nichols Kaster, PLLP as counsel for the Settlement Class. *See ECF No. 63* ¶ *5.*

and (2) applying an imprudent and disloyal preference for its own overpriced and poorly performing proprietary funds. *See ECF No. 1 ¶ 1*. Mutual of America moved to dismiss on November 8, 2022. *ECF No. 23.* Plaintiffs then filed an amended complaint adding the Mutual of America Investment Manager Committee and John and Jane Does 1-20 as defendants as well as additional information supporting their allegations. *ECF No. 32*. Defendants moved to dismiss the Amended Complaint on December 22, 2022. *ECF No. 36*. Plaintiffs responded to Defendants' motion on January 26, 2023, *ECF No. 44*, and Defendants filed a reply on February 16, 2023, *ECF No. 45*.

On November 9, 2022, while the motion was pending, the parties appeared for an initial status conference. *See ECF No. 30*. At the conference, the Court encouraged the parties to discuss the possibility of an early settlement and to exchange targeted discovery that would facilitate such discussions. *Id.* The Court also stayed formal discovery while the parties pursued these discussions. *ECF No. 27*. Following entry of the stay, the parties proceeded with targeted discovery to facilitate settlement discussions. *Decl. of Brock Specht in Supp. of Pls.' Mot. for Preliminary Approval of Class Action Settlement ("First Specht Decl.") ¶ 15.* As part of this process, Defendants produced several important categories of documents, including Plan governing documents, financial records, and disclosures, and the parties engaged in arms-length settlement negotiations. *Id.* At a pre-settlement conference with the Court on March 9, 2023, the parties reported that they were engaged in ongoing, productive settlement negotiations, and the Court scheduled a follow-up conference for March 28, 2023. *Id.* ¶ *16*; *see also ECF No. 48.* In the interim, the parties reached an agreement in principle to resolve the case on a class-wide basis, *ECF No. 50*, and subsequently drafted the comprehensive Settlement Agreement that has been preliminarily approved by the Court, *see ECF Nos. 57-01, 63.*

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $2,750,000 to a common Settlement Fund. *Settlement Agreement* ("*Settlement*") ¶ *1.29*, *ECF No. 57-01.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members[2] in accordance with the Plan of Allocation in the Settlement. *Id.* ¶ *5.1-.10.* Under the Plan of Allocation, the Net Settlement Amount will be divided between the Recordkeeping Claim (25% of Net Settlement Amount) and Investment Claim (75% of Net Settlement Amount). *Id.* ¶ *5.2.*

Participant Class Members will have their Plan accounts automatically credited with their share of the Settlement Fund. *Id.* ¶ *5.4.* Former Participant Class Members will automatically 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. *Id.* ¶ *5.5.* Under no circumstances will any monies revert to Defendants. *Id.* ¶ *5.8(b).* Any uncashed checks will be transferred to the Plan's forfeiture account and treated as a forfeiture under the Plan's terms, except that no such funds will be used to reduce any Employer contribution (e.g., matching or profit sharing) under Section 4.3(e) of the Plan's terms. *Id.*

The Settlement also provides for prospective relief. Specifically, Defendants have agreed to ensure that, for the next three years, at least half of the Plan's investment funds are managed by

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

All participants in and beneficiaries of the Mutual of America Life Insurance Company Savings Plan at any time on or after September 14, 2016, through June 6, 2023, excluding any persons with responsibility for the Plan's administrative functions or investments.

ECF No. 63 ¶ *3.*

third-party entities unaffiliated with Mutual of America. *Id.* ¶ *6.1.* Defendants have also agreed to retain the Plan's current NAV investment platform for the next three years, unless Defendants determine that using the NAV investment platform is no longer consistent with ERISA. *Id.* [3]

Plaintiffs filed a motion seeking preliminary approval of the Settlement on April 14, 2023. *ECF No. 55.* The Court held a conference regarding Plaintiffs' motion on June 5, 2023, and the Court preliminarily approved the Class Action Settlement on June 6, 2023. *ECF No. 63.*

III. CLASS COUNSEL'S WORK

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, Class Counsel have invested approximately 557 hours into this case, and additional work will be required moving forward to implement the Settlement. *See Decl. of Brock Specht in Supp. of Pls.' Mot. for Approval of Att'ys' Fees and Costs, Admin. Expenses, and Class Rep. Service Awards* ("*Second Specht Decl.*") ¶¶ *12, 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 and recordkeeping expenses versus the other plan's investments and recordkeeping expenses. *Second Specht Decl.* ¶ *11.* Thereafter, Class Counsel (1) drafted the Complaint and Amended Complaint; (2) responded to Defendants' motion to dismiss; (3) reviewed documents produced by Defendants at Plaintiffs' request; (4) engaged in arms-length settlement

[3] On December 1, 2021, the Plan terminated its group annuity contract with Mutual of America and moved to a net asset value platform. *Am. Compl.* ¶ *21, ECF No. 32*.

negotiations reaching a settlement-in-principle; and (5) consulted with the Class Representatives throughout the case. *Second Specht Decl.* ¶ *11*.

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 Rollover Form, 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 settlement administration bids; (5) reviewing the final drafts of the Settlement Notices prepared by the Settlement Administrator and ensuring that they were timely mailed; (6) working with the Settlement Administrator to create a settlement website and telephone line for Class Members who want additional information about the Settlement; (7) communicating with Class Members; and (8) 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 any objections. *Second Specht Decl.* ¶ *17*. Class Counsel also will communicate with the Independent Fiduciary that has been engaged to review the Settlement[4] 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.*

[4] 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 requires review by an Independent Fiduciary. *Settlement* ¶ *2.2.*

C. Class Representatives' Work

The Class Representatives (Eric Goldstein, Matt Sudol, and Bonnie Zelazek) have also worked to advance the 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 answer questions from counsel and to stay informed on the action's status; (4) conferred with counsel regarding their claims' potential strengths and weaknesses and the potential risks and rewards of the Settlement compared to pursuing further litigation; and (5) submitted individual declarations in in support of the Settlement. *See Decl. of Eric Goldstein in Supp. of Pls.' Mot. for Prelim. Approval of Class Action Settlement ("Goldstein Decl.") ¶¶ 3-4, 6, ECF No. 58; Decl. of Matt Sudol in Supp. of Pls.' Mot. for Prelim. Approval of Class Action Settlement ("Sudol Decl.") ¶¶ 3-4, 6, ECF No. 59; Decl. of Bonnie Zelazek in Supp. of Pls.' Mot. for Prelim. Approval of Class Action Settlement ("Zelazek Decl.") ¶¶ 3-4, 6, ECF No. 60.*

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 ¶¶ 2.24, 2.31, 2.46.* Atticus Administration LLC ("Atticus"), 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 Specht Decl. ¶ 22.* Atticus will also review the Former Participant Rollover Forms, calculate payments to Class Members under the Plan of Allocation, and facilitate distribution of payments to Class Members if the Settlement receives final approval. *Id.* In addition, as Escrow Agent, Atticus will invest the monies in the Qualified Settlement Fund while approval of the Settlement and distributions to Class Members are pending. *See Settlement*

¶ *4.5*. Upon final approval of the Settlement, Atticus will release these funds and execute the investment and tax qualification mandates in the Settlement Agreement. *Id.* ¶¶ *4.1.1-4.3, 4.5-10*. Finally, the Independent Fiduciary (Newport Trust Company, LLC) 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. *Id.* ¶ *2.2*. As noted above, both the DOL regulations and the Settlement agreement call for this independent fiduciary review. *See supra* at n.4.

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

In consideration of the work summarized above and associated expenses, Article 7 of the Settlement Agreement provides that Plaintiffs may seek (1) Attorneys' Fees; (2) litigation costs; (3) payment of Administrative Expenses, including the expenses of the Settlement Administrator, Escrow Agent, and Independent Fiduciary; and (4) a $5,000 service award for each of the Class Representatives. *Id.* ¶¶ *1.4, 1.37,1.54, 7.1-7.2*. Accordingly, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys' Fees: $915,750 (33.3% of the Gross Settlement Amount)
- Litigation Expenses: $18,553.28
- Total Settlement Administrative Expenses: $35,969 (inclusive of the below expenses)
  - Settlement Administrator & Escrow Agent: $23,469
  - Independent Fiduciary: $12,500
- Class Representative service awards: $15,000 in total ($5,000 for each Class Representative)

ARGUMENT

I. STANDARD OF REVIEW

When counsel obtain a class settlement, courts "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Settlement Agreement and applicable law authorize the requested distributions.

"It is well-established under the common fund doctrine that attorneys who create a fund for the benefit of a class of plaintiffs are entitled to reasonable compensation from that fund." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 723 (2d Cir. 2023) (quotation omitted); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). Courts typically employ either the "percentage of the fund" method or the "lodestar" method to compute fees. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). 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*, No. 14-CV-8706, 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))).[5]

Likewise, "reasonable expenses of litigation" may be recovered from a common fund, *see Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970), as well as settlement administrative expenses, *see Henry v. Little Mint, Inc.*, No. 12 Civ. 3996, 2014 WL 2199427, at *17 (S.D.N.Y. May 23, 2014) (ordering settlement administration expenses to be paid "from the Settlement Fund"). Finally, class representative service awards serve the purposes of Rule 23 and may be

[5] The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger*, 209 F.3d at 50 (quotation omitted). But courts may consider the hours submitted by counsel as a "cross-check" on the reasonableness of the requested percentage. *Id.* The key consideration in awarding fees is what is reasonable under the circumstances. *Id.* at 47.

awarded to compensate efforts undertaken on behalf of class members. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150-51 (S.D.N.Y. 2010) (awarding $15,000 case contribution awards to each of the three named plaintiffs). 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, contested a motion to dismiss, conducted early discovery, prepared an Amended Complaint, engaged in ongoing settlement negotiations with Defendants, took the lead in drafting the Settlement Agreement and accompanying exhibits, and submitted multiple filings and appeared for several conferences with the Court in connection with the Settlement. *See supra* at 4-5. To date, Class Counsel's lodestar is already $265,305.00. *Second Specht Decl.* ¶ *15*.

By the time this action is concluded and all work is complete, Class Counsel's lodestar will likely be closer to $275,000, and may exceed that amount. Following this motion, Class Counsel will continue to oversee the Settlement's administration, respond to class member inquiries, confer with the Independent Fiduciary that has been retained to review the Settlement (*see supra* at n.4), 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.*, No. 12 Civ. 3693(PGG), 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.*, No. 1:15-CV-732, 2019 WL 1993519, at *3 (M.D.N.C. May 6, 2019) (addressing and approving Nichols Kaster's billing rates); *see also Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-cv-03698, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (describing Nichols Kaster's billing rates as "reasonable"). Nichols Kaster's billing rates for ERISA actions range from $675 to $950 per hour for attorneys with more than 10 years of experience, $450 to $675 per hour for attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks. *See Specht Decl. Ex. 1.* These rates harmonize with (and are slightly less than) the rates approved for other experienced ERISA litigators. *See, e.g.*, *Kruger v. Novant Health, Inc.*, No. 1:14-CV-208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (adopting rates of $460 to $998 per hour

based on years of experience); *Spano v. Boeing Co.*, No. 06-CV-743, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701, 2015 WL 4398475, at *3 (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 as a cross check." *Solis v. OrthoNet LLC*, No. 19-CV-4678 (VSB), 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 3.45, which falls well within the reasonable range. *See id.* Indeed, according to the Second Circuit, "a multiplier of 3.5 … has been deemed reasonable." *Wal-Mart Stores*, 396 F.3d at 123. 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 more than 2,000 Class Members. *See First Specht Decl.* ¶ 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 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. County of 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 still might have prevailed.[6]

[6] *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 proven 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.[7]

Further, the risks here were even greater because this case did not follow a government investigation or action, but rather was uncovered by Class Counsel's own investigation. *See Grinnell Corp.*, 495 F.2d at 471 (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.

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

D. Class Counsel Have Provided High-Quality Representation.

Several courts have acknowledged Nichols Kaster's expertise in ERISA class action litigation.[8] Bloomberg has also recognized 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). 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.* ¶¶ *3-4*. 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 the representation, therefore, also supports the requested fee.

E. The Requested Fee Is Reasonable Compared to the Settlement.

The requested fee award of one-third of the 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 excessive fee cases" like this. *Cates*, 2021 WL 4847890, at *7.[10]

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[8] *See, e.g.*, *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021) ("To that end, [Nichols Kaster] is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this."); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-Civ.-9936, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017) ("Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]").

[9] *See Tussey v. ABB, Inc.*, No. 06-CV-04305, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases."); *Kruger v. Novant Health, Inc.*, No. 1:14-CV-208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that a one-third fee is consistent with the market rate in a complex ERISA 401(k) fee case such as this matter." (quotation omitted)); *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2579201, at *5 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019).

[10] *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); *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 v. Huntington Bancshares Inc.*, No. 2:17-CV-1153,

"Beyond just the monetary recovery, this [C]ourt 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 Class Counsel negotiated—including ensuring that, for the next three years, at least half of the Plan's investments will be nonproprietary, *see supra* at 3-4—will provide additional value to the Class, and further supports the requested fee. *See Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (noting that injunctive and non-monetary relief were relevant factors in assessing success obtained for purposes of fee award).

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. at 149-50. Class actions such as this are "'a most effective weapon in the enforcement' of federal statutes that provide for both governmental and private rights of action." *Id.* at 150 (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) in the context of private securities litigation). One recent study found that because of litigation like this, "the average share of assets paid to fees for 401(k) participants in mutual funds has declined over the last 15 years" and that "these declines have been accompanied by corresponding decreases in 401(k) administrative and recordkeeping costs."[11] Given this impact, "[c]ounsel's fees should reflect the

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2021 WL 757123, at *13 (S.D. Ohio Feb. 18, 2021) (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.*, No. 18-4205, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (same); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 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).

[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. Recordkeeping fees have declined from $92 per participant to $57 per participant."), https://www.planadviser.com/most-dc-plans-have-fixed-fee-recordkeeping-arrangements/.

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 and would discourage lawyers from seeking plan improvements like the ones included in this settlement." *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.

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 expense requests in common fund cases as a matter of course," *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012). "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 actions 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 $18,553.28 is far less than the expense amounts approved in similar cases. *See, e.g.*, *Moreno*, No. 1:15-cv-09936, ECF No. 348 at 5-6 (approving $759,779.30 in litigation

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

expenses to Nichols Kaster).[13] The Court should therefore approve these litigation expenses.

B. The Settlement Administrative Expenses Incurred Here Are Reasonable.

As Settlement Administrator and Escrow Agent, Atticus has provided services that are essential to carrying out the Settlement, including disseminating the Settlement Notice, reviewing claims review, and distributing payment. The cost of providing those services ($23,469) is reasonable in light of the services provided and comes to $9.08 per class member. And DOL regulations call for review of the Settlement by the Independent Fiduciary, as it is a "critically important" benefit to plan participants. *See Marsh*, 265 F.R.D. at 139. Both the total amount of these expenses and the underlying components are reasonable and customary in ERISA cases such as this. *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 expenses for same types of services). This Court should therefore approve the requested settlement administration expenses in the amount of $35,969.

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

"Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation." *Marsh*, 265 F.R.D. at 150. Courts reason that such awards are compensatory in nature, reimbursing class representatives who "take on a variety of risks and tasks when they commence representative actions." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003). Not only did the Class

[13] *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.*, No. 3:06-cv-703, 2014 WL 375432 at *4 (S.D. Ill. Jan. 31, 2014) (approving $1,563,046.39 in litigation expenses).

Representatives invest significant time in actively participating in the litigation, *see supra* at 6, but they also assumed significant reputational risks by suing their former employer, *see Beesley*, 2014 WL 375432, at *4 ("ERISA litigation against an employee's current or former employer carries unique risks and fortitude, including alienation from employers or peers."). And, notably, the requested award amount ($5,000) lines up with what courts have awarded in similar ERISA class actions.[14]

CONCLUSION

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

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Respectfully Submitted,

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[14] *See Bekker*, 504 F. Supp. 3d at 268 (approving service award of $20,000 to the named plaintiff); *Marsh*, 265 F.R.D. at 151 (approving service award of $15,000 to each of the three named plaintiffs); *see also In re Colonial BancGroup, Inc. ERISA Litig.*, No. 2:09-cv-792, 2012 WL 4856704, at *3 (M.D. Ala. Oct. 12, 2012) (approving a $5,000 service award where ERISA class action settlement was reached while defendants' motion to dismiss was pending); *Alford v. United Cmty. Banks, Inc.*, No. 2:11-cv-00309, ECF No. 77, at *7 (N.D. Ga. Jan. 9, 2014) (approving a $5,000 service award where an ERISA class action settlement was reached shortly after defendants' motion to dismiss was denied); *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 1:07-cv-00952, 2010 WL 11508545, at *5 (N.D. Ga. Nov. 15, 2010) (same); *In Re: HealthSouth ERISA*, No. 2:03-cv-01700, ECF No. 157, at *13 (N.D. Ala. June 28, 2006) (same).