UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TERRE BEACH, *et al.*, individually and on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Civil Action 17-CV-00563-JMF
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, JPMORGAN CHASE & COMPANY, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PLAINTIFFS' SERVICE AWARDS

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Class Counsel, Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), respectfully submits this brief in support of its application under Federal Rule of Civil Procedure 23(h) for an award of attorneys' fees to Plaintiffs' Counsel[1] and reimbursement of litigation expenses, including service awards to Class Representatives.[2] These requests are further supported by the accompanying Declaration of Joseph H. Meltzer in Support of Plaintiffs' Motion for Final Approval of Settlement and Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Plaintiffs' Service Awards ("Meltzer Decl."), which details the extensive efforts by Plaintiffs' Counsel that led to the successful prosecution of this Action and the pending Settlement, and the Class Representatives' contributions to the advancement of the Class claims.

PRELIMINARY STATEMENT

Class Counsel seeks an award of $2.97 million in attorneys' fees to be allocated among Plaintiffs' Counsel, which amounts to 33% of the $9 million achieved in this hard-fought, well-developed litigation. The requested fee also corresponds to a (negative) 0.47 multiplier of the lodestar (number of hours x customary hourly rates) that Plaintiffs' Counsel committed to this litigation on a contingent basis since its commencement in January 2017. This request is justified by Plaintiffs' Counsel's commitment of time and resources to this litigation in the face of the very real and concrete risk of receiving no remuneration at all, as well as the substantial recovery they achieved for Class Members in light of the significant hurdles faced in reaching this result. In addition, the Independent Fiduciary retained to assess the reasonableness of the Settlement and the

[1] "Plaintiffs' Counsel" consist of Kessler Topaz Meltzer & Check, LLP, Nichols Kaster, PLLP, Keller Rohrback L.L.P., and Robbins Geller Rudman & Dowd LLP.

[2] Capitalized terms shall have the meaning assigned to them in Article 1 of the Settlement Agreement (ECF No. 212-1), unless otherwise specified herein.

fee request has also concluded both to be reasonable given the uncertainties of a larger recovery at trial and the effort expended by Plaintiffs' Counsel in achieving the Settlement.

The success of this Action was far from preordained. Plaintiffs' Counsel fought for more than three years—in the face of vigorous opposition by a well-funded adversary and sophisticated, able defense counsel, and with the assistance of its experts—to overcome numerous challenges. *See* Meltzer Decl. ¶¶ 9, 42. Among other things, Plaintiffs' Counsel:

- Conducted an in-depth investigation of the Plan, the Plan's expenses compared to peers, and the fees associated with certain of the Plan's investments compared to objective benchmarks and other available options, which resulted in the drafting and filing of a detailed, 95-page second amended Complaint following consolidation of the related actions;

- Prevailed in large part on Defendants' motion to dismiss notwithstanding Defendants' arguments that courts have consistently held that the very same investment management fees as those challenged here are reasonable as a matter of law, and that the factual allegations did not support Plaintiffs' claim that Defendants failed to implement a process to monitor Plan investments;

- Served document requests, engaged in discovery meet and confers, and reviewed more than 270,000 pages of documents produced by Defendants;

- Responded to document requests and produced hundreds of pages of documents to Defendants;

- Worked with an expert to develop a Class-wide damages methodology, which entailed analyzing internal JPMorgan information regarding the Plan and Plan investments, including monthly investment performance reviews, investment fund profiles, and fund change bulletins;

- Took or defended 20 depositions, including 11 depositions of fact witnesses, four expert depositions, and five named Plaintiff depositions;

- Opposed Defendants' motion for partial summary judgment and motions to exclude both Plaintiffs' liability expert and damages expert;

- Succeeded in having a class certified over Defendants' multi-faceted opposition;

- Worked for several months to negotiate and formalize this Settlement, including preparing a mediation statement and participating in a mediation session with Hunter R. Hughes, III, as well as numerous phone calls and e-mails, in addition to

significant coordination with Defendants and Plaintiffs' damages expert to determine a proper plan of allocation; and

- Coordinated the administration of the Settlement with the Settlement Administrator, including developing the notice program, identifying who should receive the Notices and Former Participant Rollover Forms, reviewing the final drafts of those documents and other forms, and ensuring that they were timely mailed.

Plaintiffs' Counsel thus devoted significant time and resources to prosecute the claims asserted in this Action. Moreover, Plaintiffs' Counsel expended these resources notwithstanding that there was considerable risk in this case with respect to both establishing Defendants' liability and demonstrating that the Class suffered damages as a result of Defendants' conduct:

First, subsequent to the filing of this Action, the relevant caselaw developed in such a way that presented very real and significant risks that Plaintiffs may not prevail on certain claims. For instance, Plaintiffs claimed here that Defendants breached their fiduciary duties by failing to convert two of the Disputed Investments (the Core Bond Fund and the Small Cap Core Fund) to separate account and collective investment trust formats prior to 2015. However, just prior to the mediation session, in an ERISA case alleging fiduciary breaches similar to those alleged here, the district court held that a fiduciary has no duty to investigate or offer non-mutual fund investment vehicles in a plan, such as collective trusts and separate accounts. *Moitoso, et al. v. FMR, LLC, et al*. ("*Fidelity*"), 2020 WL 1495938 (D. Mass. Mar. 27, 2020) (citing cases). While not binding on this Court, this case, and the caselaw on which it relied, evidenced a clear trend against claims of this type and represented a significant risk to Plaintiffs' ability to establish liability at trial with respect to those funds.

In addition, in 2018, a trial judgment was entered in favor of the defendants in *Sacerdote v. New York Univ*., 328 F. Supp. 3d 273 (S.D.N.Y. 2018), an ERISA case where the court found that defendants' monitoring and oversight process with respect to a 401(k) plan was adequate. Thus, while Plaintiffs believed that their process claims were meritorious, there was a very real

risk, based on the facts of this Action, that the Court could have found that Defendants' conduct was on par with or even exceeded the conduct that was ultimately validated by the court in *Sacerdote*.

Second, Defendants put forth several colorable arguments that the Class suffered little to no damages, which, if accepted by the Court, would have prevented Class Counsel from achieving any recovery even if it prevailed on the merits of Plaintiffs' claims. For example, Defendants vehemently argued that Plaintiffs' damages methodology was hypothetical and speculative because it considered the performance of the actively managed Disputed Investments with the lower fees of the passively managed alternatives. After correcting for those methodological "errors," Defendants' damages expert concluded that purported damages through February 2016 for Class Members that invested in the Mid Cap Growth Fund, Growth and Income Fund, and Mid Cap Value Fund were only $1.1 million (as opposed to the $39.8 million calculated by Plaintiffs' damages expert), and that investors in the Mid Cap Growth Fund actually suffered *negative* damages, with reinvestment, of $32.9 million.

Here, the $9 million recovery represents over 16% of the approximately $55.2 million in damages that Plaintiffs' damages expert ascribed to Defendants' misconduct. In addition, considering the challenges described above relating to the claims as to the Core Bond Fund and Small Cap Core Fund, there was a significant risk that Plaintiffs' damages would have been reduced by $12.2 million (the damages ascribed to those two funds). And if performance of the Mid-Cap Growth Fund would be applied as an offset to damages for that fund, damages would have been reduced by another $22 million. Thus, the monetary relief obtained is substantial not only in the aggregate (particularly in light of the substantial risk of not recovering anything for

Class Members), but also represents a significant portion of the damages that Plaintiffs' damages expert calculated were caused by Defendants' alleged fiduciary breaches.

The requested fee is, therefore, commensurate with Plaintiffs' Counsel's vigorous efforts as well as the end result, and Class Counsel respectfully requests the Court approve its fee request. Class Counsel also respectfully submits that the expenses incurred by Plaintiffs' Counsel, totaling $735,657.63,[3] in prosecuting this Action were reasonable and necessary, and that modest service awards to Class Representatives of $10,000 each are appropriate given their dedication on behalf of all Class Members. This application should therefore be granted in full.

ARGUMENT

I. THE REQUESTED FEE IS REASONABLE AND SHOULD BE APPROVED

The law regarding fee applications in this Circuit demonstrates there is no one-size-fits-all approach to determining the appropriate fee in a class case. The assessment is far more art than science. Within that context, this Court "applies the percentage of the fund method" and considers the factors articulated in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), "in three steps." In *In re Colgate-Palmolive Co. ERISA Litig.*, Judge Schofield explained:

> The first step is to determine a baseline reasonable fee with reference to other common fund settlements of a similar size and complexity, based on the subject matter of the claims. This analysis considers three of the *Goldberger* factors—the requested fee in relation to the settlement, the magnitude and complexity of the case, and the policy consideration of using a sliding scale to avoid a windfall to class counsel. The second step is to consider the Goldberger factors of risk, the quality of the representation and other public policy concerns to make any necessary adjustments to the baseline fee. The final step is to apply the lodestar method as a cross-check, which addresses the final Goldberger factor of the time and labor expended by counsel.

[3] Pursuant to ¶ 4.2 of the Settlement Agreement, all Administrative Expenses, i.e., all expenses incurred in connection with the administration of the Settlement, including all fees charged by the Settlement Administrator and all fees and expenses charged by the Independent Fiduciary and Escrow Agent, are to be paid out of the Qualified Settlement Fund.

36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014). *See also Grice v. Pepsi Beverages Co.*, 2019 WL 340714, at *2 (S.D.N.Y. Jan. 28, 2019). The key consideration in awarding fees is what is reasonable under the circumstances. *Id.* at 47; *see also* FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees"); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1326 (2d Cir. 1990).

Application of all of those factors supports the fee requested here.

A. A Fee of 33% of the Settlement Fund Compares Favorably to Fees Awarded in Settlements of Similar Size and Complexity

All the hallmarks of a challenging case—complex facts and legal issues, a developing and shifting body of law, a well-funded defendant, and sophisticated opposing counsel—were present here. Courts both within and outside the Second Circuit have, in similar circumstances, awarded percentages of settlement funds comparable to this one. Indeed, as Judge McMahon has observed, "[t]he federal courts have established that a standard fee in complex class action cases . . . where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010).

In fact, in complex ERISA cases such as this, "courts have found that [a] one-third fee is consistent with the market rate." *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016). As the court stated in an analogous action:

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

Krueger v. Ameriprise Fin., Inc., 2015 WL 4246879, at *2 (D. Minn. July 13, 2015). *See also High St. Rehab., LLC v. Am. Specialty Health Inc.*, 2019 WL 4140784, at *11 (E.D. Pa. Aug. 29, 2019) (awarding one-third in an ERISA class action); *Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *7 (E.D. Pa. Apr. 5, 2019); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) ("Courts have [] awarded percentage fees of one-third or higher in ERISA company stock cases in appropriate circumstances"); *Andrus v. New York Life Ins. Co.*, No. 1:16-cv-05698, ECF No. 83 at n.1 (S.D.N.Y. June 15, 2017) (awarding one-third fee award in ERISA case); *Spano v. Boeing Co.*, 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014). The requested fee is therefore well within the range of fees deemed reasonable by courts in ERISA class actions.

The requested fee of 33% of the Gross Settlement Amount is also reasonable when considering the "sliding scale approach" endorsed by courts within this Circuit, where a smaller percentage for fees is typically awarded as the size of the settlement fund increases, thus avoiding a "windfall" to counsel. *Colgate-Palmolive*, 36 F. Supp. 3d at 348. Following this approach, the requested fee is in line with the attorney fee awards typically awarded by courts in this District and other courts within the Second Circuit in cases of similar size. *See, e.g.*, *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2001) (awarding 33% of $13 million settlement); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding 33 1/3% of $11.5 million settlement); *Schnall v. Annuity & Life Re (Holdings), Ltd.*, No. 02-cv-2133, slip op. at 8 (D. Conn. Jan. 21, 2005) (awarding 33.3% of $16.5 million settlement, plus expenses); *In re APAC Teleservice, Inc. Sec. Litig.*, 1999 WL

1052004, at *1 (S.D.N.Y. Nov.19, 1999) (awarding 33.33% of $21 million settlement); *see also Perez v. Jupada Enter., Inc.*, 2012 WL 6641490, at *2 (S.D.N.Y. Dec. 13, 2012 (granting Plaintiffs' motion for attorneys' fees equal to 33% of the fund); *Sanz v. Johny Utah 51 LLC*, 2015 WL 1808935 (S.D.N.Y. April 20, 2015) (approving fee equal to one-third of settlement fund even though "while high relative to the size of Plaintiffs' claim and recovery, is not unreasonable given counsel's actual work on the case").

Moreover, it is well-known that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Ameriprise*, 2015 WL 4246879, at *1; *see also In re Marsh ERISA Litig.*, 265 F.R.D. at 138 ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions."); *Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (noting that ERISA 401(k) cases are "particularly complex"). This case is no different.

As detailed herein and the Meltzer Decl., this case involved three and a half years of hard-fought litigation, in the face of an evolving legal landscape, with the Parties only reaching a settlement as the case was poised for dispositive motions and/or trial. As courts have recognized, handling a large and complex case such as this requires counsel with specialized skills. *See Savani v. URS Prof'l Solutions LLC*, 121 F. Supp. 3d 564, 573 (D.S.C. 2015) ("Very few plaintiffs' firms possess the skill set or requisite knowledge base to litigate [class-wide, statutorily-based claims for pension benefits]"); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, 2016 WL 5938722, at *10 (C.D. Cal. May 16, 2016) (finding that ERISA litigation requires "highly skilled counsel"). Based on their experience litigating similar ERISA cases (*see* Meltzer Decl. at ¶¶ 34-36; firm declarations at Exs. E-G), Class Counsel was uniquely able to meet these challenges, and achieve a successful result for the Class.

Accordingly, when considering the complexity of the case, it is clear that the percentage requested here is reasonable and reflects the extensive work and risk Plaintiffs' Counsel undertook to prosecute this Action.

B. The Other *Goldberger* Factors Likewise Support the Requested Fee.

The remaining *Goldberger* factors—the risks confronting Plaintiffs' Counsel, the quality of representation they have provided, and public policies favoring private remediation of financial misconduct and providing incentives to counsel to pursue important cases on a contingent basis—all support the requested fee.

1. Plaintiffs' Counsel, working entirely on a contingent basis, faced the very real prospect of no recovery due to the significant factual and legal hurdles in the case.

Plaintiffs' Counsel faced substantial risk at every stage of this Action. Indeed, even having survived Defendants' motion to dismiss, most of the issues Defendants raised, some of which were tested again on summary judgment and at the class certification stage, would likely have continued to pose hurdles at trial.

In moving to dismiss the Plaintiffs' claims, Defendants asserted that Plaintiffs failed to allege that Defendants committed a breach under ERISA because, among other things, the fees associated with the Plan's investments were within a range found by other courts to be reasonable as a matter of law, and that the Complaint did not include allegations that Defendants failed to implement a process to monitor plan investments or make timely plan changes. Defendants also pressed arguments that JPMorgan Chase, JPMorgan Chase Bank, National Association (the "Bank"), and the Compensation & Management Development Committee of the Board of Directors for JPMorgan Chase & Company and its members (the "CMDC Defendants") were not fiduciaries and, therefore, claims could not stand against them. Indeed, while Plaintiffs prevailed on many of those issues at the pleading stage, the Court warned that "plaintiffs' allegations that

defendants failed to implement a process to monitor plan investments are arguably insufficient in light of *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc*., 712 F.3d 705, (2d Cir. 2013)." Tr 5:11-15 (Apr. 24, 2018). The Court declined to reach resolution of the argument at that time as it found the other allegations in the Complaint to be sufficient to defeat Defendants' motion, but the risk was clear. And, at the time of the Settlement, Defendants' motion for partial summary judgment was pending, where arguments were pressed that the CMDC Defendant's process was such that it did not violate any fiduciary duty and that JPMorgan Chase, the Bank, and J.P. Morgan Investment Management Inc. ("JPMIM") were not fiduciaries under the Plan as a matter of law.

Plaintiffs also faced real obstacles at class certification. Defendants challenged essentially every part of Plaintiffs' class certification motion, including: Plaintiffs' standing to serve as Class Representatives; Plaintiffs' ability to serve as Class Representatives in light of arbitration agreements and purported limited knowledge of the case; the inclusion of funds within the Class in which no Plaintiffs invested; and the inclusion of funds that changed fee structures during the Class Period. While the Court ultimately granted class certification, that determination was far from certain and certification remained subject to post-trial review.

In the absence of the Settlement, Class Counsel would also have faced significant litigation risks on both liability and damages. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 148 (nothing that the risk for plaintiffs' counsel in ERISA action was significant, and "Plaintiffs' Counsel had to contend with the traditional risks inherent in any contingent litigation"). At the time of the Settlement, Defendants' motion for partial summary judgment[4] and motion to exclude Plaintiffs'

[4] Defendants sought summary judgment on two issues, arguing: (i) Defendant CMDC was entitled to summary judgment on Plaintiffs' failure to monitor claim because, as a matter of law, the CMDC more than satisfied its monitoring duties to the Plan; and (ii) Defendants were entitled to summary judgment on Plaintiffs' breach of fiduciary

liability expert and damages expert were pending. In addition, various developments in the relevant caselaw appeared to undercut certain of Plaintiffs' theories of the case. Although Plaintiffs believe there is strong support for denying Defendants' motions, and for distinguishing those recent cases, it is uncertain whether Plaintiffs would have prevailed. Any decisions by the Court granting those motions in full or in part would have significantly impaired Plaintiffs' ability to prove their claims at trial.

For instance, in response to Plaintiffs' summary judgment motion, Defendants cited a recent decision in this District where the court – following a bench trial on claims similar to those brought here – found for defendants on the basis that plaintiffs failed, among other things, to prove those defendants' fiduciary decisions were objectively imprudent. *Sacerdote*, 328 F. Supp. 3d at 307, 316-17. In *Sacerdote*, plaintiffs alleged that defendant-fiduciaries breached their duty of prudence through "overpayment" of recordkeeping fees, and argued that the fees paid by the plan were objectively imprudent because they were in excess of a "reasonable" range of fees identified by plaintiffs. *Id.* at 293, 306. Plaintiffs there also argued that the oversight committee acted imprudently by failing to remove certain funds from the plan as investment options (thereby continuing to allow plaintiffs to invest in such funds). *Id.* at 307. After trial in that case, the court held "that while there were deficiencies in the [c]ommittee's processes—including that several members displayed a concerning lack of knowledge relevant to the [c]ommittee's mandate—plaintiffs have not proven that the [c]ommittee acted imprudently or that the [p]lans suffered losses as a result." *Id.* at 280. The Court further held that plaintiffs failed to establish objective imprudence because they failed to show "that their proposed fee ranges were the only plausible or prudent ones -- or, indeed, that any comparable [p]lan has ever charged within that range." *Id*. at

duty claims with respect to the Bank, JPMorgan Chase and JPMIM because there is no record evidence that those entities were fiduciaries to the Plan. (ECF No. 194).

307. Relying on *Sacerdote*, Defendants would have undoubtedly made similar arguments at trial, including that purported Employee Plans Investment Committee's ("EPIC") diligence here was on par or exceeded the conduct that was ultimately validated by the court in *Sacerdote*.

The risks to Plaintiffs were further underscored by the recent decision in *Fidelity*, which was issued as summary judgment was pending and just prior to the mediation of this Action. There, the court held that a fiduciary has no duty to investigate or offer non-mutual fund investment vehicles, such as collective trusts and separate accounts, as alternatives to mutual fund investments. The court held, "Fidelity did not incur liability because it had no inherent duty to investigate these particular types of funds," and further that "plans are under no duty to offer alternatives to mutual funds, even when the plaintiffs argue they are markedly superior." *Id*. at *12-14 ("The fact that courts have repeatedly upheld fiduciaries' decisions not to offer these alternatives indicates that a prudent fiduciary is under no reasonable duty to offer them."). This holding stood in contrast to Plaintiffs' claim, which was the basis for Plaintiffs' pending motion for summary judgment, that EPIC breached its fiduciary duties as a matter of law by failing to convert the higher cost Small Cap Core Fund and Core Bond Fund to materially indistinguishable, and cheaper, separate account and collective trust formats. According to the *Fidelity* court, "there is no inherent fiduciary duty to offer any particular type of investment vehicle, whether gold bars, hedge funds, collective accounts, or stable value funds … [and therefore Plaintiffs] failed to show that a prudent fiduciary would have considered these alternatives to mutual funds." *Id.* at *14. Defendants would have undoubtedly made a similar argument in connection with the trial here, which the Court may well have accepted.[5]

[5] *Fidelity* is arguably distinguishable given that, unlike this case where Defendants themselves offered less expensive alternative investment vehicles of the same investments offered in the Plan, Fidelity does not offer CITs or separate accounts as investment options in the broader market. *Id.* at *13. However, it was not certain whether this Court would have viewed this as a significant distinguishing factor.

Plaintiffs' damages methodology was also subject to vigorous challenge. Through their motion to exclude, Defendants sought to undermine Plaintiffs' entire theory of damages and prevent Plaintiffs' expert from testifying to such, arguing that even if Plaintiffs could prove the merits of their claims, they were entitled to little or no damages at all. Indeed, there is no template for measuring damages in a case such as this. Under Plaintiffs' proposed methodology, the most plausible estimate of Class-wide damages totaled $55.2 million, which consisted of the fee differential between each of the Disputed Investments and Plaintiffs' proposed lower fund alternatives, plus reinvestment of those fees. While Plaintiffs' Counsel believed the damages methodology to be sound, Defendants vigorously disputed that methodology, and the matter likely would have come down to a battle of experts at trial—an inherently risky proposition. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *9 (S.D.N.Y. Sept. 9, 2015) (noting defendants "vigorously contested," *inter alia*, plaintiffs' damages expert's "conclusions in quantifying the alleged overcharges," and explaining "[t]he prospect of a battle at trial and establishing recovery for all Class members without decertification add[ed] substantial risk to Plaintiffs' claims").[6] Plaintiffs' Counsel thus faced the prospect that even if they were to prevail on liability, their proffered damages methodology would be partially or entirely rejected.

Specifically, Defendants and their expert argued that Plaintiffs' methodology was hypothetical and speculative – in part because it compared actively managed funds to passively managed funds – and thus excessively overstated damages. After correcting for those methodological "errors," Defendants' damages expert concluded that purported damages through February 2016 (assuming Plaintiffs prevailed on the merits) for Class Members that invested in

[6] *See also Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("On the issue of damages, a trial would likely have turned heavily on a 'battle of the experts' between the parties' respective economists. It is impossible to predict which party's model of damages—if either—the jury would credit.").

the Mid Cap Growth Fund, Growth and Income Fund, and Mid Cap Value Fund were only $1.1 million (as opposed to the $39.8 million calculated by Plaintiffs' damages expert), and that investors in the Mid Cap Growth Fund actually suffered *negative* damages, with reinvestment, of $32.9 million through February 2015 and *negative* $50.8 million through July 2018. *See* Expert Rebuttal Report of Bruce E. Stangle, ECF 192-94 ¶ 17 and n. 37.[7]

In sum, victory was far from assured at any stage, with meaningful hurdles to overcome to certify a class, overcome motions for summary judgment, win at trial, and preserve a favorable judgment on appeal. The requested fee reflects the risks that Plaintiffs' Counsel undertook in pursuing this case on a contingency basis for more than three years.

2. Plaintiffs' Counsel provided exemplary representation of the Class.

"[T]he quality of representation is best measured by results," which may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55. As set forth above, the result Plaintiffs' Counsel achieved substantially compensates Class Members for their losses in light of the significant risks that counsel faced, and compares well to other cases.

The $9 million Settlement Amount represents over 16% of the damages that Plaintiffs' damages expert calculated were most reasonably associated with Defendants' alleged fiduciary breaches. In reality, as discussed above, the percentage of recovery is likely much higher when factoring in all of the risks attendant to the particular claims. But even as evaluated against this damages estimate, this recovery compares favorably to other class action settlements. *See, e.g.*,

[7] These risks are in addition to the challenges described above that Plaintiffs faced with respect to their claims relating to the Small Cap Core Fund and the Core Bond Fund. Had the Court accepted the argument that Defendants were under no duty to convert these funds to alternative formats, Plaintiffs' total damages would have been reduced by another $12.2 million. And had the Court further accepted Defendants' argument that Plaintiffs' claims as to the Target Date Funds were in essence based on hindsight and ignored the fact that investment managers typically evaluate and change their fees over time, the total amount of damages Plaintiffs could have recovered would be minimal if existent at all.

Johnson v. Fujitsu Tech. & Business of Am., Inc., 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented just under 10% of the plaintiffs' damages estimate); *Springer v. Code Rebel Corp*., 2018 WL 1773137, at *5 (S.D.N.Y. Apr. 10, 2018) (approving settlement representing 16% of estimated damages).[8] Plaintiffs' Counsel have, therefore, achieved a substantial recovery for Class Members far beyond the norm, and should be compensated accordingly.

Moreover, any assessment of the percentage recovery must account not only for the litigation uncertainties detailed above—including with respect to class certification, summary judgment, trial, and any appeal—but also the certainty of delay as Plaintiffs prepared for trial and inevitable appeals. In other words, "[a] very large bird in the hand of this litigation is surely worth more than whatever birds are lurking in the bushes." *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995); *see also In re Global Crossing Sec and ERISA Litig.*, 225 F.R.D. 436 (2004) (stating that the certainty of the settlement amount in that case had to be judged in the context of the substantial legal and practical obstacles to plaintiffs eventually prevailing in the case). Plaintiffs' Counsel should be rewarded for achieving this excellent recovery for Class Members without imposing on them the cost of potentially years of additional litigation toward an uncertain outcome.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *City of Providence*, 2014 WL 1883494, at *17. Plaintiffs' Counsel faced top-

[8] *See also In re Giant Interactive Grp.,* 279 F.R.D. at 162 (recovery of 16.5% of recoverable damages was within range of reasonableness); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (approving recovery of approximately 13% of provable damages); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (recovery of 9% of damages was reasonable); *Newbridge Networks Sec. Litig.,* 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly 6 to 12 percent of a potential recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.,* 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

flight defense attorneys, who were also able to draw on JPMorgan's vast resources. The high quality of the lawyers opposing Plaintiffs' efforts "further proves the caliber of representation that was necessary to achieve the Settlement." *In re Marsh ERISA Litig.*, 265 F.R.D. at 148.

Furthermore, in response to the Settlement and the anticipated fee award, only one Class Member out of nearly 350,000 lodged an objection, and that objection is not to the fee or Settlement Amount, but rather expresses a desire to maintain confidentiality for fear of retribution from Defendants as a result of taking part in this Action.[9] This "overwhelmingly positive response by the Class … attests to the approval of the Class with respect to the Settlement and the fee and expense application." *Maley*, 186 F. Supp. 2d at 374.[10]

In addition, pursuant to the Settlement Agreement, the parties retained an Independent Fiduciary to review the Settlement for compliance with all relevant requirements set forth in PTE 2003-39. Following its investigation, the Independent Fiduciary has concluded that the Settlement and the fee request are reasonable:

> After a thorough review of the pleadings and interviews with the parties' counsel, Gallagher has concluded that the Settlement was achieved at arms' length and is reasonable given the uncertainties of a larger recovery for the Class at trial and the value of claims foregone. The fee request is also reasonable in light of the effort expended by Plaintiffs' counsel in the litigation.

See Gallagher Fiduciary Advisors, LLC Independent Fiduciary Report at ¶ 3, attached to the Meltzer Decl. as Exhibit L.

[9] Under the Preliminary Approval Order, the deadline for Class Members to object is September 7, 2020, and Class Counsel will respond by September 17, 2020 to any objections.

[10] The Notice advised Class Members that Class Counsel would seek an award of attorneys' fees and expense reimbursement "not to… exceed 33% of the $9,000,000.00 settlement amount plus their litigation expenses incurred in the prosecution of the case." (ECF No. 212, ¶ 9, Ex. 1-A, at ¶ 10)

3. Public policy considerations support the proposed fee.

The requested fee furthers the policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. The public interest is well served by this Action, which sought to hold JPMorgan accountable for allegedly breaching its duties to its employees who participated in the 401(k) Plan. "Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf." *Fleisher*, 2015 WL 10847814, at *22. This is especially important in the ERISA context because "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers." *In re Marsh ERISA Litig.*, 265 F.R.D. at 149-50.

A 33% fee would, moreover, compensate Plaintiffs' Counsel at a level commensurate with the benefits they have conferred on the Class, the substantial investment of time and money they devoted to litigating this case and bringing about the Settlement, as well as the contingent nature of their representation. As courts in this Circuit have held, "the protection of retirement funds is a great public interest" and "private attorneys general have a major role to play in ERISA litigation." *Fastener Dimensions, Inc. v. Mass. Mut. Life Ins. Co.*, 2014 WL 5455473, at *9 (S.D.N.Y. Oct. 28, 2014). Indeed, suits like this are one of the reasons why fees in 401(k) plans have dropped in recent years. *See 401(k) Fees Continue To Drop*, FORBES (Aug. 20, 2015)[11] ("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."). Public policy favors this fee request.

[11] Available at https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop/#132eb0d5164f.

C. The Requested Fee Reflects a Negative Multiplier that Falls Far Below Those Regularly Approved in This Circuit.

The degree of a multiplier should reflect "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Bisys*, 2007 WL 2049726, at *3. The requested fee would result in a negative multiplier of 0.47 of the total lodestar contributed by Plaintiffs' Counsel ($6,273,814.75), based on over 11,900 total hours devoted to this Action. That is well justified by the risks Plaintiffs' Counsel faced, the complexity of this non-typical litigation, and the creativity and diligence Plaintiffs' Counsel demonstrated in pursuing the Action to this conclusion for the Class.

Courts in this Circuit "have repeatedly recognized that the reasonableness of the fee request under the percentage method is reinforced where, as here, 'the percentage fee would represent a negative multiplier of the lodestar.'" *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *18 (S.D.N.Y. Dec. 18, 2019) (quoting *In re Blech Sec. Litig.*, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000)). Indeed, the negative multiplier is more than modest in light of awards from similar cases within this Circuit. *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353 (approving multiplier of 5); *Andrus*, ECF No. 74, at 12 (noting that approved one-third fee represented a multiplier of 5); *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").

Because the Court is using lodestar as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized," but rather "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Goldberger*, 209 F.3d at 50. Plaintiffs' Counsel nonetheless respectfully submit that the hours

recorded in this case withstand even close scrutiny, as Plaintiffs' Counsel strove to maximize efficiency, including avoiding duplication, without sacrificing the quality of their representation.

Over more than three years, Plaintiffs' Counsel devoted over 11,900 hours to prosecuting this case and achieving a recovery for the Class.[12] *See* Exs. E-G. Much of that time was spent gathering the necessary proof to prevail on class certification and at trial and to defeat JPMorgan's pretrial motions. To that end, Plaintiffs' Counsel obtained and analyzed more than 270,000 pages of documents, and prepared for and participated in 20 depositions. Given the size and complexity of the Action, the amount of hours spent on this case over three years is reasonable, and compares favorably to other recent complex cases. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 146 (Plaintiffs' Counsel invested about 45,000 hours in the case for purposes of determining lodestar).

Further, Plaintiffs' Counsel's hourly rates reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)—*i.e.*, the Southern District of New York. *See Farbotko v. Clinton Cnty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is "the district in which the court sits"); *see also id.* at 209 (determination of reasonable rate entails "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel," which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district"). Plaintiffs' Counsel's hourly rates range from $690 to $1,325 for partners/counsel; $400 to $650 for associates; $350 to $385 for staff attorneys/contract attorneys; and $100 to $350 for paralegals, clerks, investigators, and other

[12] The vast majority of those hours are attributable to Kessler Topaz, who was appointed by the Court to serve as Class Counsel.

support staff.[13] These rates are consistent with the rates approved for other experienced ERISA litigators. *See, e.g.*, *Novant Health*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience).

Plaintiffs' Counsel's fee request is, in short, well-justified by the negative lodestar multiplier, particularly given the significant amount of work that went into this case and the serious risk of no recovery.

II. PLAINTIFFS' COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES, INCLUDING SERVICE AWARDS, SHOULD BE GRANTED

A. Plaintiffs' Counsel's Expenditures on the Class's Behalf Were Reasonable.

"Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Fleisher*, 2015 WL 10847814, at *23; *see also In re Marsh ERISA Litig.*, 265 F.R.D. at 150 ("It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses."). "When the lion's share of expenses reflects the typical costs of complex litigation such as experts and consultants, trial consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses, courts should not depart from the common practice in this Circuit of granting expense requests." *Penn. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016) (internal quotation marks omitted). Plaintiffs' Counsel's request for reimbursement of the expenses devoted to pursuing claims on behalf of Plaintiffs and other Class Members is reasonable and reflect expenses typically incurred in prosecuting complex actions such as this.

[13] Plaintiffs' Counsel's lodestar is calculated using their current hourly rates, "which has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *Fleisher*, 2015 WL 10847814, at *18.

Plaintiffs' Counsel spent $735,657.63 in out-of-pocket costs in prosecuting and resolving this Action. Meltzer Decl. (at ¶¶ 48, 51), Exs. E-G. Those expenses are the type of expenses typically billed by counsel in cases such as these, including "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation." *Flesisher*, 2015 WL 10847814, at *23.

By far the largest expense item, nearly 79% of the expense request, is for experts, which are often deemed "critically important" and recoverable expenses. *See In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353-54. Indeed, courts have frequently held that expert witness fees are reimbursable where "[t]he expenses incurred were essential to the successful prosecution and resolution of [the] Action." *In re EVCI Career Colleges Holding Corp. Sec. Litig*., 2007 WL 2230177, at *57-58 (S.D.N.Y. July 27, 2007). Here, there can be no doubt that the experts Plaintiffs engaged were essential to the successful resolution of this case. Plaintiffs' liability expert, Marcia Wagner, submitted five separate expert reports in this case, including an initial report, two rebuttal reports, and two reply reports. Ms. Wagner, who is a recognized expert on the standards and practices of fiduciaries who manage retirement plan assets and has decades of experience in the industry, opined on several subject matters at the heart of this case, including whether Defendants met the applicable standard of care with respect to the process for selecting and monitoring the Plan investments. To do that, Ms. Wagner not only relied on academic literature and other sources, but thoroughly analyzed hundreds of documents produced by Defendants in this case.

As discussed above, the work of Cynthia Jones, Plaintiffs' damages expert, was also critical to the resolution of this case. The issue of damages was hotly contested by both sides throughout the course of this litigation, with Defendants' damages expert submitting three expert reports critiquing Plaintiffs' damages methodology as relying on untenable assumptions and claiming that

Plaintiffs, at best, suffered minimal or no damages at all. Ms. Jones' work was essential to combating these arguments and crafting a succinct damages methodology. It was also critical to Plaintiffs' preparation for mediation and for devising a plan of allocation that fairly compensates all Class Members.

None of those expenditures have yet been reimbursed. Indeed, "[t]he fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Id.* Furthermore, the total expense amount is reasonable in light of the stage of the case and the amount awarded in similar ERISA cases. *See, e.g.*, *Ameriprise*, 2015 WL 4246879, at *3 (approving $782,000 in litigation expenses).

This request for reimbursement should be granted in full.

B. Service Awards to Plaintiffs Are Warranted Given Their Dedication to the Class, Which Helped Achieve This Extraordinary Result.

Finally, this Court also should approve the requested service awards in the amount of $10,000 per class representative. "Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150. Courts reason that such awards are compensatory in nature, reimbursing class representatives who "take on a variety of risks and tasks when they commence representative actions." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003).

The requested awards in this case are fully consistent with these recognized rationales. First, the Class Representatives invested significant time providing information to Plaintiffs' Counsel during the investigation of the Class's claims, reviewing case materials (pleadings, discovery responses, interrogatory responses, settlement agreement, etc.), producing documents

relevant to their Plan participation, appearing for their depositions, and communicating with Class Counsel. Second, they assumed significant reputational risks by suing their current or former employer.

The amount of the requested awards is also in line with the amounts awarded in similar cases. *See Sealock v. Covance, Inc*., 2020 U.S. Dist. LEXIS 44753 (S.D.N.Y. Mar. 13, 2020) (approving $10,000 service award); *Andrus*, ECF No. 83 at ¶ 4 (approving $10,000 service awards); *Main*, ECF No. 138 at 2 (same). Indeed, courts have approved significantly greater awards in other analogous ERISA cases. *See, e.g.*, *Kruger*, 2016 WL 6769066, at *6 (approving $25,000 service awards to named plaintiffs in ERISA action); *Ameriprise*, 2015 WL 4246879, at *3 (same); *Abbott*, 2015 WL 4398475, at *4 (same); *Beesley*, 2014 WL 375432, at *4 (same); *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (approving $15,000 service awards).

CONCLUSION

Class Counsel respectfully requests that the Court grant its application for (1) attorneys' fees in the amount of 33% of the Gross Settlement Amount (or, $2.97 million) to Plaintiffs' Counsel; (2) reimbursement of $735,657.63 in out-of-pocket litigation expenses; and (3) service awards of $10,000 to each Class Representative.

Dated: August 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2020, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which will send a notification to all counsel of record.

/s/ *Lisa M. Port*
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