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

MICHAEL W. ALLEGRETTI, CHANDRA V. BROWN-DAVIS, YOLANDA BROWN, RONALD DINKEL, SIOBHAN E. FANNIN, KRISTIE KOLACNY, DIANNA J. MARTIN, SHERRI NELSON, BECKY S. RAY, SCOTT C. READ, TIMOTHY M. RENAUD, LISA SMITH, SUSAN WEEKS, AND ANDRO D. YOUSSEF, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **WALGREEN CO.; THE RETIREMENT PLAN COMMITTEE OF THE WALGREEN PROFIT-SHARING RETIREMENT PLAN; THE TRUSTEES OF THE WALGREEN PROFIT-SHARING RETIREMENT TRUST; THE BOARD OF DIRECTORS OF WALGREEN CO.,** **Defendants.**	**Case No. 1:19−cv−05392** **MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS** **Hon. Charles R. Norgle**

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

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I. INTRODUCTION

Plaintiffs, in this class action under the Employee Retirement Income Security Act of 1974 ("ERISA"), obtained an outstanding result for the Class. After over two years of investigation, mediation, litigation, and negotiation, Plaintiffs secured a $13.75 million settlement fund and meaningful non-monetary relief. This Court has preliminarily approved the settlement. Dkt. 101.

Under the "common fund" doctrine, after obtaining a recovery for the benefit of a class, class counsel is entitled to an award of reasonable attorneys' fees from the settlement proceeds. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "Courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). When (as in ERISA class actions) "the prevailing method of compensating lawyers for similar services is the contingent fee"—expressed as a percentage of the settlement fund—the prevailing "contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original; internal quotation marks omitted). Accordingly, courts in this circuit assess reasonable fees for class counsel as a percentage of the overall value of the settlement. *See, e.g.*, *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *1–2 (S.D. Ill. Jan. 31, 2014) (citing Manual for Complex Litigation, Fourth, § 21.71, at 337 (2004)).

A fee of one third (or 33 1/3%) of the common fund is "the market rate for settlements of this size and in settlements concerning this particularly complex area of law," and courts routinely award that percentage to class counsel in ERISA cases. *George v. Kraft Foods Glob., Inc.*, 2012 WL 13089487, at *2 (N.D. Ill. June 26, 2012).[1] More generally, "common-fund cases from within

[1] *See, e.g.*, *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) ("A one-third fee is consistent with the market rate in settlements concerning this

the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011); *see also Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *10 & n.4 (S.D. Ill. Dec. 16, 2018) ("Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher to counsel in class action litigation") (collecting cases).

Accordingly, pursuant to Federal Rules of Civil Procedure 23(h)(1) and 54(d)(2), Named Plaintiffs and Class Representatives Michael W. Allegretti, Chandra V. Brown-Davis, Yolanda Brown, Ronald Dinkel, Siobhan E. Fannin, Kristie Kolacny, Dianna J. Martin, Sherri Nelson, Becky S. Ray, Scott C. Read, Timothy M. Renaud, Lisa Smith, Susan Weeks, and Andro D. Youssef (collectively, "Plaintiffs" or "Class Representatives") now petition this Court for an award of attorneys' fees of $4,583,333.33 (one-third of the monetary award in the settlement), which would ***include*** the cost and expenses Class and Local Counsel incurred in prosecuting this case. Plaintiffs also seek a service award of $15,000 for each of the Plaintiffs as Class Representatives.

II. BACKGROUND

A. Procedural History

Plaintiffs filed this action on August 9, 2019 (Dkt. No. 1). Plaintiffs allege that Defendants breached their fiduciary duties under the ERISA, 29 U.S.C. §§1001, *et seq* by imprudently retaining and monitoring a suite of poorly performing funds (the Northern Trust Focus Funds) for the Plan. Dkt. No. 67 ¶ 119. Plaintiffs' Complaint was the product of Class Counsel's lengthy and thorough investigation of the legal and factual issues, which included a thorough review of Plan

particularly complex area of law."); *Nolte v. Cigna Corp.*, 2013 WL 12242015, at *2 (C.D. Ill. Oct. 15, 2013) ("[T]he normal rate of compensation in the market [is] 33.33% of the common fund recovered" because the class action market commands contingency fee agreements and the class counsel accepts a substantial risk of nonpayment."); *Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("a one-third fee is consistent with the market rate" in ERISA class action litigation).

documents, interviews with over 200 current and former Plan participants, and a careful analysis of the performance of the Challenged Funds. Declaration of Charles Field ("Field Decl.") ¶ 5.

Throughout the litigation, Class Counsel prosecuted the case vigorously and effectively, with meaningful assistance from Local Counsel. Soon after Plaintiffs filed their Amended Complaint, Defendants moved to dismiss. *See* Dkt. No. 37. Plaintiffs largely defeated that motion. Dkt. No. 46.[2] Thereafter, the parties engaged in an unsuccessful mediation with Robert Meyer, Esq., of JAMS. Field Decl. ¶¶ 8–9. Plaintiffs then continued with extensive discovery and prepared a motion for class certification. *See* Dkt. No. 68. The Court granted that motion and appointed Sanford Heisler Sharp, LLP as Class Counsel. *See* Dkt. No. 73.

During discovery, Class Counsel prepared and responded to extensive written discovery requests (serving both interrogatories and 85 document requests), deposed Defendants' corporate representative under Rule 30(b)(6), and subpoenaed third-parties Ellwood & Associates (the Plan's investment consultant) and Northern Trust (investment manager for the Challenged Funds). Field Decl. ¶ 6. Counsel also analyzed thousands of documents, including Plan documents, a decade of meeting minutes, resolutions of the Walgreen's Board of Directors, and other documents concerning the Challenged Funds. *Id.* Additionally, Plaintiffs hired an expert to determine the Class's potential damages. *Id*.

B. Negotiations and Settlement

After Plaintiffs deposed Defendants' corporate representative, the parties resumed their efforts to reach a resolution. After six months of rigorous negotiations (from March to September 2021), the Parties finalized a Settlement that included the $13,750,000 fund and non-monetary relief, including confirmation of the removal of the Northern Trust Focus Funds from the Plan in

[2] The Court held that Plaintiffs lacked standing to bring claims based on two funds of the ten funds at issue, but otherwise denied the motion. *See* Dkt. No. 46 at 3–4.

connection with a Request for Proposal. *See* Settlement Agreement Dkt. No. 99-3, ¶¶ 2.25, 10.1. The Court granted preliminary approval of the Settlement on November 1, 2021. Dkt. No. 101. Pursuant to the Court's Order, the Settlement Administrator published a settlement website and disseminated approximately 195,000 Notices by mail and 107,000 Notices by email by December 1, 2021. Field Decl. ¶ 12. Since dissemination of the Notice, Class Counsel has responded to questions from six Class Members. *Id*. ¶ 13. The proposed fees, costs, and incentive awards requested herein were fully described in the Class Notice.

Plaintiffs are filing this Application fourteen days in advance of the deadline for objections to the Settlement. *See* Dkt. No. 101 ¶ 9. To date, no Class Members have filed objections.

C. Additional Work to Be Performed

Class Counsel's work on this matter is not yet complete. Class Counsel still needs to prepare the Motion for Final Approval of the Settlement, attend the Fairness Hearing, and if necessary, respond to any objections. Field Decl. ¶ 14. If final approval is granted, Class Counsel will supervise the distribution of the net Settlement Amount to eligible Class Members. *Id*. In addition, Class Counsel will continue to respond to questions from Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id*.

III. THE REQUESTED FEE AWARD IS FAIR AND REASONABLE

For its successful work on behalf of the class, Counsel is entitled to receive the "market price" of their legal services given "the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litig.*, 264 F.3d at 718. "When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis." *George*, 2012 WL 13089487, at *2 (citing *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)). The percentage "market price" for class counsel's services "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in

part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007). The court may also consider "actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).

These factors and all indicate that an award of one-third the monetary settlement aligns with the market rate for Class and Local Counsel's services and is reasonable in this case.

1. The Percentage Requested Is the Market Rate in the Seventh Circuit

Counsel's request for one-third of the settlement as fees aligns with the market rate, derived from both fee awards in other ERISA class actions and with "privately-negotiated" contracts within the Seventh Circuit and in this district. *Taubenfeld*, 415 F.3d at 599 (noting that these data bear directly on the court's determination of the "market" fee rate). Courts have roundly held that a "one-third fee [percentage] is consistent with the market rate" in ERISA class action litigation, which is a "particularly complex area of law." *George*, 2012 WL 13089487, at *2; *see also Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting 13 ERISA cases in the Seventh Circuit in which the court awarded one-third of the settlement); *see supra* n.1 (collecting more cases). One-third is also "the standard contingent percentage that employment lawyers in the Northern District of Illinois charge individual clients." *Brewer v. Molina Healthcare, Inc.*, 2018 WL 2966956, at *4 (N.D. Ill. June 12, 2018); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUD. 27, 35 (2004) ("Taken as a whole, the evidence suggests that one-third is the benchmark for privately negotiated contingent fees.").

2. Class Counsel Undertook Significant Risk of Nonpayment

"The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958

(7th Cir. 2013); *see also In re Trans Union Corp. Privacy Litig*., 629 F.3d 741, 746 (7th Cir. 2011). In awarding fees, a "court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation," rather than in hindsight. *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994). That risk was substantial here.

To begin with, this type of ERISA litigation involves substantial risk of loss: "Plaintiffs claiming a breach of fiduciary duty do not often succeed." *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 466 (D. Md. 2014) ("Numerous courts have emphasized the many hurdles plaintiffs must clear to succeed" on a claim for imprudence under ERISA); *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 269 (S.D.N.Y. 2020) ("ERISA 401(k) fiduciary breach class actions are extremely complex and require a willingness to risk significant resources in time and money, given the uncertainty of recovery and the protracted and sharply-contested nature of ERISA litigation.").

To prevail in such cases, Plaintiffs must first establish a breach—a tall order. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *Howell v. Motorola, Inc*., 633 F.3d 552 (7th Cir. 2011) (affirming summary judgment for plan fiduciaries); *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) (same). Even if Plaintiffs show a breach, other issues remain. The elements of causation and damages often present unsettled and hotly contested issues of law. *See, e.g., Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 364 (4th Cir. 2014) (dispute over causation standard); *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014) (remanding with instruction to "reevaluate" the "method of calculating the damage award"). If Plaintiffs were unsuccessful on any of these points—which invariably involve contested expert testimony—recovery could be significantly reduced or lost all together, meaning that Counsel "would receive no fees at all" for pursuing this action. *Trans Union*, 629 F.3d at 746.

In this case, in particular, Plaintiffs' claims challenge a type of investment option called a target date fund: a fund that typically invests in a mix of stocks and bonds (as well as other asset classes) and becomes more conservative (*i.e.*, invests in less stock and more bonds) as time passes. Different target date funds invest in different mixes of assets and change their allocations at different rates over time.[3] Some courts have rejected efforts to draw comparisons between certain target date funds. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 & n.2 (8th Cir. 2018) (rejecting such a comparison due to certain differences in funds). To succeed in this case and obtain relief, Plaintiffs had to show that the Challenged Funds (the Northern Trust target date funds) were in fact comparable to other funds and to Plaintiffs' proposed benchmarks. While Plaintiffs had strong arguments that cases such as *Meiners* were distinguishable and unpersuasive, Class Counsel took on the significant risk that this court would ultimately disagree and concur with Defendants, who argued otherwise. *See Brown-Davis v. Walgreen Co.*, 2020 WL 8921399, at *2 (N.D. Ill. Mar. 16, 2020) (noting in denying Defendants' motion to dismiss that the "facts are disputed with regard to the similarities between the Funds and Comparator Funds and benchmark indexes").

Despite these uncertainties regarding the outcome of the case, Class Counsel took the case on a wholly contingent basis and devoted thousands of hours and out-of-pocket dollars to the case. If such risks undertaken by Class Counsel were not "compensated with a commensurate award, no firm, no matter how large or well-financed," would "have the incentive to consider pursuing a case such as this." *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *3 (W.D. Mo. Aug. 16, 2019); *see Trans Union*, 629 F.3d at 746; *Silverman*, 739 F.3d at 958.

[3] U.S. Dep't of Labor, Target Date Funds – Tips for ERISA Plan Fiduciaries, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf (providing a general primer on how target date funds work and noting the "differences among [target date funds] offered by different providers").

3. Class Counsel Is Highly Qualified and Performed Exceptional Work

Class Counsel's qualifications and the quality of their work is also relevant to the market value of their services and the percentage fees the court should award. *See Sutton*, 504 F.3d at 693; *Taubenfeld*, 415 F.3d at 600. In this case, Class Counsel were among the few firms in the country with the legal and financial experience necessary to litigate such a complex class action, a background they leveraged to obtain an outstanding result for the class.

Counsel is Highly Qualified. Handling a case of this complexity requires counsel with specialized skills. "[T]he market for highly-qualified ERISA counsel with the resources and track record capable of handling a case of this magnitude and complexity is small." *Downes v. Wisconsin Energy Corp. Ret. Acct. Plan*, 2012 WL 1410023, at *4 (E.D. Wis. Apr. 20, 2012). Counsel "must be knowledgeable about this complex and developing area of law, aware of numerous merits and procedural pitfalls, willing to risk dismissal at any stage, and prepared to pursue many years of litigation." *Bekker*, 504 F. Supp. 3d at 270. They must also have "expertise regarding industry practices" and be able to analyze pertinent financial records and data. *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *3 (M.D.N.C. Sept. 29, 2016).

Class Counsel, Sanford Heisler Sharp, LLP, is a preeminent nationwide plaintiffs' firm specializing in complex class litigation. The firm has "extensive experience in handling class actions, other complex litigation, and the types of claims asserted in this action." Dkt. No, 73 at 3; *accord Karg v. Transamerica Corp.*, 2020 WL 3400199, at *4 (N.D. Iowa Mar. 25, 2020) (noting that Sanford Heisler Sharp has "a wealth of experience in navigating class actions and show knowledge of and intellectual engagement with the applicable law" in ERISA breach of fiduciary duty cases); *see also* Field Decl. ¶¶ 28-34 (describing Class Counsel's extensive experience and

quoting other praise for their work).[4] Class Counsel have served as lead or co-lead counsel in scores of other class and collective actions nationwide, including several other ERISA class actions, with great success. *Id.* ¶ 29.[5] The team has been led by Charles Field, who has decades of experience in finance and in the law of financial regulation, and David Tracey, who has served as class counsel in multiple ERISA actions. *Id.* ¶¶ 16–27. Messrs. Field and Tracey were assisted by a team of other highly qualified attorneys and legal assistants. *Id.* ¶ 40. Local Counsel likewise has a distinguished track record of success in class actions. Barnow Decl. ¶¶ 7, 10, 11.

Counsel Generated Substantial Relief for the Class. As noted above, Counsel successfully defeated Defendants' motion to dismiss and, after extensive investigation and discovery, obtained $13.75 million in monetary recovery for the class. This sum constitutes approximately 40% of the $34 million in damages calculated by Plaintiffs' expert by comparing the performance of Challenged Funds against the average performance of their Morningstar peer universe starting on January 1, 2018 (five years after the Funds were added to the Plan). The settlement compares favorably to settlements in similar cases, even accounting for more aggressive damages models. *See, e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) ("numerous courts have approved settlements with recoveries around (or below)" 10% of estimated potential damages); *Baird v. BlackRock Institutional Tr. Co., N.A.*, No. 17-CV-01892-HSG, Dkt. No. 490 at *9 (N.D. Cal. Nov. 3, 2021) (approving $9.65 million settlement—28.4% of the damages

[4] Among many accolades, Sanford Heisler Sharp has been recognized as an "AV" rated firm, "Employment Group of the Year" by *Law360* (2016 and 2018), "Best Law Firm National Tier 1 Employment Firm" by *U.S. News & World Report* (2016-2019), "Elite Trial Lawyers" by the *National Law Journal* (2014, 2015, and 2019), and "2020 Labor & Employment Employee-Side Firm of the Year" by Benchmark Litigation.

[5] *See Cutrone v. Allstate Corp.*, 2021 WL 4439415, at *3 (N.D. Ill. Sept. 28, 2021) (denying motion to dismiss another claim challenging the Northern Trust's target date funds); *Pizarro v. Home Depot, Inc.*, 2019 WL 11288656, at *3-4 (N.D. Ga. Sept. 20, 2019) (denying motion to dismiss claim challenging BlackRock's target date funds); *see also* Field Decl. ¶ 29 (listing other multi-million-dollar settlements).

plaintiffs intended to prove at trial); *Clark v. Duke Univ.*, 2019 WL 2588029 (M.D.N.C. 2019) (approving $10.65 million monetary settlement, under 4% of total estimated damages).[6]

The settlement in fact creates far more value for the Class than $13.75 million, for at least three reasons. First, the agreement provides for current Plan participants to receive their distributions on a tax-deferred basis (i.e., as direct deposits in their 401(k) Plan accounts) and gives former participants the option to direct their distribution into a tax-deferred vehicle if they so choose. *See* Dkt. No. 99-3 ¶ 6.5.2, 6.7–6.9. The "the actual value to the class for the monetary part of the settlement" is therefore "more than [$13.75] million." *Tussey I*, 2019 WL 3859763, at *2. Second, Class Counsel leveraged targeted discovery (including an early 30(b)(6) deposition) to obtain an early settlement for the class. Thus, "a major benefit of the settlement is that Class Members may obtain these benefits much more quickly" without having "to await the outcome of a trial and inevitable appeal" that would delay their compensation "for many years, if indeed they received any at all." *Schulte*, 805 F. Supp. 2d at 583. Third, Class Counsel negotiated significant *non-monetary* relief, including confirmation that the fiduciaries have removed the Challenged Funds and an agreement that the fiduciaries will "continue to use an investment advisor to provide ongoing investment monitoring services for the Plan." Dkt. No. 99-3 ¶¶ 10.1, 10.2. *See Beesley*, 2014 WL 375432, at *1 ("A court must also consider the substantial affirmative relief when evaluating the overall benefit to the class."); *accord* MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.71 (2004). These aspects of the settlement increase its value well beyond $13.75 million.

[6] *See also Price v. Eaton Vance*, No. 1:18-cv-12098-WGY (D. Mass. Sep. 24, 2019) (approving ERISA class settlement that equaled approximately 23.8% of expected value); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (20% recovery in ERISA class action approved); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (approving ERISA 401(k) settlement that represented 19% of estimated damages); *Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve 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").

4. Class Counsel Spent Considerable Time, Effort, and Expense Litigating this Case

Counsel has been investigating, litigating, and negotiating with the Defendants in this case since June 2019. Field Decl. ¶ 4. As of December 15, 2021, Class Counsel have expended nearly 3,563.02 hours in attorney and staff time prosecuting this action on behalf of the Class. *Id*. ¶ 40. Local Counsel have expended approximately 79 hours. Barnow Decl. ¶ 16. A breakdown of these hours by attorney level is attached. The number of hours expended by Counsel parallels or exceeds the number in other cases in which district courts within the Seventh Circuit have granted a one-third attorneys' fees award. *See, e.g*., *Schulte*, 805 F. Supp. 2d at 598 (awarding 33.33% fees after Class Counsel spend 2,815.50 hours on the matter).

Moreover, unlike in many cases, here Counsel are ***not*** requesting separate reimbursement for their costs and expenses litigating this case (e.g. mediation, discovery, filing, and expert costs), which totaled $49,572.63. Field Decl. ¶ 46 ($47,557.49); Barnow Decl. ¶ 19 ($2,015.14). Instead, a portion of the fee award will reimburse Counsel for those expenses. *See*, *e.g.*, *Bell*, 2019 WL 4193376, at *6 (noting it is "well established" that such expenses are reimbursable).

5. To Date, No Class Member Has Objected to the Settlement

The Settlement Notice, which was approved by this Court and disseminated to all Class members on December 1, 2021, advised Class Members of the fees, costs, and service awards that Class Counsel intended to seek. *See* Dkt No. 99-6. To date, Class Counsel has received inquiries about the Settlement from absent Class Members, but have not received any complaints about the terms of the Settlement or Class Counsel's requested fee. Moreover, no Class Member has (to date) objected to the proposed fees, costs, or service awards. This "indicates the appropriateness of the [fee] request." *McDaniel v. Qwest Commc'ns Corp.*, 2011 WL 13257336, at *4 (N.D. Ill. Aug. 29, 2011), *aff'd*, 743 F.3d 221 (7th Cir. 2014).

6. A Lodestar Cross-Check Confirms that a One-third Fee is Reasonable

To verify the reasonableness of a fee award, courts (especially outside this circuit) have sometimes cross-checked the award using the "lodestar method," in which the court multiplies the hours spent on the case times the attorneys' reasonable hourly rates to arrive at a "lodestar," then adjusts that number up or down to reflect the individual characteristics of the case, such as the risk of nonpayment. *See Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998). The lodestar cross-check is not required and has "fallen into disfavor" among district courts in the Seventh Circuit. *George*, 2012 WL 13089487, at *3 (quoting *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979–80 (7th Cir. 2003)); *Will*, 2010 WL 4818174, at *3 (calling the lodestar cross-check "unnecessary, arbitrary, and potentially counterproductive"); *see* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUD. 248, 269, Table 11 (2010) (finding lodestar cross-check was used in only 17% of cases in the 7th Cir. between 1993 and 2008).

Nonetheless, a lodestar cross-check confirms that a one-third fee is reasonable in this case. Based on Counsel's hours recorded (3,563.02) and current hourly rates, the lodestar amount to date is approximately $2,245,852.40 for Class Counsel and $54,910 for Local Counsel.[7] The lodestar multiplier is therefore approximately 2.0. The Seventh Circuit, "mandate[s]" an award of fees at a multiple of the lodestar "if the court finds that counsel 'had no sure source of compensation for their services.'" *Florin*, 34 F.3d at 565 (quoting *In re Continental Illinois*

[7] See Field Decl. ¶ 41; Barnow Decl. ¶ 16. Class Counsel's hourly rates are reasonable and have been approved by many courts. *See* Field Decl. ¶¶ 37, 38; Barnow Decl. ¶ 14; *see, e.g., Wellens et al. v. Daiichi Sankyo, Inc.*, Case No. 13-cv-00581, Doc. 191, ¶20 (N.D. Cal. Feb. 10, 2016) (approving Sanford Heisler's standard hourly rates of $850–$1,050 for partners, $700 for senior litigation counsel, and $425–$750 for associates, as "in line with attorneys of comparable skill, experience, and reputation"); *Ha v. Google Inc.*, 2018 WL 1052448, at *2 (Cal. Super. Feb. 8, 2018) (approving award of attorneys' fees to Sanford Heisler and calculating lodestar modifier based on billing rates of $850 for partners, $750 for senior litigation counsel, up to $500 for associates, and $295 for senior legal assistants); *see also Barrett v. Forest Labs., Inc.*, No. 1:12-cv-05224, Doc. No. 292 (S.D.N.Y. Apr. 26, 2018) (approving requested fee award to Sanford Heisler); *id.* at Doc. No. 282 (declaration setting forth Sanford Heisler's standard hourly rates, including rates of up to $1,000 for partners, up to $850 for senior litigation counsel, up to $550 for associates, and $295 for senior legal assistants).

Securities Litigation, 962 F.2d 566, 569 (7th Cir.1992)). "[T]he need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Id.* Given the factors outlined above—the risks of nonpayment, the complexity of the case, Counsel's caliber and performance, the outcome for the Class, and the absence of objections—a 2.0 multiplier is well within the reasonable range. *See Schulte*, 805 F.Supp.2d at 598 n.27 (recognizing irrelevance of lodestar cross-check while nevertheless approving fee request with lodestar risk multiplier of 2.5); *Spano*, 2016 WL 3791123, at *3 ("Courts have generally held that a lodestar multiplier falling between 2 and 4.5 demonstrate a reasonable attorney's fees."); *Bekker*, 504 F. Supp. 3d at 271 (approving multiplier of 5.85).

IV. THE COURT SHOULD APPROVE SERVICE AWARDS OF $15,000

The Court may, in its discretion, authorize incentive awards to class representatives. "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016; *accord Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992); *see* 5 Newberg on Class Actions § 17:4 (5th ed. Jun. 2021 Update) (opining that Rule 23(e) supports such awards, given the heightened risks and burdens of serving as a class representative). In deciding whether a service award is warranted, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook*, 142 F.3d at 1016. Courts also heavily weigh the risks plaintiffs took in lending their names to the lawsuit. "[U]nlike in consumer and most other class actions, each Plaintiff was willing to alienate their employer, longtime friends loyal to [Walgreen] and current and future employers unlikely to embrace an employee who files an action against his employer." *Abbott*, 2015 WL 4398475, at *4; *see also Brewer*, 2018 WL 2966956, at *2 (opining that service awards are especially "well suited

in employment litigation" given the risks the named plaintiffs bear in suing their employer); *see Beesley*, 2014 WL 375432, at *4 ("ERISA litigation against an employee's current or former employer carries unique risks," including "alienation from employers or peers").

In ERISA cases, there is an additional, independent ground for granting service awards. "[A]ctions for breach of fiduciary duty" under ERISA § 502(a)(2) are "brought in a representative capacity on behalf of the plan as a whole." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008) (explaining that ERISA describes "the 'plan' as the victim of any fiduciary breach and the recipient of any relief"). "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses … incurred in that behalf." *United States v. Equitable Tr. Co. of New York*, 283 U.S. 738, 744 (1931) (awarding personal representative of trust beneficiary $7,500—over $135,000 in today's dollars—"for his services," plus attorneys' fees and expenses, in suit to restore property to a trust fund); 2 Street, Federal Equity Practice § 2041 ("[W]here a person occupying a trust relation, or acting *en autre droit* [in another's right], sues…, his costs will usually be charged to the trust fund."). In ERISA, "Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans." *Free v. Briody*, 732 F.2d 1331, 1337–38 (7th Cir. 1984). Equity thus permits the court to compensate Plaintiffs for their services on behalf of Plan, "which ERISA typically treats as a trust." *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011).

A $15,000 award for each of the Class Representative is plainly appropriate here. From the inception of this case, Plaintiffs have been active, hands-on participants in this litigation, expending significant amounts time to benefit the Class. Among other efforts, they responded to document requests and interrogatories; reviewed and approved pleadings; and actively participated

in settlement discussions. *See* Field Decl.¶ 50. They took also substantial personal risks in initiating this action. *Id*. ¶ 49. Under similar circumstances, courts within this circuit have authorized incentive awards higher than the $15,000 Plaintiffs request. *See, e.g.*, *Cook*, 142 F.3d at 1016 (affirming $25,000 incentive award out of $14 million fund in ERISA case); *Abbott*, 2015 WL 4398475, at *4 (approving $25,000 awards in ERISA case because "the Named Plaintiffs initiated the action, took on a substantial risk, and remained in contact with Class Counsel"); *George*, 2012 WL 13089487, at *4 ($15,000 award out of $9.5 million ERISA settlement).[8]

Furthermore, the Class Notice advised that each Plaintiff would seek up to $15,000 as a service award. To date, no Class Member has voiced any objection. Field Decl. ¶ 52.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant this Motion and award $4,583,333.33 in attorneys' fees and a $15,000 service award for each Class Representative.

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[8] *See also Hale*, 2018 WL 6606079, at *15 (approving $25,000 service awards to each representative); *Nolte*, 2013 WL 12242015, at *4 (C.D. Ill. Oct. 15, 2013) ($25,000 awards); *In re Sw. Airlines Voucher Litig*., 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013) ($15,000 awards); *Spano*, 2016 WL 3791123, at *4 (noting a $25,000 award was "consistent with awards in comparable cases, even those which have not required such a long commitment"); *Heekin v. Anthem, Inc*., 2012 WL 5878032 at *1 (S.D. Ind. Nov. 20, 2012) ($25,000 award).

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