**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| James Smith and Jerry Honse, on behalf of themselves and all others similarly situated, and on behalf of the Triad Manufacturing, Inc. Employee Stock Ownership Plan, | |
| Plaintiffs, | JUDGE FRANKLIN U. VALDERRAMA |
| v. | MAGISTRATE JUDGE YOUNG B. KIM |
| GreatBanc Trust Company, the Board of Directors of Triad Manufacturing, Inc., David Caito, Robert Hardie, Michael McCormick, Elizabeth J. McCormick, Elizabeth J. McCormick Second Amended and Restated Revocable Living Trust, Michael K. McCormick Second Amended and Restated Revocable Living Trust, David M. Caito Revocable Trust, and First Amended and Restated Robert Hardie Revocable Trust, | |
| Defendants. | |

**PLAINTIFFS' UNOPPOSED MOTION AND INCORPORATED MEMORANDUM OF LAW FOR ATTORNEYS' FEES AND EXPENSE REIMBURSEMENT, SETTLEMENT ADMINISTRATION EXPENSES, AND SERVICE AWARDS**

# TABLE OF CONTENTS

BACKGROUND AND PROPOSED SETTLEMENT TERMS ..... 1

ARGUMENT ..... 2

I. The Requested Attorneys' Fee Is Reasonable and Well Below Market Rates for Contingent Class Representation ..... 2

A. The Requested Fee of 15% Is Less than Half of the Typical 33% Fee Approved in Similar Class Action Settlements ..... 3

B. Several Market Factors Support the Requested Fee ..... 4

1. The Risk of Nonpayment ..... 4

2. Quality of Performance and Work Performed… ..... ……5

3. The Stakes of the Case ..... 8

4. The Contract Between Plaintiffs and Class Counsel ..... 8

C. The Requested Fee Is Reasonable under a Lodestar Crosscheck ..... 9

II. Class Counsel's Reasonably Incurred Litigation Expenses Should Be Reimbursed from the Settlement Fund ..... 10

III. The Requested Settlement Administration Expenses Are Reasonable ..... 11

IV. Service Awards of $12,500 Each for the Named Plaintiffs Are Appropriate ..... 13

CONCLUSION ..... 15

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Abbott v. Lockheed Martin Corp.*,
2015 WL 4398475 (S.D. Ill. July 17, 2015) .....3

*Ahrendsen v. Prudent Fiduciary Servs., LLC*,
2023 WL 4139151 (E.D. Pa. June 22, 2023) .....9

*Am. Express Co. v. Italian Colors Rest.*,
570 U.S. 228 (2013) .....5

*Baird v. BlackRock Int'l Tr. Co., N.A.*,
2021 WL 5113030 (N.D. Cal. Nov. 3, 2021) .....10

*Becker v. Wells Fargo & Co.*,
No. 0:20-cv-02016-KMM-BRT, ECF 285 (D. Minn. Sept. 1, 2022) .....10, 12

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

*Bell v. Pension Comm. of ATH Holding Co., LLC*,
2019 WL 4193376 (S.D. Ind. Sept. 4, 2019) .....3

*Boeing Co. v. Van Gemert*,
444 U.S. 472 (1980) .....2, 10

*Burnett v. Prudent Fiduciary Servs. LLC*,
2023 WL 387586 (D. Del. Jan. 25, 2023), *report and recommendation adopted sub nom. Burnett v. Prudent Fiduciary Serv.*, 2023 WL 2401707 (D. Del. Mar. 8, 2023), *appeal filed* No. 23-1527 (3d Cir. Apr. 3, 2023) .....6

*Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*,
897 F.3d 825 (7th Cir. 2018) .....2, 13

*In re Cap. One Tel. Consumer Prot. Act Litig.*,
80 F. Supp. 3d 781 (N.D. Ill. 2015) .....3

*Cook v. Niedert*,
142 F.3d 1004 (7th Cir. 1998) .....9, 13, 14

*Cunningham v. Wawa, Inc.*,
2021 WL 1626482 (E.D. Pa. Apr. 21, 2021) .....10

*Dennard v. Transamerica Corp.*,
No. 1:15-cv-00030, ECF 121 (N.D. Iowa Oct. 28, 2016) .....10

*Florin v. Nationsbank of Ga., N.A.*,
60 F.3d 1245 (7th Cir. 1995) .....5

*Foster v. Adams & Assocs., Inc.*,
No. 18-cv-02723-JSC, ECF 244 (N.D. Cal. Feb. 11, 2022) .....10

*Frank v. Eastman Kodak Co.*,
228 F.R.D. 174 (W.D.N.Y. 2005).....13

*Frommert v. Conkright*,
223 F. Supp. 3d 140 (W.D.N.Y. 2016), *amended on other grounds*, 2017 WL 3867795 (W.D.N.Y. May 4, 2017) .....9

*Gamino v. KPC Healthcare Holdings, Inc.*,
No. 5:20-cv-01126-SB-SHK, ECF 418 (C.D. Cal. Mar. 11, 2023).....10

*Gaskill v. Gordon*,
160 F.3d 361 (7th Cir. 1998) .....3

*George v. Kraft Foods Glob., Inc.*,
2012 WL 13089487 (N.D. Ill. June 26, 2012) .....3, 4

*Godfrey v. GreatBanc Tr. Co.*,
No. 1:18-cv-07918, ECF 324 (N.D. Ill. Oct. 4, 2022) .....3, 10

*Hale v. State Farm Mut. Auto Ins. Co.*,
2018 WL 6606079 (S.D. Ill. Dec 16, 2018).....14

*Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*,
59 F.4th 1090 (10th Cir. 2023) .....6

*Heekin v. Anthem, Inc.*,
2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) .....14

*Henry v. Wilmington Tr. NA*,
--- F.4th ----, 2023 WL 4281813 (3d Cir. June 30, 2023).....6

*Kirchoff v. Flynn*,
786 F.2d 320 (7th Cir. 1986) .....8

*Koszyk v. Country Fin.*,
2016 WL 5109196 (N.D. Ill. Sept. 16, 2016) .....11

*Leung v. XPO Logistics, Inc.*,
326 F.R.D. 185 (N.D. Ill. 2018).....8

*Lloyd v. Argent Tr. Co.*,
2022 WL 17542071 (S.D.N.Y. Dec. 6, 2022), *appeal filed* No. 22-3116 (2d Cir. Dec. 9, 2022).....6

*In re Marsh ERISA Litig.*,
265 F.R.D. 128 (S.D.N.Y. 2010).....5

*Nistra v. Reliance Tr. Co.*,
No. 1:16-cv-04773, ECF 291 (N.D. Ill. June 19, 2020).....3, 14

*Reetz v. Lowe's Cos., Inc.*,
No. 5:18-cv-00075-KDB-DCK, ECF 263 (W.D.N.C. Oct. 12, 2021).....12

*Retsky Fam. Ltd. P'ship v. Price Waterhouse, LLP*,
2001 WL 1568856 (N.D. Ill. Dec. 10, 2001).....8

*Silverman v. Motorola Sols., Inc.*,
739 F.3d 956 (7th Cir. 2013).....2, 4

*Smith v. Greatbanc Tr. Co.*,
2020 WL 4926560 (N.D. Ill. Aug. 21, 2020), *aff'd sub nom. Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021).....5

*Spano v. Boeing Co.*,
2016 WL 3791123 (S.D. Ill. Mar. 31, 2016).....3, 10

*Stevens v. SEI Invs. Co.*,
2020 WL 996418 (E.D. Pa. Feb. 28, 2020).....12

*Sutton v. Bernard*,
504 F.3d 688 (7th Cir. 2007).....2, 4

*In re Synthroid Mktg. Litig.*,
264 F.3d 712 (7th Cir. 2001)..... *passim*

*Taubenfeld v. AON Corp.*,
415 F.3d 597 (7th Cir. 2005).....3, 9

*Tom v. Com Dev USA, LLC*,
No. 2:16-cv-01363, ECF 166 (C.D. Cal. Dec. 4, 2017).....10

*Will v. Gen. Dynamics Corp.*,
2010 WL 4818174 (S.D. Ill. Nov. 22, 2010).....3

**Statutes**

29 U.S.C. § 1132(g)(1).....10

ERISA..... *passim*

**Other Authorities**

Fed. R. Civ. P. 23 ..... 10

Consistent with the terms of the Class Action Settlement Agreement, Plaintiffs James Smith and Jerry Honse (collectively "Plaintiffs") and Class Counsel respectfully move the Court for an order approving (1) attorneys' fees to Class Counsel in the amount of $2,279,105.00 (15% of the Settlement value), (2) reimbursement of $180,395.00 in litigation expenses advanced by Class Counsel, (3) Settlement Administration Expenses of $15,500, (3) Service Awards of $12,500 to each Named Plaintiff as Settlement Class Representatives, and (4) for other such relief as the Court may deem just and proper.[1]

As discussed herein, all requested amounts are reasonable in light of the excellent results obtained for the Class through the proposed Settlement. In particular, the fee request is just 15% of the total value of the Settlement, which is substantially less than the 33% fee typically awarded by Seventh Circuit courts in complex ERISA cases. Further, Class Counsel performed extensive work, and their requested fee is *less* than the value of the time Class Counsel spent prosecuting this Action. Finally, zero objections have been lodged concerning the Settlement's terms or the requested attorneys' fees and expense reimbursement, settlement administration expenses, and service awards thus far. Defendants do not oppose the requested relief in this motion.

## BACKGROUND AND PROPOSED SETTLEMENT TERMS

Plaintiffs incorporate by reference the Factual and Procedural Background and the Summary of the Proposed Settlement Terms Sections from their Final Approval Motion and the Motion's accompanying Declarations. ECF157 at 2-4, 4-8; ECF 157-1 to 157-7. Relevant to this motion, the Settlement Agreement ("SA") provides that Class Counsel may move for an award of

[1] The concurrently-filed Unopposed Motion for Final Approval of Settlement ("Final App. Mot.") sets forth why the Settlement Agreement provides substantial and valuable economic consideration to the Class and should be approved. Capitalized terms used herein shall have the meaning as set forth in the Settlement Agreement, filed previously at ECF 145-2, unless otherwise specified herein.

attorneys' fees, reimbursement of litigation costs and expenses, and service awards for the Named Plaintiffs. SA § VI.1. The Settlement Agreement also provides for payment of reasonable settlement administration expenses and taxes. *Id.* § VI.3. The Settlement Agreement provides that Defendants will pay a total of $2.5 million in cash as payment toward all of these expenses. *Id.* § III.1. The value to the Class from the Settlement is not contingent on the award of any attorneys' fees and expense reimbursement, settlement administration expenses, or service awards. And, if any of the $2.5 million cash set aside for these awards is not granted by the Court, that amount will be allocated to Class Members (i.e., the $2.5 million is non-reversionary). *Id.* § VI.6. The Class Notice explained that the Named Plaintiffs and Class Counsel would seek attorneys' fees and expense reimbursement, settlement administration expenses, and service awards consistent with the amounts in this motion. Declaration of Jeffrey Mitchell ("Mitchell Decl.") Ex. A.

## ARGUMENT

### I. The Requested Attorneys' Fee Is Reasonable and Well Below Market Rates for Contingent Class Representation

Under the common fund doctrine, class counsel are entitled to a reasonable attorneys' fee from the fund created for the benefit obtained in a class settlement. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Within the Seventh Circuit, "attorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013).

In evaluating the reasonableness of a requested fee, the Seventh Circuit requires district courts to consider whether the fee is within the range of fees which would have been agreed to at the outset of the litigation, considering the risk of nonpayment and the market rate. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 832 (7th Cir. 2018); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"); *Sutton v. Bernard*, 504 F.3d 688,

692 (7th Cir. 2007). Courts must "do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, [and] information from other cases." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

To determine a reasonable fee in a class action settlement, courts in this Circuit favor the percentage of the fund method, rather than lodestar method, because contingent, percentage of the recovery fees mirror the market. *See George v. Kraft Foods Glob., Inc.*, 2012 WL 13089487, at *2 (N.D. Ill. June 26, 2012) (citing *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)) (applying percentage of the fund method in awarding attorneys' fees in ERISA class action settlement)); *see also In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) (noting that market rate in consumer class actions is a fee based on a percentage of the recovery); *Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) (same).

However, regardless of which method is applied here—the percentage of the fund or the lodestar method—the requested fee is reasonable.

### A. The Requested Fee of 15% Is Less than Half of the Typical 33% Fee Approved in Similar Class Action Settlements

Seventh Circuit courts routinely award fees that are one-third of the common fund achieved in ERISA class action settlements similar to this one. *See, e.g.*, *Godfrey v. GreatBanc Tr. Co.*, No. 1:18-cv-07918, ECF 324 at 4 (N.D. Ill. Oct. 4, 2022) (awarding one-third of $16.5 million ERISA class action settlement as attorneys' fees); *Nistra v. Reliance Tr. Co.*, No. 1:16-cv-04773, ECF 291 at 4 (N.D. Ill. June 19, 2020) (awarding $2.64 million in attorneys' fees in $13.3 million ESOP class action settlement); *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *1, 3 (S.D. Ind. Sept. 4, 2019) (awarding one-third of $23 million common fund as attorneys' fees); *Spano v. Boeing Co.*, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016) (finding a one-third fee award to be consistent with ERISA class action settlements); *Abbott v. Lockheed Martin Corp.*,

2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (awarding one-third of $62 million ERISA class action settlement); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law [ERISA].") (awarding $10 million in fees out of $30 million gross settlement fund in ERISA class action); *George*, 2012 WL 13089487, at *4 (awarding one-third of $9.5 million ERISA class action settlement).

Here, the 15% fee request is less than half of the typical attorneys' fee award in similar ERISA class action settlements, which underscores its reasonableness. This method weighs heavily in favor of approving the requested attorneys' fees.

**B. Several Market Factors Support the Requested Fee**

The market price for legal fees "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton*, 504 F.3d at 693 (quoting *Synthroid I*, 264 F.3d at 721). Further, the actual agreement that each Named Plaintiff entered into with Class Counsel is relevant to evaluating the market price for contingent representation.

***1. The Risk of Nonpayment***

First, the risk of nonpayment to Class Counsel supports approval. "Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman*, 739 F.3d at 958 (citation omitted); *see also Sutton*, 504 F.3d at 694 (finding abuse of discretion where court refused to account for the risk of loss and therefore "the possibility exists that Counsel . . . was undercompensated"). Class Counsel undertook this case on a purely contingent-fee basis; had Plaintiffs lost the case, Class Counsel would have received neither fees nor reimbursement of their expenses. *See* Yau Decl. ¶¶ 17-18, 20; Feinberg Decl. ¶¶ 13, 16. While Class Counsel was

confident in Plaintiffs' claims, the outcome of the litigation was uncertain, and Plaintiffs faced considerable risks. As described in the concurrently-filed Motion for Final Approval of Settlement, ERISA litigation entails significant risks, and it may span years (sometimes decades) and often ends in no recovery after trial. Yau Decl. ¶ 18.

Despite this significant risk of nonpayment, Class Counsel collectively devoted more than 4,600 hours of attorney and paralegal time (worth more than $3 million) and $180,395.50 in out-of-pocket expenses to litigate this matter to a successful resolution. Yau Decl. ¶¶ 8, 23. The substantial risk that Class Counsel's work could have gone uncompensated (and their expenses unreimbursed) underscores that a 15% common fund award is reasonable and below market rates.

***2. Quality of Performance and Work Performed***

"Many courts have recognized the complexity of ERISA breach of fiduciary duty company stock claims." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010); *see also Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995) ("Very few areas of the law are as unsettled and complex as ESOP valuation.") (internal citations omitted). Class Counsel here navigated unsettled law, secured important wins, and negotiated a Settlement that provides substantial value for the Class.

For example, Class Counsel defeated a motion to compel arbitration at a time when the law on the intersection of ERISA remedies and the effective vindication doctrine was unsettled. ECF 145-4 ¶ 17. This Court agreed with Class Counsel that the arbitration provision Defendants sought to enforce operated "as a 'prospective waiver of a party's right to pursue statutory remedies'" and "are unenforceable, on public-policy grounds." *Smith v. Greatbanc Tr. Co.*, 2020 WL 4926560, at *4 (N.D. Ill. Aug. 21, 2020), *aff'd sub nom. Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021) (*citing Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013)). Defendants filed an interlocutory appeal in their continued attempt to force Plaintiffs to

individualized arbitration. ECF 55. Class Counsel carefully developed their appellate arguments on an important issue given the oft-repeated refrain that the Supreme Court has never actually relied on the effective vindication doctrine to strike an individual arbitration clause. Yau Decl. ¶ 19.

Class Counsel then hired appellate specialists to draft the brief and argue the Seventh Circuit appeal. *See* Declaration of Peter K. Stris ("Stris Decl.") ¶¶ 3–4. Class Counsel ultimately secured a landmark arbitration decision that has been cited by other federal appellate and district courts. *See, e.g.*, *Henry v. Wilmington Tr. NA*, --- F.4th ----, 2023 WL 4281813 (3d Cir. June 30, 2023); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090 (10th Cir. 2023); *Burnett v. Prudent Fiduciary Servs. LLC*, 2023 WL 387586 (D. Del. Jan. 25, 2023), *report and recommendation adopted sub nom. Burnett v. Prudent Fiduciary Serv.*, 2023 WL 2401707 (D. Del. Mar. 8, 2023), *appeal filed* No. 23-1527 (3d Cir. Apr. 3, 2023); *Lloyd v. Argent Tr. Co.*, 2022 WL 17542071 (S.D.N.Y. Dec. 6, 2022), *appeal filed* No. 22-3116 (2d Cir. Dec. 9, 2022).

After resolution of the appeal, the case returned to the district court, and Class Counsel completed extensive fact discovery, including receiving and analyzing tens of thousands of documents, taking and defending 12 depositions, briefing successful motions, and working with a valuation expert to estimate potential damages. ECF 145-4 ¶¶ 18–20; ECF 145-1 ¶ 24; ECF 115. Thereafter, Class Counsel represented the Class in protracted settlement negotiations over a period of four months. ECF 145-1 ¶¶ 20–22; ECF 145-4 ¶ 16.

Class Counsel in this matter—Cohen Milstein Sellers & Toll PLLC ("CMST") and Feinberg, Jackson, Worthman & Wasow LLP ("FJWW")—are national leaders in ERISA litigation. *See generally* ECF 145-1; ECF 145-4.

CMST is a national leader in class action litigation generally and has been named by *Law360* as one of the ten "Most Feared Plaintiffs Firms." ECF 145-4 ¶ 5; *see also* ECF 145-5. For over 20 years, CMST has had a dedicated group of ERISA class action specialists. ECF 145-4 ¶ 5. *Law360* also named CMST's ERISA practice "Benefits Group of the Year" for three of the last four years (2019, 2021, and 2022). *Id.* ¶ 6. Michelle Yau chairs the ERISA practice group and was named an MVP in the area of Employee Benefits by *Law360*. ECF 145-4 ¶ 6; ECF 145-5 at 93–94. Ms. Yau began her career as an Honors Attorney at the U.S. Department of Labor and has specialized in ERISA fiduciary breach cases involving complex financial transactions or investments for almost the last two decades. ECF 145-4 ¶ 4. Ms. Yau also worked as a financial analyst on Wall Street prior to her legal career, where she performed valuations of private and public companies using similar methodologies at issue in this case. *Id*.

FJWW is also a national leader in class action litigation, and specifically, ERISA class actions. ECF 145-3. FJWW regularly handles ESOP class actions, and the firm has worked on groundbreaking ERISA cases before the U.S. Supreme Court and U.S. Court of Appeals. *Id.* Daniel Feinberg of FJWW has litigated ERISA claims since 1989 and has specialized in ESOP class actions since 2008. ECF 145-1 ¶ 4. Mr. Feinberg's ESOP litigation has resulted in more than $150 million in recoveries on behalf of class members. *Id.* Mr. Feinberg has also been named a "Northern California Super Lawyer" for the past 17 years and a Top 100 Lawyer by Northern California Super Lawyers each year from 2011 to 2018. *Id.* ¶ 8. Finally, Mr. Feinberg was named a Fellow of the American College of Employee Benefits Counsel, a rare accolade for plaintiff-side counsel. *Id.* ¶ 7.

Stris & Maher LLP ("Stris") served as Plaintiffs' appellate counsel for briefing and arguing the Seventh Circuit appeal. Stris is one of the nation's leading litigation boutiques with a prominent

plaintiffs-side ERISA practice before trial and appellate courts. Stris Decl. Ex. A. Chambers USA has recognized Stris as one of the highest-ranking law firms for ERISA plaintiffs-side litigation. *Id.*

In sum, the Class enjoyed representation of the highest quality, which further supports the requested attorneys' fees.

***3. The Stakes of the Case***

This important case sought to remedy millions of dollars of losses to the retirement accounts of the Class Members. However, given the risks and expense in ERISA litigation, it is highly unlikely that any individual Class Member would bring this case and pay an attorney on an hourly basis. Yau Decl. ¶ 17. Therefore, Class Counsel's willingness to litigate this case on a contingency fee basis was critical to the financial wellbeing of the 468 Class Members.

***4. The Contract Between Plaintiffs and Class Counsel***

Class Counsel's requested fee is consistent with representation agreements commonly entered into within this Circuit and District, including between Plaintiffs and Class Counsel here. Specifically, the customary contingency agreement in this Circuit is 33% to 40% of the total recovery. *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018); *see also Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation" and noting, with approval, contracts providing for one-third contingent fee if litigation settled before trial); *Retsky Fam. Ltd. P'ship v. Price Waterhouse, LLP*, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (recognizing that customary contingent fee is "between 33 1/3% and 40%" and awarding counsel one-third of the common fund).

Here, each Plaintiff entered into a contingency retainer agreement with Class Counsel for a fee of up to 33 1/3% of any recovery, plus expenses. Yau Decl. ¶ 16. Yet Class Counsel are requesting *less* than half the agreed to amount—15% of the total recovery value. *Id.* ¶¶ 7, 16. Based

on a review of "actual fee contracts that were privately negotiated for similar litigation, [and] information from other cases," Class Counsel's request for 15% fee award is well below market fee awards and is hence reasonable. *See Taubenfeld*, 415 F.3d at 599.

**C. The Requested Fee Is Reasonable under a Lodestar Crosscheck**

While not required, a lodestar crosscheck further underscores the reasonableness of the requested attorneys' fees. Here, Class Counsel's requested fee award of $2.3 million is *less* than the $3.0 million of lodestar they invested in prosecuting this Action. Yau Decl. ¶¶ 7-8. Under the lodestar approach, reasonable hourly rates are multiplied by the hours reasonably expended by the attorneys, which may then be multiplied by a risk multiplier that is determined at the district court's discretion. *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998). The Seventh Circuit has held that the hourly rates to be applied in calculating the lodestar are those normally charged for similar work by attorneys of comparable skill and experience in the community in which the attorney practices. *Synthroid I*, 264 F.3d at 718. In ERISA class actions, federal courts recognize that reasonable hourly rates are based on national, rather than local, rates. *See, e.g.*, *Beesley*, 2014 WL 375432, at *3; *see also Frommert v. Conkright*, 223 F. Supp. 3d 140, 151 (W.D.N.Y. 2016), *amended on other grounds*, 2017 WL 3867795 (W.D.N.Y. May 4, 2017).

As of the date of this filing, Class Counsel and their paralegals collectively worked approximately 4,658 hours, for a total lodestar of approximately $3,029,591.00.[2] Yau Decl. ¶¶ 8-11; Feinberg Decl. ¶ 10; Stris Decl. ¶¶ 5-6. This lodestar reflects reasonable hourly rates that have been approved by federal courts in light of Class Counsel's experience. *See, e.g.*, *Ahrendsen v. Prudent Fiduciary Servs., LLC*, 2023 WL 4139151, at *7 (E.D. Pa. June 22, 2023) (approving

[2] Class Counsel will continue to incur fees in responding to any Class Member inquiries or objections, preparing for and participating in the Fairness Hearing, and otherwise effectuating the settlement. Yau Decl. ¶¶ 6, 15; Feinberg Decl. ¶ 11.

CMST's hourly rates as reasonable); *Becker v. Wells Fargo & Co.*, No. 0:20-cv-02016-KMM-BRT, ECF 285 (D. Minn. Sept. 1, 2022) (same); *Baird v. BlackRock Int'l Tr. Co., N.A.*, 2021 WL 5113030, at *7 (N.D. Cal. Nov. 3, 2021) (same); *Gamino v. KPC Healthcare Holdings, Inc.*, No. 5:20-cv-01126-SB-SHK, ECF 418 (C.D. Cal. Mar. 11, 2023) (approving FJWW's hourly rates as reasonable in lodestar crosscheck); *Foster v. Adams & Assocs., Inc.*, No. 18-cv-02723-JSC, ECF 244 (N.D. Cal. Feb. 11, 2022) (same); *Cunningham v. Wawa, Inc.*, 2021 WL 1626482, at *8 (E.D. Pa. Apr. 21, 2021) (same); *Tom v. Com Dev USA, LLC*, No. 2:16-cv-01363, ECF 166 (C.D. Cal. Dec. 4, 2017) (approving Stris's hourly rates as reasonable); *Dennard v. Transamerica Corp.*, No. 1:15-cv-00030, ECF 121 (N.D. Iowa Oct. 28, 2016) (same). Further, courts within this District have approved awards of attorneys' fees where the underlying lodestar contained similar hourly rates for ERISA class counsel. *See, e.g.*, *Godfrey*, No. 1:18-cv-07918, ECF 319-1, 324 (approving attorneys' fees where class counsel's hourly rates were between $370 to $975 for attorneys and up to $275 for paralegals); *Spano*, 2016 WL 3791123, at *3 (approving hourly rates between $460 and $998 for attorneys and up to $309 for paralegals). Finally, Chicago-area counsel further supports Class Counsel's hourly rates as reasonable for ERISA class action litigation. *See* Declaration of Patrick Muench ¶¶ 3-5.

In light of the complexity of this case, the risk of total non-payment, and the excellent result obtained for the Class Members, the requested attorneys' fees—which is less than the lodestar invested by Class Counsel—should be approved.

## II. Class Counsel's Reasonably Incurred Litigation Expenses Should Be Reimbursed from the Settlement Fund

In addition to the requested attorneys' fees, counsel who create a common fund are entitled to the reimbursement of out-of-pocket litigation expenses. *Beesley*, 2014 WL 375432, at *3 (citing Fed. R. Civ. P. 23); *Boeing*, 444 U.S. at 478; 29 U.S.C. § 1132(g)(1) (providing for recovery of

the "costs of action"). The Seventh Circuit has held that litigation expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid I*, 264 F.3d at 722.

Here, Class Counsel have incurred $180,395.50 in out-of-pocket litigation expenses, which were all documented in the firms' books and records. Yau Decl. ¶¶ 23–24; Feinberg Decl. ¶ 15; Stris Decl. ¶ 9. These expenses were necessary to the prosecution of the case and the successful result achieved for the Class. Yau Decl. ¶ 23; Feinberg Decl. ¶ 15. Such expenses included, *inter alia*, court filing fees, postage, online legal research, vendor expenses for electronic discovery storage and review, mediation expenses, transcript and stenography expenses for depositions, and travel expenses in connection with depositions, mediation, and court hearings. Yau Decl. ¶ 23; Feinberg Decl. ¶ 15; Stris Decl. ¶ 9. These expenses are of the type routinely billed by attorneys to paying clients. *See Koszyk v. Country Fin.*, 2016 WL 5109196, at *5 (N.D. Ill. Sept. 16, 2016) (approving out-of-pocket expense reimbursement for case-related travel, electronic research, court fees, court reporters, postage and courier fees, working meals, photocopies, telephone calls, travel, and plaintiffs' portion of mediator fees); *Beesley*, 2014 WL 375432, at *3 (reasoning that reimbursement of litigation costs and expenses is "well established" in common fund settlements, which may include expert witness costs, computerized research, court reports, travel expenses, copy and facsimile expenses, and mediation). Accordingly, Class Counsel request that the Court approve reimbursement in the amount of $180,395.00 in reasonable litigation expenses.

## III. The Requested Settlement Administration Expenses Are Reasonable

In addition to Class Counsel's out-of-pocket litigation expenses, Plaintiffs seek approval of the settlement administration expenses necessary for the effectuation of this Settlement. In order to be administered and effectuated, the Settlement requires time, resources, and expertise from several non-parties. As such, the Settlement Agreement provides for disbursement from the

Settlement Fund to cover (i) the amount required for settlement administration expenses, including the Class Notice fees and expenses (SA III.1, *see also id.* II.7); (ii) all taxes and tax-related expenses incurred in connection with the taxation of the income of the Settlement Fund (*id.* VI.3); and (iii) one-half of the Independent Fiduciary's fee (*id.* IX.2).

The total requested settlement administration expenses of $15,500 are reasonable and essential to carry out the settlement. The cost of $15,500 reflects just one-tenth of a percent (0.0010) of the Settlement value, which is substantially below the settlement administration costs approved by other courts in similar ERISA class settlements. *See Reetz v. Lowe's Cos., Inc.*, No. 5:18-cv-00075-KDB-DCK, ECF 263 at 2 (W.D.N.C. Oct. 12, 2021) (approving settlement administration costs of $203,045, reflecting 1.6% of the gross settlement value); *Becker,* No. 0:20-cv-02016-KMM-BRT, ECF 285 at 2 (awarding $400,000 to settlement administrator and $15,000 to independent fiduciary, representing 1.28% of the gross settlement value); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020) (approving settlement administration expenses of $60,170.97, reflecting 0.8% of the gross settlement value).

The Parties' Settlement Administrator, Analytics Consulting, LLC ("Analytics"), has performed settlement administration services, including (1) reviewing the Settlement Class Member information provided by Defendants; (2) preparing and mailing the Settlement Notices; (3) searching for valid addresses for any Settlement Class Members whose Notices were returned as undeliverable; (4) establishing a telephone support line for Settlement Class Members; (5) creating and maintaining the Settlement website; and (6) managing the project and communicating with counsel regarding the status of settlement administration. Yau Decl. ¶ 27; Mitchell Decl. ¶¶ 6-14. Class Counsel selected Analytics after a competitive bidding process involving five (5) additional settlement administration companies. Yau Decl. ¶ 29.

Similarly, Fiduciary Counselors Inc. ("FCI") was selected as the Independent Fiduciary to review the Settlement after a competitive bidding process. Yau Decl. ¶ 31. The cost for FCI's services, $20,000, was in line with the other bidders and lower than the highest bid. *Id.* Further, the Class is splitting the Independent Fiduciary cost with Defendants, which results in just $10,000.

Therefore, this Court should approve the requested settlement administration expenses.

## IV. Service Awards of $12,500 Each for the Named Plaintiffs Are Appropriate

Finally, Class Counsel requests that the Court grant a service award of $12,500 to each Named Plaintiff for their efforts on behalf of the Class. Such awards are routinely granted to compensate named plaintiffs for their time spent prosecuting the claims, as well as to compensate them for the risks they incurred in stepping forward to vindicate the rights of others. *See Cook*, 142 F.3d at 1016 (recognizing in an ERISA class action that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *Synthroid I*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives."); *see also Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) ("In employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers."). In evaluating service awards, the district court evaluates "the actions the plaintiff has undertaken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store*, 897 F.3d at 834 (internal quotation marks omitted).

Here, the Named Plaintiffs spent a significant amount of time and effort in pursuing the litigation on behalf of the Class. The Named Plaintiffs communicated with Class Counsel throughout the litigation, including responding to questions, reviewing the pleadings, preparing

for depositions, and assessing the settlement. Yau Decl. ¶ 36; Declaration of James Smith ("Smith Decl.") ¶¶ 9–10; Declaration of Jerry Honse ("Honse Decl.") ¶¶ 7-8. Both Named Plaintiffs also sat for their depositions and responded to written discovery requests, including interrogatories and requests for the production of documents. Yau Decl. ¶ 37; Smith Decl. ¶ 10; Honse Decl. ¶ 8. Moreover, both Named Plaintiffs understood the responsibilities as class representatives and were prepared to serve the best interests of the Class through trial, if necessary. Yau Decl. ¶ 38; Smith Decl. ¶ 8, Ex. A; Honse Decl. ¶ 6, Ex. A. This active and continuous participation for the benefit of the Class supports the requested service awards.

The amount requested—$12,500 each, or 0.16% of the total recovery—is comparable to other awards approved by courts within this Circuit in ERISA and other class action cases. *See, e.g.*, *Nistra*, No. 1:16-cv-04773, ECF 291 at 4-5 (awarding $25,000 to named plaintiff in ERISA class action settlement); *Hale v. State Farm Mut. Auto Ins. Co.*, 2018 WL 6606079, at *15 (S.D. Ill. Dec 16, 2018) (awarding $25,000 for each of three named plaintiffs); *Beesley*, 2014 WL 375432, at *4 (noting in ERISA case that "[a]wards of $15,000 to $25,000 for a Named Plaintiff award and total Named Plaintiff awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases"); *Cook*, 142 F.3d at 1016 (upholding award of $25,000 to class representative based on plaintiff's time expended and results obtained for the class); *Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 service award to lead class plaintiff over objection).

Because the requested service awards are reasonable in light of the Named Plaintiffs' contributions to the Class, the service awards should be approved.

## CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and approve the requested amounts.

Dated: July 17, 2023

Respectfully submitted,

*/s/ Caroline E. Bressman*
Caroline E. Bressman (admitted pro hac vice)
**COHEN MILSTEIN SELLERS & TOLL PLLC**
400 South Fourth Street ● #401-27
Minneapolis, MN 55415
Tel: (612) 807-1575
cbressman@cohenmilstein.com

Michelle C. Yau (admitted *pro hac vice*)
Daniel R. Sutter (admitted *pro hac vice*)
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699
myau@cohenmilstein.com
dsutter@cohenmilstein.com

Carol V. Gilden, Illinois Bar: 6185530
190 South LaSalle Street ● Suite 1705
Chicago, IL 60603
Tel: (312) 357-0370
Fax: (312) 357-0369
cgilden@cohenmilstein.com

**FEINBERG, JACKSON, WORTHMAN & WASOW, LLP**
Nina Wasow (admitted *pro hac vice*)
Dan Feinberg (admitted *pro hac vice*)
2030 Addison Street ● Suite 500
Berkeley, CA 94704
Tel: (510) 269-7998
Fax: (510) 269-7994
nina@feinbergjackson.com
dan@feinbergjackson.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that, on July 17, 2023, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system and to be thereby served upon all registered participants identified in the Notice of Electronic Filing in this matter on this date.

*/s/ Caroline E. Bressman*
Caroline E. Bressman