UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARVER, *et al.*, Plaintiffs, v. BANK OF NEW YORK MELLON, *et al.*, Defendants.	Case. No. 1:15-cv-10180-JPO-JLC

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS

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PRELIMINARY STATEMENT

Following three years of hard-fought litigation, which included extensive document and deposition discovery, contested motion practice, and multi-day mediation sessions, the Parties[1] settled this ERISA fiduciary breach class action for $12.5 million in cash for the benefit of the Settlement Class. The Settlement was achieved solely through the efforts of Plaintiffs' Counsel,[2] working with twelve dedicated Named Plaintiffs.

On December 20, 2018, this Court issued its Preliminary Approval Order (ECF 196). Pursuant to the schedule in that Order, Lead Plaintiffs' Counsel Ciresi Conlin LLP ("Ciresi Conlin") and McTigue Law LLP ("McTigue Law") on behalf of Plaintiffs' Counsel are now filing this Memorandum, along with their (1) Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Final Approval Memorandum"), (2) Declaration of Heather M. McElroy in Support of (I) Unopposed Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards ("McElroy Declaration"), which details the extensive efforts that led to the successful prosecution of this Action and the pending Settlement, (3) the Declaration of J. Brian McTigue in Support of Motion for Attorneys' Fees and Reimbursement of Litigation Expenses ("McTigue Declaration"), (4) declarations of

[1] All capitalized terms used herein that are not otherwise defined herein shall have the same meaning ascribed to them in the Court's Preliminary Approval Order (ECF 196) or the Stipulation and Agreement of Settlement (the "Settlement") filed concurrently with Plaintiffs' Preliminary Approval Motion. (ECF 194.) Additionally, unless otherwise noted, quotation marks, internal citations, and footnotes are omitted and emphasis is added.

[2] On April 12, 2016, the Court appointed Ciresi Conlin LLP and McTigue Law LLP as Interim Co-Lead Counsel (hereinafter, "Lead Plaintiffs' Counsel") for the putative class in the Action with responsibility to lead and coordinate prosecution of the case. (ECF 53.) Additional counsel representing Named Plaintiffs in this Action include the firms of Beins Axelrod, PC, Slevin & Hart LLP, Keller Rohrback LLP, and Sidney Kalban, Esq. These firms and "Lead Plaintiffs' Counsel" will be collectively referred to herein as "Plaintiffs' Counsel."

other Plaintiffs' Counsel detailing the time and expenses each firm devoted to the Action, and (5) declarations of the Named Plaintiffs recounting their contributions to the Action.

In the Final Approval Memorandum, we explain why the Settlement is an excellent result for the Settlement Class and should be approved. In this Memorandum, we respectfully petition the Court to award attorneys' fees in the amount of $4,166,250 to be allocated among Plaintiffs' Counsel, which amounts to 33.33% of the $12.5 million Settlement. Analyzed under the lodestar cross-check methodology, the requested fee represents *less than half* of our current lodestar in the case and a negative multiplier of .43. We also seek reimbursement of litigation expenses in the amount of $1.8 million (just shy of the $1.81 million actually incurred), which were occasioned by the complex, multinational transactions at issue and the pioneering nature of the litigation. Finally, we request that the Court grant the Named Plaintiffs a service award of $10,000 each in recognition of their valuable service to the Settlement Class.

These requests are justified by the complex nature of this ERISA class action involving thousands of different plans and Plaintiffs' Counsel's commitment of time and resources in the face of the very real risk of receiving little to no remuneration in such a difficult case. For three years, Plaintiffs' Counsel successfully pursued this groundbreaking ERISA class action, which as this Court acknowledged, raised issues "of first impression," against one of the nation's largest banks and the largest depositary bank for ADRs in the world—the Bank of New York Mellon ("BNYM"). As a result of their efforts, Plaintiffs' Counsel have achieved a Settlement that provides $12.5 million in relief to the Settlement Class. The Settlement Fund is non-reversionary, and the entire amount, plus interest (less taxes, reasonable attorneys' fees, expenses, service awards, and administrative costs) will be distributed through direct and proportionate payments to Settlement Entities. The response of the Settlement Class to the Settlement has been overwhelmingly positive. Out of the over 867,000 potential Settlement Entities directly notified about this Settlement, none filed any objection to the Settlement, the proposed one-third attorney

fee award, reimbursement of up to $1.8 million in Litigation Expenses, or the grant of $10,000 Service Awards to the Named Plaintiffs.

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

In similar complex ERISA and financial litigation matters that have been litigated over many years, courts in this district have found that a one-third fee award is reasonable. *See, e.g., City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement); *In re Marsh ERISA Litig.*, 265 F.R.D 128, 146-50 (S.D.N.Y. 2010) (awarding 33 1/3% fee award on a $35 million settlement); *Becher v. Long Island Lighting Co*., 64 F. Supp. 2d 174, 182–83 (E.D.N.Y. 1999) (finding in ERISA case that one-third fee award is "reasonable and is well within the range accepted by courts in this circuit."). Likewise, the requested out-of-pocket expenses are reasonable in light of the complexity and the advanced stage of the litigation, and the proposed $10,000 service awards are well within the bounds of what has been approved in other cases. Accordingly, Named Plaintiffs and Plaintiffs' Counsel respectfully request that the Court grant the present motion and approve the requested amounts.

BRIEF HISTORY OF THE LITIGATION

The Final Approval Memorandum, the McElroy Declaration, and the McTigue Declaration contain a detailed discussion of this Action's complexities, progress, and ultimate success. Here, we describe only certain aspects of the Action particularly relevant to the requests for attorneys' fees, litigation expenses, and service awards.

The Complaints. Deborah Jean Kenny, Edward C. Day, Carl Carver, Lisa Parker, and

Landol D. Fletcher (the "original Plaintiffs") commenced this Action on December 31, 2015, with the filing of a Class Action Complaint that asserted claims against BNYM under Sections 404, 406, and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and alleged that BNYM breached fiduciary duties and engaged in prohibited transactions in conducting foreign exchange transactions in connection with BNYM ADRs. (ECF 1.) Specifically, the original Plaintiffs alleged that BNYM, in contravention of its fiduciary duties, overcharged ERISA Entities[3] when converting cash distributions on BNYM ADRs from foreign currencies to U.S. Dollars by systematically assigning BNYM ADR owners FX rates at or near the worst rates during the applicable 24-hour trading session rather than rates at which BNYM internally booked the trades, and retaining the spread between the rates for itself. (*Id.*) The Class Action Complaint alleged that BNYM thereby retained millions of dollars from dividends or cash distributions owed and payable to the Settlement Class. (*Id.*)

On January 12, 2016, Robert E. Hartline filed a separate action against Defendants, captioned *Hartline v. The Bank of New York Mellon, et al.*, No. 1:16-cv-00228-JPO. On April 12, 2016, the Court consolidated the *Hartline* action with this Action. (ECF 53.) A Consolidated Amended Class Action Complaint was filed on May 3, 2016 adding Hedy Anselman, David Baumann, Timothy Garrett, Dana Kellen, Daryl Watkins, and Robert E. Hartline as additional named Plaintiffs (together with original plaintiffs, the "*Carver* Plaintiffs"). (ECF 54.)

Motion to Dismiss. On June 2, 2016, BNYM moved to dismiss the Consolidated Amended Class Action Complaint and to strike the jury demand, which the Named Plaintiffs opposed. (ECF 61.) (McElroy Decl. ¶¶ 17-18.) On March 17, 2017, the Court heard argument on BNYM's motion

[3] "ERISA Entity" means an ERISA plan and any trust, pooled account, collective investment vehicle, or group insurance arrangement that files a Form 5500 annual return/report as a Direct Filing Entity (DFE) in accordance with the DFE Filing Requirements, such as a group trust, master trust investment account (MTIA), common/collective trust (CCT), pooled separate account (PSA), 103-12 investment entity (102-12 IE), group insurance arrangement (GSA), or collective investment vehicle that held plan assets as defined by the U.S. Department of Labor "Instructions for Form 5500, Annual Return/Report of Employee Benefit Plan."

to dismiss and, by Opinion and Order, dated March 31, 2017, denied BNYM's motion to dismiss the Consolidated Amended Class Action Complaint and granted BNYM's motion to strike the jury demand. (ECF 81) ("March 31 Order"). In the March 31 Order, the Court found that "dividends and other cash received by BNYM from foreign issuers [related to ADRs] are [ERISA] plan assets because the Plans have a beneficial ownership interest in them under ordinary notions of property rights," likely subjecting BNYM to ERISA's fiduciary duty requirements with respect to ADR transactions. (*Id.* at 11.) The Court stated in its order that this issue was a "question of first impression." (*Id.* at 9.) Indeed, BNYM represented on several occasions during the litigation that it intended to re-litigate at summary judgment or on appeal the issue of its fiduciary obligations with respect to cash distributions received on ADRs. (McElroy Decl. ¶ 26.)

BNYM answered the Consolidated Amended Class Action Complaint on April 21, 2017. (ECF 86.) *Carver* Plaintiffs and Dante A. Dano, Jr. then filed a First Amended Consolidated Class Action Complaint on June 8, 2017. (ECF 93.) BNYM answered the First Amended Consolidated Class Action Complaint on June 22, 2017. (ECF 95.)[4]

Scheduling Orders. Shortly after this Action was filed, the Contract Action, *Normand v. BNYM*, No. 16-cv-212-JPO-JLC, was filed in this district and assigned to the same judge. The Contract Action alleges state, common law contract claims (non-ERISA claims) against BNYM for the same or similar conduct as alleged in this Action. Although the legal standards, legal issues, and the theories of recovery and calculation of losses diverged, given the factual similarities between the two cases, Magistrate Judge Cott ordered counsel in both cases to coordinate discovery efforts. In large part, the Scheduling Orders in the two cases were identical. All the

[4] On November 29, 2017, in accordance with Rule 25(a), Lead Class Counsel filed a suggestion of death for Robert E. Hartline and requested that Mr. Hartline be withdrawn as a plaintiff in the Action. On December 29, 2017, Edwin G. Scheibel filed a separate action against Defendants, captioned *Scheibel v. The Bank of New York Mellon, et al.*, No. 1:17-cv-10231, and designated it as related to the Action. On April 16, 2018, the Court consolidated the *Scheibel* action with the Action and ordered that Interim Co-Lead Counsel remain in that role in the consolidated action.

deadlines for pleadings, motions, class certification, and so on were the same, and discovery modifications were consistent. Coordinating the two actions meant that Named Plaintiffs had a much tighter timeframe than the Contract Action to complete discovery. (McElroy Decl. ¶ 30.)

Merits Discovery: Documents. The document discovery in this case was significant. The documents at issue in this Action included all of the documents produced by BNYM in the Contract Action, plus ERISA specific documents not produced in the Contract Action. This added an additional layer of complexity to the case. In total, BNYM produced, and Lead Plaintiffs' Counsel reviewed, nearly 3 million pages of documents, e-mails, and spreadsheets in this Action. Over 100,000 of these documents were spreadsheets, 99% of which were native Excels. Named Plaintiffs produced, and BNYM reviewed, over 218,000 pages of documents, collected from at least 22 different ERISA plans. A significant amount of attorney and paralegal time and a considerable amount of expenses for third-party document reviewers and database hosting was incurred to review the millions of pages of documents and native spreadsheets produced by BNYM and to conduct a privilege and responsiveness review of documents produced by the twelve Named Plaintiffs. Of course, we could not physically look at every document, in the short time allowed in the Case Management Order, but through Relativity searches, predictive coding and other search tools, and an experienced document review team, we were able to identify likely subsets of relevant documents for detailed review. The process worked. We were able to identify the key documents for deposition witnesses, motion practice, and experts. (*See* McElroy Decl. ¶¶ 33-46.)

Merits discovery: Depositions. Once document discovery was well underway, and the Parties had negotiated Rule 30(b)(6) topics and timing, depositions began. On November 14, 2017, Magistrate Judge Cott ruled that the depositions of all BNYM's witnesses were to be coordinated with the Contract Action, and that the parties were to avoid duplicative questioning. This arrangement drove hard bargaining over the division of deposition time between the Contract Action and this Action. In some cases, Lead Plaintiffs' Counsel took the lead in questioning the

deponent; in other cases, counsel in the Contract Action took the lead, reserving time for non-duplicative questioning in the ERISA case.

In total, BNYM took 12 depositions of the Named Plaintiffs, all of which Plaintiffs' Counsel defended, while Lead Plaintiffs' Counsel deposed eight BNYM witnesses, including multiple 30(b)(6) witnesses. In keeping with Magistrate Judge Cott's coordination order, Plaintiffs' Counsel also attended at least five other depositions noticed in the Contract Action, where they did not separately question the deponents. (ECF 108.) (*See* McElroy Decl. ¶¶ 47-51.)

Experts. Lead Plaintiffs' Counsel retained David DeRosa as a testifying expert to opine on class certification, the merits of the case, and damages. Dr. DeRosa has testified as an expert over twenty times in federal courts and has been qualitied as an expert many times, including as an expert in statistics and foreign currency exchange markets. (McElroy Decl. ¶ 52.)

Named Plaintiffs also retained additional consulting experts to assist in analyzing large data sets from the U.S. Department of Labor or produced in discovery by BNYM and third parties for purposes of (1) identifying ERISA Entities that owned BNYM ADRs during the Settlement Class Period, and (2) identifying and analyzing ADR FX transactions associated with those ERISA Entities. Such efforts were necessary to the case, but extraordinarily time-consuming and complicated. Because BNYM did not believe it to be a fiduciary with respect to ADR FX before this case, BNYM had not tracked or even identified ERISA Entities among their ADR clients. Moreover, the Depositary Trust Company ("DTC") acted as agent for many ERISA Entities and non-ERISA Entities, further masking the identify of many ERISA Entities and their ADR FX transactions behind a double blind wall. That meant that Lead Plaintiffs' Counsel had to spend considerable time and expense obtaining relevant data from third parties and then working with consultants capable of analyzing the large databases to both identify injured Settlement Entities and estimate their losses. This was a complex and time-consuming endeavor that lasted throughout fact and expert discovery and into the post-settlement period (and one not present in the Contract

Action). (McElroy Decl. ¶ 53.)

In addition to the time and expense incurred in working with experts and consultants, Lead Plaintiffs' Counsel also assisted David DeRosa in preparation of his extensive expert report in support of class certification and a supplement to that report, and, still later, two reports on the merits of the case and damages. (*Id.*, ¶¶ 54-60.) Dr. DeRosa was deposed twice, and counsel at Ciresi Conlin deposed BNYM's damages expert twice—for a total of four full-day expert depositions. (*Id.*, ¶ 63.) On August 24, 2018, BNYM moved to exclude Named Plaintiffs' expert witness from testifying, which Named Plaintiffs opposed. (ECF 170, 181.)

Early Summary Judgment. BNYM filed a motion for partial summary judgment on the application of the statute of limitations on February 12, 2018, arguing the class period should not be tolled on the basis of fraud or concealment under ERISA. If successful, this motion would have gutted Named Plaintiffs' monetary recovery. Named Plaintiffs vigorously opposed the motion. (ECF 114, 124.)

Class Certification. On May 15, 2018, Named Plaintiffs moved the Court for certification of the putative class pursuant to Rule 23(b)(1), or in the alternative Rules 23(b)(2) and (b)(3), of the Federal Rules of Civil Procedure. (ECF 141.) BNYM opposed the motion on June 5, 2018. (ECF 153.) Named Plaintiffs filed a reply brief in support of their class certification motion. Class certification was highly contested. (McElroy Decl. ¶¶ 68-70.) The case settled while the class certification and summary judgment motions were pending.

Mediation and Settlement. While discovery and motion practice was proceeding, the Parties began discussing the possibility of resolving the Action. On March 22 and 23, 2018, the Parties participated in a two-day mediation session with the Honorable Layn Phillips and David Murphy of PhillipsADR. The Parties were unable to resolve the action and returned to complete fact and expert discovery. Following the close of discovery and submission of all class-certification briefing, the Parties again began discussing the possibility of resolving the Action.

They engaged in a second mediation session with David Murphy of PhillipsADR on September 17, 2018. The Parties reached an agreement in principle at the mediation to settle the Action based on a mediator's proposal. Following this mediation session, the Parties engaged in further arm's-length negotiations and ultimately reached an agreement-in-principle to settle the Action and thereafter negotiated a term sheet (the "Term Sheet") setting forth the material terms of their agreement. The Term Sheet was executed on September 26, 2018, and the Parties informed the Court of their agreement on September 27, 2018. (ECF 187; *see also* McElroy Decl. § F.)

Thereafter, the Parties negotiated the Stipulation (and exhibits thereto), which sets forth the final and binding agreement to settle the Action. During this time, Named Plaintiffs worked with consultants and their Claims Administrator to develop the notices and Plan of Allocation. The notice program and each document comprising the notice were negotiated and exhaustively revised, with input from consulting experts and the Claims Administrator, to make them easy to read and understand. The Parties executed the Stipulation on December 14, 2018. (ECF 194.)

Named Plaintiffs filed a motion for preliminary approval of the Settlement on December 14, 2018. The Court issued an order granting preliminary approval of the Settlement on December 20, 2018. A final approval hearing is scheduled for May 23, 2019, at which time the Court will consider the present motion and Plaintiffs' motion for final approval of the Settlement.

Counsel's Investment of Time and Money in the Action. The amount of time and money Plaintiffs' Counsel have already expended on a contingent basis in the foregoing activities was substantial. Through April 12, 2019, Plaintiffs' Counsel have devoted more than **18,870** professional hours to this case, representing **$9,687,502** million in dollars-times-hours "lodestar," and, through April 12, 2019, have incurred **$1,813,979** in out-of-pocket expenses.

Work on the case is ongoing. Lead Plaintiffs' Counsel will continue to incur additional hours in connection with settlement approval, including the final approval hearing, and generally administering and implementing the Settlement and the Plan of Allocation.

ARGUMENT

I. Legal Standard

When attorneys create a settlement fund for the common benefit of members of a class, the attorneys who created the fund are entitled to "a reasonable fee—set by the court—to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). "The rationale for this rule is an equitable one: it prevents unjust enrichment of those benefiting from a lawsuit without contributing to its costs." *Id.* at 47. Common fund fee awards are therefore a commonplace feature of class litigation. Here, Plaintiffs' Counsel successfully created a common fund of $12.5 million plus interest, and accordingly are entitled to a reasonable share of that fund as a fee.

The Second Circuit approves of two ways of determining a reasonable attorney's fee in common fund cases: the "percentage-of-recovery" method and the "lodestar" method. *See id.* at 50. The trend in this Circuit, however, 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). Under the percentage method, the court sets a fee that is "a reasonable percentage of the total value of the settlement fund created for the class." *Goldberger*, 209 F.3d at 47. But even when the percentage of the fund method is used, the Second Circuit encourages the practice of reviewing hours as a cross check on the reasonableness of the requested percentage. *Id.* Regardless of the method used, several factors identified by the Second Circuit in *Goldberger*, which we discuss below in more detail, ultimately determine what is a reasonable fee. *Masters v. Wilhelmina Modeling Agency*, 473 F.3d 423, 436 (2d Cir. 2007).

II. The Requested Fees Are Reasonable Under the *Goldberger* Factors

The *Goldberger* factors referred to above are: (i) "the time and labor expended by counsel;" (ii) "the magnitude and complexities of the litigation;" (iii) "the risk of the litigation;" (iv) "the

quality of representation;" (v) "the requested fee in relation to the settlement;" and (vi) "public policy considerations." *Goldberger*, 209 F.3d at 50.

In determining a reasonable fee, this Court has indicated that it applies the *Goldberger* factors following the approach in *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380 (S.D.N.Y. 2017). *Grice v. Pepsi Bev. Co.*, 2019 WL 340714, at *2 (S.D.N.Y. Jan. 28, 2019) (Oetken J.). Under that approach, the Court "applies the percentage fund method" and considers the *Goldberger* factors in three steps. *Id.* First, the Court determines a reasonable baseline fee by comparing the requested rate to that awarded in "other common fund settlements of similar size and complexity, taking into account the requested fee in relation to the settlement, the magnitude and complexity of the instant case and the policy consideration of using a sliding scale based on the amount of the settlement to award a windfall to class counsel." *Id.* Next, the Court considers the remaining *Goldberger* factors, such as the risk of the litigation, the quality of representation, and remaining public policy concerns that may render adjustments to the baseline fee necessary. *Id.* Finally, the Court will apply a lodestar method as a cross-check, in order to compare the resulting percentage with time and labor actually expended by counsel. *Id.*

Here, 33.3% is a reasonable fee under the circumstances of this particular case and consistent with the *Goldberger* factors, as explained below.

A. The Requested One-Third Rate Is Consistent With Settlements of Similar Size and Cases of Comparable Complexity and Magnitude

The requested fee of $4,166,250, a third of the recovery, and only 43% of the current lodestar, is fair and reasonable in relation to the recovery and compares favorably to fee awards in other very risky common fund cases in the Second Circuit and elsewhere.

"[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement." *Wal-Mart Stores, Inc.*, 396 F.3d at 122. In other words, fee percentages should decline as the recovery increases to avoid a windfall. *See Grice*, 2019 WL 340714, at *2; *see also Goldberger*, 209 F.3d at 52 ("[I]t is not ten times as

difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case."). Courts in this district have consistently applied this principle. *See, e.g.*, *Grice*, 2019 WL 340714, at *2; *McGreevy*, 258 F. Supp. 3d at 385; *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003). The empirical literature also attests that federal courts do, in fact, award larger percentage fees in smaller recoveries and smaller fees in larger recoveries. *See generally* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Leg. St. 27-78 (2004); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34, 837 (2010) (based on an analysis of 700 common fund settlements in 2006 and 2007, finding class action fee awards typically range from 25% to 35%, with smaller recoveries earner larger percentage fees.).

In light of this sliding scale approach, the magnitude and complexity of this case, and the amount of attorney time invested, the fee requested by Plaintiffs' Counsel is well-warranted and well within the range of awards made by district courts in the Second Circuit. One-third percentage fee awards are common in ERISA cases. Although class action fee percentages typically range from 25% to 35%, "ERISA concerns a highly specialized area of law" that can be extremely complex and, thus, often warrant "percentage fees of one-third or higher." *In re Marsh ERISA Litig.*, 265 F.R.D at 138, 149 (awarding 33 1/3% fee award on a $35 million settlement); *accord Krueger v. Ameriprise Fin. Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) (recognizing that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation" and awarding 33 1/3% fee on $27.5 million settlement); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 350 (S.D.N.Y. 2014) (recognizing that "ERISA concerns a highly specialized area of law" that warrants "a higher fee"); *Becher*, 64 F. Supp. 2d at 182–83 (finding in ERISA case that "class counsel's requested fee, which represents one-third of the Settlement Fund, appears reasonable and is well within the range accepted by courts in this circuit."). Indeed, nationwide, "courts have consistently awarded one-third contingent fees" in

ERISA class actions asserting breaches of fiduciary duties—often under less complex and novel theories than the one asserted here. *E.g.*, *Krueger*, 2015 WL 4246879, at *2 (collecting ERISA cases where courts awarded one-third percentage fees); *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("Courts have found that a one-third fee is consistent with the market rate in a complex ERISA 401(k) fee case such as this matter"); *Spano v. Boeing Co.*, 2016 WL 3791123, at *2 (S.D. Ill. March 31, 2016) (same).

A one-third fee is also appropriate based on the size of the settlement here and is "consistent with the norms of class litigation in this circuit." *See Silverstein v. Alliance Bernstein, LP*, 2013 WL 7122612, at *9–10 (S.D.N.Y. Dec. 20, 2013) (Oetken, J). Many ERISA and non-ERISA cases in this Circuit have awarded percentage fees at or in excess of what is requested here on settlements of approximately the same size. *E.g.*, *City of Providence*, 2014 WL 1883494 at *11 (awarding 33% of $15 million settlement); *Fogarazzo v. Lehman Bros. Inc.*, 2011 WL 671745, at *3-4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.5 million settlement); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement); *Schnall v. Annuity & Life Re (Holdings), Ltd.*, No. 02-2133, slip op. at 8 (D. Conn. Jan. 21, 2005) (awarding 33.3% of $16.5 million settlement); *Maley v. Del Globla Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33 1/3% of $11.5 million settlement, which represented a "modest multiplier of 4.65"); *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); *Becher*, 64 F. Supp. at 182 (awarding 33 1/3% on $7.75 million settlement in an ERISA case); *In re APAC Teleservice, Inc. Sec. Litig*., 1999 WL 1052004 at *1 (S.D.N.Y. Nov. 19, 1999) (awarding 33 1/3% of $21 million settlement).[5]

In addition, studies of recent class settlements also support the proposed fee. One recent study surveying class settlements during 2006-07 found that the median fee percentage awarded

[5] Plaintiffs' Counsel cites these decisions not to argue for a broad-based rule supporting certain fee percentages, but rather simply to illustrate that courts have awarded substantial percentages of a settlement fund where the particular circumstances of the case warranted it. Plaintiffs' Counsel respectfully submit that the circumstances of this particular Action justify the requested fee here.

in ERISA cases was 28% of the fund. Fitzpatrick, 7 J. Empirical Legal Stud. at 835. Consistent with that study, this Court in *Colgate-Palmolive* cited with approval a compilation of 100 ERISA cases from 1997 to 2013, in which the median fee percentage was 28%, with a standard deviation of 5%. 36 F. Supp. 3d at 351. "Fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court." Eisenberg, 1 J. Empirical Legal Studies at 74.

But this case was not a run-of-the-mill ERISA case. The magnitude and complexity of *this* ERISA case well warrants a 33 1/3% baseline fee percentage. This case not only involved the standard complexities inherent in ERISA litigation, but was premised on a thorny and unsettled nuance of ERISA law that presented a question of "first impression" to this Court and to the Second Circuit. Factually, this case also involved an opaque and technical corner of the financial-services world (one that its own employees call a "black box") and highly specialized financial instruments, requiring Plaintiffs' Counsel to become familiar with the array of systems BNYM used for transacting FX on ADRs and consulting with numerous experts in foreign exchange, statistics, and database management. The size of the case presented its own challenges. This was not a typical ERISA class action brought on behalf of a single group of plan participants against a single plan. Rather, the putative class included *thousands* of ERISA plans and *hundreds of thousands* of ERISA plan participants, beneficiaries, and fiduciaries, which presented various legal and factual challenges at the class certification stage. We have been unable to find any previous ERISA action comparable in innovation, scope, and complexity. (McElroy Decl. ¶¶ 80, 123-27.)

Lastly, the application of the sliding scale principle and any analysis of the reasonableness of the percentage in relation to the settlement must also reflect the "amount of work and time spent by counsel in this litigation." *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009). Certainly, for those cases in which settlement is quick and the time and labor expended by counsel is low, a high percentage fee would be a windfall and therefore inappropriate.

Id. But in cases where counsel is requesting a higher percentage fee that "still represents a negative multiplier to the total adjusted lodestar," there is no real danger of overcompensation. *Id.* (awarding 33 1/3 % fee on large settlement).

As detailed in the McElroy and McTigue Declarations, Plaintiffs' Counsel have dedicated enormous efforts to this case since it was filed in 2015. This was not a quick settlement. In total, Plaintiffs' Counsel and their support staff have billed **18,870** hours in this Action. Specifically, Named Plaintiffs and their counsel, *inter alia*: (1) conducted an extensive investigation prior to filing their initial complaint; (2) fully briefed a motion to dismiss on an issue of first impression in ERISA law and prevailed; (3) briefed opening and reply briefs in support of class certification (and mustered evidence to support them); (4) fully briefed a motion for partial summary judgment filed by BNYM on the statute of limitations; (5) completed substantial (and highly contested) fact discovery, including reviewing nearly 3 million pages of documents, e-mails, and spreadsheets, defending 12 depositions of Named Plaintiffs, and taking eight depositions of BNYM witnesses; (6) completed substantial expert discovery, including exchanging multiple class certification and merits expert reports, conducting and defending four expert depositions, and opposing BNYM's motion to exclude Named Plaintiffs' expert's testimony; (7) prepared multiple mediation statements and participated in several days of in-person mediation sessions; (8) negotiated a comprehensive Settlement Agreement and drafted and filed a motion for preliminary approval of the settlement and supporting papers; and (9) worked with the Claims Administrator to field class member inquiries and otherwise effectuate the settlement process. (McElroy Decl. § I.)

Moreover, each stage of the litigation, from the negotiation of the scheduling order to the multiple days of mediation that led to the pending Settlement, was hard-fought. Document and deposition discovery required substantial resources in reviewing millions of documents, analyzing complex spreadsheets and databases, and preparing for and participating in many depositions. Lead Plaintiffs' Counsel confronted and managed important issues nearly every day. Expert

discovery was particularly comprehensive and wide-ranging, and included *Daubert* briefing on complex statistical modeling. The development of the factual foundation for the ERISA classwide damages analysis entailed extraordinary efforts that stretched over much of the discovery period and following. And Plaintiffs' Counsel's work is not yet done. It is anticipated that Class Counsel will perform additional work going forward, including appearing at the final approval hearing, continuing to field class member inquiries, and overseeing the administration of the settlement and the distribution of settlement payments.

Plaintiffs' Counsel's lodestar in this action is already $9,687,502 as of April 12, 2019. By the time the action is concluded and all work has been performed, Plaintiff's Counsel's lodestar will exceed $10 million. Plaintiffs' Counsel are seeking $4,166,250 (33.33% of the recovery), which amounts to only 43% of the current lodestar. In cases of this size and complexity, it is common for courts to award *at least* the lodestar and in many cases a multiplier on top of that. Here, however, Plaintiffs' Counsel are seeking a standard percentage award, representing a *negative* multiplier from their lodestar. This is a very "strong indication" of the reasonableness of the requested fee. *See In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving requested fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee").

Courts have routinely awarded a one-third attorney fee under very similar circumstances—where the case is complex, counsel had invested significant resources over a long period of time, and the percentage fee results in a negative lodestar. *In re Marsh ERISA Litigation*, for example, involved an ERISA class action contentiously litigated over several years in which counsel had invested millions of dollars in attorney time and sought fees that represented a significant cut to their lodestar. 265 F.R.D. at 149. There, the Court awarded the requested one-third fee on a $35 million settlement (nearly three times the settlement here), calling the award "well-warranted" under the *Goldberger* factors and "in light of the comparative data" and noting that the awarded

fee "yield[ed] a below lodestar recovery." *Id*. Similarly, in the EDS ERISA Litigation, the settlement was for $12.5 million—the same amount here—and the court awarded the requested one-third fee, taking into account, among other things, that the awarded fee was only 70% of the lodestar. *In re EDS ERISA Litig.*, No. 03-00126, Order (E.D. Tex. Aug 6, 2008). In a securities class action from this district, *City of Providence v. Aeropostale, Inc*, the court awarded 33% fee on a $15 million settlement. The court recognized the fee was on the higher end, but concluded 33% was reasonable given "the advanced stage of the litigation," the "substantial expenditure of time and effort by counsel," the "complicated" nature of the case, the "substantial risk" involved, and the fact that the fee award was only 70% of the lodestar. 2014 WL 1883494, at *11-12; *see also Krueger*, 2015 WL 4246879, at *1 (awarding one-third fee on $27.5 million settlement, representing only 63% of the lodestar).

Under the circumstances here, 33 1/3% is a reasonable baseline fee based on a comparison to other common fund settlements of similar size and complexity, the requested fee in relation to the settlement, the magnitude and complexity of the case, and the policy consideration of using a sliding scale based on the amount of the settlement to award a windfall. Of course, this comparative number crunching is only part of the analysis. The Court's task is not simply to feed data into a formula and determine a fee. The additional subjective factors discussed below, especially the risk of this type of litigation generally and this novel case in particular, further support a 33 1/3% fee.

B. The Remaining *Goldberger* Factors Support the One-Third Fee Award.

1. The Relative "Risk" Strongly Favors a One-Third Percentage Fee.

Risk is not uniform in all class actions. For example, in *Goldberger*, the court noted that some securities fraud class actions are, in truth, really not that risky. *Goldberger*, 209 F.3d at 52. ERISA fiduciary breach class actions, however, stand in "sharp contrast" to such securities fraud class cases. *In re Marsh ERISA Litig.*, 265 F.R.D. at 147. As this Court explained in the *Marsh ERISA Litigation*, securities laws have been around for more than 75 years and securities fraud

class actions have been litigated since the early 1940s. *Id.* There is a large body of appellate case law in securities fraud cases, and over the years, tens of billions of dollars have been paid in securities fraud settlements and judgments. *Id.* In contrast, ERISA is a relativity new statute, and the laws creating 401(k) plans are even newer (1981).[6] ERISA case law remains thin in comparison to securities or antitrust cases.

ERISA fiduciary breach cases involving investments of *multiple plans* against third-party financial institutions (like this one) are newer still—indeed, rare. The risk was enormous. Typically, ERISA investment-related class actions are brought on behalf of a class of participants of a *single* plan against the plan itself. Here, however, this Action was brought on behalf of participants, beneficiaries, and fiduciaries of *thousands of plans* against a third party financial institution that assumed fiduciary duties through its conduct in handling ERISA plan assets. In fact, when Plaintiffs filed this Action, the key legal question on whether BNYM even owed a fiduciary obligation to them under ERISA was unsettled. BNYM vigorously contested and would have continued to argue throughout the case that it was not a fiduciary under ERISA and therefore its practice of adding a spread to FX rates did not constitute a breach of their obligations under ERISA. While the Court indicated in its March 31 Order that BNYM was subject to ERISA fiduciary duties, the Court noted that the issue was one of "first impression," and BNYM expressed its intention to revisit that question at the summary judgment stage or, if need be, on appeal. The unsettled nature of the applicable ERISA law pertaining to fiduciary duties and plan assets significantly increased the risks to Plaintiffs' Counsel. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *16 (D. Conn. Nov. 3, 2016) ("risks associated with litigating this case were particularly profound because the key legal question in this case is one of first impression in the Second Circuit"). (*See* McElroy Decl. § II.)

[6] Employee Retirement Income Security Act, 88 Stat. 829 (Sept. 2, 1974); Revenue Act of 1978, 92 Stat. 2763 (Nov. 11, 1978) (creating deferral arrangements that ultimately led to 401(k) plans); Proposed Amendments to Income Tax Regulations, 46 Fed. Reg. 55,544 (Nov. 10, 1981) (first proposed regulations to authorize 401(k) plans).

The complexity of Named Plaintiffs' ERISA theory of liability presented unique hurdles raised by BNYM at class certification, including the potential of intra-class conflicts between plan participants and plan fiduciaries and issues related to identifying the sheer number of potential ERISA Entities impacted by the Settlement. A recent decision on class standing by another judge in this District in a contract action against Citigroup related to ADRs posed additional challenges. *See Merryman v. Citigroup, Inc.*, No. 15 CV 9185, 2018 WL 1621495, at *5-11 (S.D.N.Y. Mar. 22, 2018). There, the court held that the plaintiffs in that case only had standing to sue as to ADRs they personally owned and could not assert claims with respect to ADRs owned by other putative class members. *Id.* at *11. Although Plaintiffs' Counsel believed they would ultimately prevail on these issues, they still presented considerable litigation risks. (McElroy Decl. ¶¶ 80-81.)

Named Plaintiffs faced further risks to establishing their entitlement to monetary relief. Based on BNYM's pending motion for partial summary judgment on the application of the statute of limitations, for example, Named Plaintiffs faced a significant risk that the Court could substantially shorten the class period, limiting the Settlement Class's potential monetary relief. In fact, another judge in this District in a state law contract action against JP Morgan related to ADRs recently declined to toll the statute of limitations on a similar theory. *See Merryman v. J.P. Morgan Chase Bank, N.A.*, 2016 WL 5477776, at *11 (S.D.N.Y. Sept. 29, 2016). Although Named Plaintiffs believe the present Action is distinguishable both legally and factually, the decision still posed risk. Moreover, issues relating to the Settlement Class's potential monetary relief would likely come down to an unpredictable and hotly disputed "battle of the experts," highlighted in BNYM's motion to exclude Named Plaintiffs' expert and the opposition to the motion. *See, e.g.*, *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579–80 (S.D.N.Y. 2008) ("[I]n this battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found."). Named Plaintiffs thus faced significant risk that, even if liability were established, that the monetary relief that now forms the basis for

Settlement Entities' recoveries could never be proven at trial or would be greatly reduced. In sum, victory was far from assured at any stage of the Action. (McElroy Decl. ¶¶ 83-84.)

In addition, this Action did not settle at an early stage. Both fact and expert discovery had been completed, and class certification and *Daubert* motions were fully briefed. Thus, Lead Plaintiffs' Counsel assumed the high risk that they would work an enormous amount of hours and incur significant expense only to see little or no recovery.

In addition to these foregoing litigation risks unique to this case in particular, there were a host of traditional risks inherent in contingent litigation—that witnesses may testify unexpectedly, that experts will have made errors in their assessments, that documents may not turn out to mean what they say, and so on. One cannot overlook the risks posed by summary judgment, *Daubert* motions, trial, post-trial motions, and appeals, or the delays inherent in such proceedings. Lead Plaintiffs' Counsel accepted this case on a contingent basis, with the attendant risk that they would receive nothing at all. There was a significant risk of nonpayment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk. *See Marsh*, 265 F.R.D. at 148; *cf. Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("[T]he risk of not prevailing, and therefore the risk of not receiving any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.")

There may not be a "substantial contingency risk in every common fund case," but, here, there certainly was.

2. The High "Quality of Representation" Strongly Favors a One-Third Percentage Fee.

Lead Plaintiffs' Counsel has significant experience prosecuting complex cases around the country. Ciresi Conlin is a national leader in complex litigation and trial and has a well-deserved reputation for representing plaintiffs in high-profile mass tort actions and other bet-the-company litigation and achieving significant results. Ciresi Conlin's litigation team is led by Michael V. Ciresi and Jan M. Conlin. (McElroy Decl. ¶ 131, Ex. A.)

Mr. Ciresi was a named partner and Chairman of the Executive Board of Robins, Kaplan, Miller & Ciresi L.L.P. During his 43 years at the firm, he drove the firm's litigation practice. Mr. Ciresi's trial practice and consulting is focused on the areas of products liability, class actions, mass torts, intellectual property, and commercial litigation. He has obtained over $12 billion in verdicts, awards, and settlements on behalf of his clients during his career. Mr. Ciresi has served as lead trial counsel in multiple bellwether trials in complex class actions. One of Mr. Ciresi's most high profile cases was the *State of Minnesota and Blue Cross and Blue Shield of Minnesota v. Phillip Morris Incorporated, et al.* where Mr. Ciresi was co-lead counsel for the State of Minnesota and Blue Cross and Blue Shield of Minnesota in a groundbreaking lawsuit against the tobacco industry. (*See* McElroy Decl. ¶¶ 132-34.)

Ms. Conlin also has a long record of leading business critical litigation in high-stakes cases and achieving substantial results on both sides of the "v." Ms. Conlin has multiple nine-figure patent infringement and business litigation representations. Other Ciresi Conlin partners are known for their trial expertise, creative problem solving, and the ability to handle cases efficiently, run by small teams who know all aspects of the case. (*See* McElroy Decl. ¶ 135.)

McTigue Law is a national leader in ERISA litigation and has served as lead counsel or co-lead counsel in numerous complex ERISA class actions for more than 20 years. McTigue Law has secured many multi-million dollar verdicts for its ERISA plan and participant clients. The firm has prosecuted cases on behalf of hundreds of thousands of ERISA plan participants recovering more than $300 million. (McTigue Decl. ¶¶ 2-5.)

The extremely high quality of the defense counsel representing BNYM and opposing Named Plaintiffs' efforts bears further witness to the caliber of representation that was necessary to achieve the Settlement. *See Global Crossing*, 225 F.R.D. at 467.

The quality of representation is also measured by the actual settlement result. All told, the results obtained here are outstanding. The Settlement Class's potential best-case damages award

based on the analysis of Named Plaintiffs' damages expert is approximately $48 million. In contrast, BNYM's damages expert opined that no classwide damages could be established and that even if the Named Plaintiffs' damages methodology were used, damages would be capped at $6 million in the best-case scenario. In reaching a common fund settlement of $12.5 million, Plaintiffs recovered over 26% of their maximum potential damages in the Settlement. Courts routinely approve lower rates of recovery in comparable cases. *See, e.g.*, *City of Providence*, 2014 WL 1883494, a *9 (approving $15 million settlement that represented "a recovery in the range of 9.2% to 21% of estimated damages"); *In re Giant Interactive*, 279 F.R.D. at 163 ("[T]he average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses."). This Settlement is not a claims-made settlement, and there will be no reversion of settlement funds to BNYM if the Settlement becomes final.

Lead Plaintiffs' Counsel possessed and effectively utilized the requisite skill to provide excellent legal services for the Settlement Class and to achieve an outstanding result, and, thus, this *Goldberger* factor supports the fee award requested.

3. "Public Policy" Strongly Favors a One-Third Percentage Fee.

Congress passed ERISA to promote the important goal of protecting and preserving the retirement savings of American workers. *In re Marsh ERISA Litig.*, 265 F.R.D. at 149-50. ERISA's "most important purpose" was to "assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000).

The ERISA statute itself encourages private enforcement. *See* 29 U.S.C. § 1132(a), ERISA § 502(a). The Supreme Court has noted that private actions provide "a most effective weapon in the enforcement" of federal statutes that provide for both governmental and private rights of action. *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (quoting *Bateman Eichler, Hill Richards, Inc. v.*

Berner, 472 U.S. 299, 310 (1985) (discussing private actions in the context of securities class actions).) "To make certain that the public [interest] is represented by talented and experienced trial counsel, the renumeration should be both fair and rewarding." *Ellman v. Grandma Lee's Inc.*, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986); *see also Maley*, 186 F. Supp. 2d at 373 ("Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute."); *Spann v. AOL Time Warner*, 2005 WL 1330937 at *3-4 (S.D.N.Y. June 7, 2005) (awarding 33 1/3% fee in an ERISA fiduciary breach case, noting that lawsuits such as this create incentives for fiduciaries to comply with ERISA).

In this case, the U.S. Department of Labor took no action against BNYM with respect to their foreign exchange misconduct related to ADRs. Without the efforts of Plaintiffs' Counsel, the participants, beneficiaries, and fiduciaries of thousands of ERISA Entities would not have obtained any relief at all. Plaintiffs' Counsel have clearly promoted the public interest by vindicating the rights of the aggrieved plan participants, beneficiaries, and fiduciaries, and it is in the public interest for them to be paid a reasonable attorney's fee. This factor, too, like the other *Goldberger* factors, strongly supports the fee requested here. (McElroy Decl. ¶¶ 142-43.)

4. The Class's Reaction to the Settlement and Fee Request Supports Granting this Application.

Although not a formal *Goldberger* factor, the Settlement Class's reaction to the requested fee also supports Plaintiff Counsel's application for a one-third fee award. The Settlement Entities all directly received court-approved notice of the Settlement, which explained that Lead Plaintiffs' Counsel intended to apply for attorneys' fees of no more than 33.33% of the $12.5 million settlement amount and would seek to recover no more than $1.8 million in expenses. The deadline for submitting written objections was April 18, 2019, and no one has objected to the Settlement or the fee and expense request. (McElroy Decl. ¶ 7.) This supports the fee award. *See Vaccaro v. New*

Source Energy Partners L.P., 2017 WL 6398636, at * 8 (S.D.N.Y. Dec. 14, 2017) ("The fact that no class members have explicitly objected to these attorneys' fees supports their award.")

C. A Lodestar Cross-Check Supports a One-Third Fee Award

The final step is to use the lodestar as a "cross check" on the reasonableness of the percentage awarded. *See Goldberger*, 209 F.3d at 50; *Grice*, 2019 WL 340714, at *5. A reasonable fee award under the lodestar approach is calculated as "the product of a reasonable hourly rate and the reasonable number of hours required by the case." *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011). "Where the lodestar method is used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Davis v. J.P. Morgan Chase & Co*., 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011); *see also Goldberger*, 209 F.3d at 50; *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (court may rely on summaries submitted by attorneys and need not review actual billing records).[7] Moreover, it is not necessary for the Court to reach a conclusion as to the reasonableness of the hourly rates charged. *Acevedo v. Workfit Med. LLC*, 187 F. Supp. 3d 370, 382–83 (W.D.N.Y. 2016).

Regardless, here, Plaintiffs' Counsel's hourly rates reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *i.e.*, the Southern District of New York. *See Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984); *Farbotko v. Clinton Cnty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is the "district in which the court sits.") The rates of the four primary attorneys at Ciresi Conlin who worked on this Action ranged from $600-625/hour for a senior partner to $350 per hour for an associate. These are the rates at which Ciresi Conlin attorneys regularly charge per diem clients nationwide, and the rates their per diem clients pay. (McElroy Decl. ¶ 113.) These rates are comparable to rates this Court has found reasonable. *See In re IndyMac Mortgage-Backed Sec.*

[7] If requested, however, Lead Plaintiffs' Counsel will promptly provide their billing records for *in camera* review.

Litig., 94 F.Supp.3d 517, 526-27 (S.D.N.Y. 2015) (findings hourly rate between $210 and $450 for associates and between $410 and $835 for partners to be reasonable); *City of Providence*, 2014 WL 1883494, at *13 (approving billing rates of attorneys in New York firms ranging from $335 to $875 per hour); *see also Doe v. Unum Life Ins. Co. of Am.*, 2016 WL 335867, at *4 (S.D.N.Y. Jan. 28, 2016) (finding reasonable hourly rates of $600 for a partner and $355 for an associate in an ERISA case). Ciresi Conlin paralegal rates range from $125/hour to $230/hour based on of experience, which are also in a reasonable range. *See Doe*, 2016 WL 335867, at *4 (approving hourly rate of $200 for paralegal services).[8] The rates charged by other Plaintiffs' Counsel and staff are comparable and reasonably reflect their level of experience and expertise.

As for hours worked, Lead Plaintiffs' counsel respectfully submit that to the best of their knowledge, informed by significant auditing of time records in preparing this application, that the hours they present to the Court reflect meaningful efforts that contributed to this resolution. This Action was run primarily by four attorneys—two at Ciresi Conlin (one partner and one associate) and two at McTigue Law—which is an extraordinarily lean team given the complexity of the case and the size of the settlement class. Because Plaintiffs' Counsel's time is devoted on a fully contingent basis, and is compensated (if at all) years later, there is a natural disincentive to amass lodestar for its own sake. The risk of non-payment and the aggressive discovery schedule gave counsel every reason to work efficiently. (McElroy Decl. ¶ 122.)

[8] Ciresi Conlin named partners Michael V. Ciresi and Jan M. Conlin, who collectively have over 75 years of trial and litigation experience bill at rates of $850 and $800 per hour, respectively, rates that reflect their skill and reputation and that are lower than the rates of equally high caliber litigation counsel in New York. *See King v. JCS Enters.*, 325 F. Supp. 2d 162, 169 (E.D.N.Y. 2004) (reasonable hourly rate is one that "similarly skilled attorneys in the area would charge for similar work"); *see In re Platinum & Palladium Commodities Litig.*, 2015 WL 4560206, at *3-4 (S.D.N.Y. July 7, 2015) (approving billing rates of $950 and $905 for two partners who "each have nearly 40 years of experience litigating complex antitrust actions" and referring to a *National Law Journal* survey "indicating that the average partner billing rate at the largest New York-based law firms is $982 per hour."). Further, the two attorneys billing at or over $800/hour contributed less than 5% of the total number of hours billed. (McElroy Decl., Ex. B.)

Applying the foregoing rates to the recorded hours, Ciresi Conlin's lodestar from case inception to April 12, 2019 is $4,104,179.80, and McTigue Law's lodestar is $5,278,190. Including other Plaintiffs' Counsel, the total case lodestar (not including time spent preparing the present motion) is $9,687,502.80. (McElroy Decl. ¶ 114.) The requested one-third fee of $4,166,250 represents merely **43% of the lodestar**. Even if this Court reduced the lodestar by 30% to reflect lower hourly rates, a one-third fee on that adjusted lodestar would still only represent 61%. Courts regularly award lodestar multipliers from two to six times the lodestar, *Davis*, 827 F.Supp.2d at 185, but here the fee award—even if the lodestar is reduced—still results in a negative multiplier. Under these circumstances, the lodestar cross-check clearly supports Plaintiffs' Counsel's request for a one-third fee. *See Fogarazzo*, 2011 WL 671745, at *4 (lodestar cross-check "unquestionably" supported one-third fee award when the fee amounted to a "deep discount" of the lodestar by 51%).

II. The Court Should Allow Counsel's Request for Reimbursement of Expenses

Litigating complex contingent cases requires counsel to incur significant expenses. The need to defray these expenses on an ongoing basis places significant demands on counsel and increases their overall level of litigation risk. Plaintiffs' Counsel have thus far advanced over $1.8 million (over $1.4 million of which was advanced solely by Ciresi Conlin), and they are entitled to reimbursement of these expenses. *See In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 178 (S.D.N.Y. 2007); *Miltland Raleigh-Durham v. Alyers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients."). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment, but instead, encompass "all reasonable" litigation-related expenses. *In re Marsh ERISA Litig.*, 265 F.R.D. at 150.

Because the expenses incurred here were incurred with no guarantee of recovery—and because Ciresi Conlin was covering nearly all of the costs for the other law firms—Plaintiffs' Counsel had a strong incentive to keep them at a reasonable level, and attempted to do so. Lead

Plaintiffs' Counsel made a concerted effort to keep their attorney teams very lean, push down work to paralegals or litigation support personnel as often as possible, made a concerted effort to avoid unnecessary expenditures, and economized where possible. The expenses actually incurred were largely attributable to ordinary and necessary items such as expert fees, court reporters, computer-assisted document organization and review, travel, and mediation fees and are the type of expenses typically billed by attorneys to paying clients in the marketplace. (McElroy Decl. ¶ 145.) The notice provided to Settlement Entities stated that the expense reimbursement request would not exceed $1.8 million, and there have been no objections to this request. (*Id.*, ¶ 153)

Nearly half of the expenses incurred here were for expert and consultant fees, which courts have found are "critically important." *See In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d at 353-54. The expert costs were driven by challenges unique to this novel and complex ERISA case. Unfortunately, because BNYM did not recognize (until this case) that it owed a fiduciary duty to ERISA Entities related to FX conversion on ADR cash distributions, BNYM did not maintain data on ADR ERISA ownership. This presented counsel with the unwieldy hurdle of distinguishing *ERISA* ADR owners from all other ADR owners for purposes of preparing a damages model and ultimately calculating monetary relief for the Settlement Class. To achieve this, counsel had to rely heavily on paid consultants to analyze large databases from the U.S. Department of Labor or that were produced in discovery by BNYM or in response to third-party subpoenas to identify injured ERISA Entities and calculate their losses. This was a formidable task that occupied copious amounts of attorney and consultant time. Were it not done, however, Plaintiffs' Counsel would not have been able to present a compelling damages case and would not have recovered the Settlement it did here. (McElroy Decl. ¶ 148.) Additionally, Plaintiffs' Counsel assisted in the preparation of multiple rounds of opening and rebuttal expert reports (for both class certification and merits), preparing their testifying expert for two full-day depositions, and responding to a motion to exclude their testifying expert. Although significant, the expenses

incurred in this Action were essential to the successful development and prosecution of the case and should be reimbursed. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct 23, 2012 ("despite its size," approving attorneys' expenses of $2.5 million to be paid out of a settlement fund of $9.5 million because expenses were the type of litigation costs typically "appropriate for reimbursement" such as expert fees, deposition costs, travel, etc.).[9]

III. Service Awards for the Named Plaintiffs Are Well Deserved

The notices sent to potential Settlement Entities disclosed that Named Plaintiffs would seek awards of $10,000 each for their initiative and efforts in the litigation. The twelve Named Plaintiffs Hedy L. Anselman, David Baumann, Carl Carver, Dante A. Dano, Jr., Edward C. Day, Landol D. Fletcher, Timothy R. Garrett, Dana Kellen, Deborah Jean Kenny, Lisa Parker, Edwin Scheibel, and Daryl Watkins have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Settlement Class. (*See* Anselman Decl., Baumann Decl., Carver Decl., Dano Decl., Day Decl., Fletcher Decl., Garrett Decl., Kellen Decl., Kenny Decl., Parker Decl., Scheibel Decl., and Watkins Decl.) They came forward to initiate the Action and thereafter remained in consistent contact with Plaintiffs' Counsel. They responded to document requests and interrogatories, reviewed and approved pleadings, collected and reviewed many documents, assisted with discovery, and were involved in settlement discussions. They prepared for, traveled to, and sat for full-day depositions, where defense counsel examined them about the Complaint, ADRs, foreign exchange, their personal investment histories, and so on, assiduously seeking ammunition to oppose class certification. The demands of litigation took time away from their jobs and families. These individuals should be rewarded for their willingness to step forward to ensure that the interests of the Settlement Class are vindicated. (McElroy Decl. ¶¶ 154-157.)

[9] In light of the significant expenses in other categories, Lead Plaintiffs' Counsel have carefully scrutinized their expenses and have not sought reimbursement for items that they view as law firm overhead, including internal copying charges. Further, Ciresi Conlin has not sought reimbursement for computerized research charges.

Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class which has benefited from them. *See generally Dornberger v. Met. Life Ins. Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001) (reviewing case law supporting awards from $2,500 to $85,000). 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, such as complying with discovery requests and often must appear as witnesses in the action." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003) (granting incentive award of $15,000 to class representative). Named Plaintiffs request a payment of modest case contribution awards out of the Settlement Fund in the amount of $10,000 for each of the twelve Named Plaintiffs for a total of $120,000. This amount is in line with those awarded in similar complex class actions. *See, e.g.*, *Karic v. Major Auto. Cos., Inc.*, 2016 WL 1745037, at *8 (E.D.N.Y. Apr. 27, 2016) (awarding $20,000 each to seven named class representatives); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding $50,000 each to three named class representatives); *In re Marsh ERISA Litig.*, 265 F.R.D. at 151 (awarding $15,000 each to three named class representatives).

CONCLUSION

The attorneys' fees and expenses Plaintiffs' Counsel request will reasonably compensate them for the risks they assumed in this groundbreaking ERISA class action and the time and resources they committed over three years to obtain the excellent result achieved here. Plaintiffs' Counsel respectfully request that the Court: (1) award attorneys' fees in the amount of $4,166,250 from the Settlement Fund; (2) order reimbursement of $1,800,000 in litigation expenses advanced by Plaintiffs' Counsel; and (3) award $10,000 each to Hedy L. Anselman, David Baumann, Carl Carver, Dante A. Dano, Jr., Edward C. Day, Landol D. Fletcher, Timothy R. Garrett, Dana Kellen, Deborah Jean Kenny, Lisa Parker, Edwin Scheibel, and Daryl Watkins in recognition of their efforts on behalf of the Settlement Class.

April 23, 2019

Respectfully Submitted,

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