IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DIANE G. SHORT, JUDITH DAVIAU, and JOSEPH BARBOZA, Individually and as representatives of a class of participants and beneficiaries in and on behalf of the BROWN UNIVERSITY DEFERRED VESTING RETIREMENT PLAN, and the BROWN UNIVERSITY LEGACY RETIREMENT PLAN, Plaintiffs, vs. BROWN UNIVERSITY, Defendant.	Civil Action No. 1:17-cv-00318-WES-PAS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER AWARDING REASONABLE ATTORNEY'S FEES AND COSTS AND FOR PAYMENT OF CASE CONTRIBUTION AWARDS TO PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Plaintiffs Diane G. Short, Judith Daviau, and Joseph Barboza (collectively, "Plaintiffs"), on behalf of the Brown University Deferred Vesting Retirement Plan ("Deferred Vesting Retirement Plan") and the Brown University Legacy Retirement Plan ("Legacy Retirement Plan"; together, the "Plans"), and as representatives of a class of participants and beneficiaries of the Plans, by and through the undersigned counsel, and Defendant Brown University (the "University") have entered into a Stipulation of Settlement (the "Settlement") to resolve all claims asserted in this ERISA class action lawsuit in exchange for a $3.5 million cash payment plus the provision of significant therapeutic or affirmative relief.

By Order of April 15, 2019, this Court: (i) granted Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement; (ii) certified for settlement purposes the Settlement Class of all participants and beneficiaries who had a balance in either the Plans during the Class Period, excluding any participant who is a fiduciary to either of the Plans; (iii) approved the form and manner of giving notice to the proposed Settlement to members of the affected Classes; (iv) appointed Class Counsel; and (v) set a schedule proving for: the filing of the instant Motion for Approval of Case Contribution Awards to Plaintiffs and an Award of Attorneys' Fees and Costs to Class Counsel (July 3, 2019), as well as the deadline for objections (July 18, 2019), and the final fairness hearing (August 1, 2019). ECF No. 47.

Class Counsel have pursued this complicated ERISA class action for nearly two years, committing their services and resources and advancing substantial costs to prosecute the case. To date, these attorneys have received no compensation for their efforts, nor have they received reimbursement for any of the substantial out-of-pocket costs they incurred. All of their fees have been contingent upon receiving a favorable result of the case. After two years of uncompensated effort, along with substantial risk of non-recovery, Class Counsel have achieved a $3.5 million

cash settlement plus therapeutic relief (the "Settlement"), which will provide an immediate, meaningful and certain benefit to Class Members and which, on a proportionate basis, is as large or larger than any other recovery in the several similar cases brought throughout the country alleging fiduciary breaches in connection with the administration of 403(b) retirement plans.

By this motion, Class Counsel seek an award of attorney's fees in the amount of $1,050,000, plus the actual costs they incurred in prosecuting this case to a successful conclusion through a negotiated settlement.[1] Class Counsel also ask the Court to approve case contribution or service awards to be paid to the three named representatives of the Class, in the amount of $5,000 each, for their efforts in support of the case. Pursuant to the negotiated settlement and the common fund doctrine, these amounts would be paid from the $3.5 million Settlement Fund negotiated by the parties; the remainder of the fund, after payment of costs incurred in connection with notice and settlement administration procedures, is to be distributed to Class Members in proportion to their average quarterly account balances in the Plans during the Class Period, pursuant to the proposed Plan of Allocation submitted to the Court for approval as part of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF No. 45). The proposed attorney's fee award would be divided among the three law firms that represented Plaintiffs and the Class in this action; the costs incurred in connection with the litigation would be reimbursed to the firms that incurred them.

In setting fees, the principal measure used by courts is the ratio of benefits obtained to the amount of fees sought. *See Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997). Given the recovery obtained, the complexity of the case, the quality and

1 The Stipulation of Settlement provides that Defendant shall take no position directly or indirectly on Class Counsel's application for attorneys' fees and expenses, provided that Class Counsel do not request an award of attorneys' fees higher than 30% of the Settlement Amount. Decl. ¶¶ 10.

quantity of the work performed, and the risks involved in undertaking this litigation, the fee requested here is fair and reasonable. The proposed award of thirty percent of the Settlement Fund is only marginally greater than Class Counsel's lodestar in the case. Schneider Decl. ¶ 8. By either the percentage of fund or the lodestar measure, the requested fee constitutes reasonable compensation for the hard-fought results Counsel have achieved and should be approved. Finally, the $1,050,000 million fee falls within the range of attorney's fee awards courts have approved in other class actions.

The reimbursement of litigation costs and expenses that Class Counsel are asking the Court to approve are for only the actual litigation costs and expenses incurred in the course of the litigation. Such litigation costs, in the total amount of $18,991.95, include: (i) documented out-of-pocket charges for court filing fees, service costs, and hearing transcripts to date; (ii) documented travel expenses of Class Counsel; and ; (iii) mediation fees. Schneider Decl. ¶ 9; Collins Decl. ¶¶ 18-20. To the extent that additional costs are incurred in connection with the settlement administration process (for which Class Counsel have yet to be billed), these will be paid from the Settlement Fund.

Finally, Plaintiffs seek approval of $5,000 in case contribution awards to each as compensation for the assistance they have provided in the prosecution of this case, which includes researching and providing to Class Counsel certain Plan documents and reports, and regularly consulting with Class Counsel. Such awards are customary in class action settlements, and the amount requested is reasonable and fair in light of the substantial contributions these individuals made to the case and the time and effort they expended in assisting with the litigation.

Pursuant to the Preliminary Approval Order (ECF No. 47), this application for an award of attorney's fees, litigation expenses and case contribution service awards is being filed fourteen (14) days in advance of the date by which Class Members are required to submit objections to the Settlement. Class Members will, therefore, have an adequate opportunity to register any objections they might have to Class Counsel's request for fees and costs and their request for payment of case contribution awards from the Settlement Fund. In the event that any such objections are filed, Plaintiff will provide the Court with further briefing addressing the substance of each such objection.

II. DISCUSSION

A. Class Counsel Should Receive an Award of Reasonable Fees and Costs to be Paid from the Settlement Fund

Federal Rule of Civil Procedure 23(h) provides, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." The Rule requires that an application for an award of fees be made by motion, that Class Members be provided the right to object to the motion, and that the court hold a hearing and state its findings of facts and conclusions of law under Rule 52(a). Fed. R. Civ. P. 23(h)(1)-(3).

Under the long-recognized percentage of the fund or common benefit doctrine, litigants or lawyers who recover a common fund for the benefit of a class of persons other than themselves are entitled to reasonable attorney's fees from the fund prior to the distribution of the balance to the class. *In re In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (observing that "a common fund fee award may be appropriately determined by a percentage-of-the-fund (POF) method.") (citing *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp.

2d 249, 265 (D.N.H. 2007) ("An attorney who recovers a common fund for the benefit of others is entitled to 'a reasonable attorney's fee from the fund as a whole.'") (*quoting Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)). "The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs." *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n. 6 (1st Cir. 1995). *See also In re Fid./Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("[L]awyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax.").

Thus, the purpose of the percentage of the fund doctrine is to "spread the costs of litigation among all the beneficiaries of an identifiable fund over which a court can exercise legitimate control, in effect guarding against the unjust enrichment of passive beneficiaries at the expense of the active beneficiary." *In re Lupron* 2005 WL2006833 at *2 (quoting *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986)); *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d at 265; *Boeing Co.*, 444 U.S. at 478; *In re Zyprexa Prod. Liab. Litig.*, 594 F.3d 113, 128–9 (2d Cir. 2010). "Class action lawsuits are the prototypical example of instances where the common fund doctrine can apply." *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 457 (D.P.R. 2011) (quoting *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010)).

Plaintiffs and their attorneys, through the prosecution and ultimate settlement of this case, have created a common fund of $3.5 million plus therapeutic relief for the benefit of the Settlement Class. Based on the above-described precedent, Class Counsel are entitled to and

respectfully seek an award of reasonable fees and costs to be paid from that fund prior to the distribution of the balance to Class Members.

B. The Percentage-of-the-Fund Method is the Preferred and Appropriate Method for Determining the Amount of Attorney's Fees to be Awarded to Class Counsel

In assessing the reasonableness of attorney's fees, courts have traditionally relied upon two forms of analysis: the "lodestar" approach and the "reasonable percentage of the common fund" approach. *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F. Supp. 2d at 457–8; *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126, 129–30 (D.N.H. 1993).

The lodestar approach multiplies the reasonable hours spent in litigating the case by the reasonable hourly rates of those who spent time on the case, subject to a multiplier or discount for special circumstances. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d at 305 (citing *Blum*, 465 U.S. 886; *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir. 1992)). Under the percentage-of-the-fund analysis, the court fashions the fee award based on a reasonable percentage of the fund recovered for those benefitted by the litigation. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d at 305.

In *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991), the First Circuit recognized "the tendency exhibited by some courts, particularly in common fund cases, to jettison the lodestar in favor of a 'reasonable percentage of the fund' approach." *Id.* at 526 n. 10. Subsequently, called on to "pass upon the legitimacy of the POF method in common fund cases," the Court stated:

> We think that a more malleable approach is indicated. Thus, we hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar. Our decision is driven both by our recognition that use of the POF method in common fund cases is the prevailing praxis and by the distinct advantages that the POF method can bring to bear in such cases.

In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d at 307.

The First Circuit went on to identify some of the "distinct advantages" of the POF approach, including: (1) it is less burdensome to administer, (2) it reduces the possibility of collateral disputes, (3) it enhances efficiency throughout the litigation, (4) it is less taxing on judicial resources, and (5) it better approximates the workings of the marketplace. *Id.*; *see also In re Lupron, 2005 WL2006833* at *3 (identifying the advantages of the POF approach recognized by the Court in *In re Thirteen Appeals*). Other courts in this district have recognized one or more of these advantages of the percentage of the fund method in common fund cases. *See*, *e.g.*, *Duhaime*, 989 F. Supp. at 377 (percentage of fund method "appropriately aligns the interests of the class with the interests of the class counsel--the larger the value of the settlement, the larger the value of the fee award"); *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. 99, 108 (D.R.I. 1996), *supplemented,* 974 F. Supp. 155 (D.R.I. 1997) (noting that task of calculating lodestar in complex case would be wasteful, and percentage of fund "better approximates workings of marketplace"); *Bussie v. Allamerica Fin. Corp.*, No. CIV.A. 97-40204-NMG, 1999 WL 342042, at *2 (D. Mass. May 19, 1999) (percentage of fund method aligns interests of class with interests of class counsel; encourages efficiency and avoids the disincentive to settle cases early created by lodestar method).

Since the First Circuit's decision in *In re Thirteen Appeals*, district courts within this Circuit have characterized the percentage of fund approach as the "preferred" or "favored" methodology for determining reasonable fees in common fund cases. *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 483 (D.P.R. 2012) ("The POF approach methodology is favored in this Circuit for determining the appropriate attorney's fees in common fund cases . . ."); *In re Cabletron Sys.,*

Inc. Sec. Litig., 239 F.R.D. 30, 37 (D.N.H. 2006) ("The POF method is preferred in common fund cases because 'it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' ") (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005), *as amended* (Feb. 25, 2005)); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184 (D. Me. 2003) (identifying the percentage of the fund method as the "prevailing approach").

Pursuant to the above-discussed authorities, Plaintiffs request that the Court utilize the percentage of the fund method to determine the reasonable compensation that should be paid to Class Counsel in this common fund case. Adopting this approach will promote efficiency and spare the Court the not insignificant burden of the evaluation of counsel's detailed time records that would be required by using the lodestar approach. The three firms representing the Class have expended nearly 1,000 hours on this case, through the efforts of a significant number of attorneys and paralegals. Schneider Decl. at ¶ 8; Collins Decl. ¶¶ 13-17. Plaintiffs have provided the Court with declarations setting forth, in summary form, the professional time spent on the case by each of the three firms representing Plaintiffs and the Class, including the number of hours spent by each legal worker who devoted time to the case and his or her hourly rate. As discussed below, this can be used by the Court as a lodestar "cross-check" against the percentage of fund calculation and establishes that the percentage of fund calculation results in a fee award that is comparable to the lodestar. Additionally, should the Court desire to conduct an *in camera review* of Class Counsel's detailed time records, we will provide them at the Court's request. *See In re Fleet/Norstar Securities Litigation*, 935 F. Supp. at 107–8 (in settlement involving five law firms billing for more than 7,300 hours, "the task of administering the lodestar method of calculation is both overwhelming and wasteful"); *Branch v. F.D.I.C.*, No. CIV.A.91-CV-

13270RGS, 1998 WL 151249, at *3 (D. Mass. Mar. 24, 1998) ("Another not inconsiderable argument favoring the POF method is that it relieves courts of the burden of wading through often foot-thick stacks of bills attempting to parse the value of lawyers' time.")

C. The Requested Fee of Thirty Percent of the Settlement Fund, or $1,050,000, Is Reasonable Compensation for the Work Performed and the Results Obtained by Class Counsel and Should Be Approved

A district court has both the authority and the duty to determine the fairness of attorney's fees in a class action settlement. *See Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999); *Duhaime*, 989 F. Supp. at 376 –377; *Gorsey v. I.M. Simon & Co.*, No. CIV. A. 86-1875-Z, 1991 WL 181439, at *1 (D. Mass. Sept. 4, 1991). In discharging this duty, the amount of attorney's fees that the court determines to be appropriate rests in the court's sound discretion. *Evans v. Jeff D.*, 475 U.S. 717, 736, n. 26 (1986); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d at 302 (court has substantial discretion in evaluating fairness of fees).

The First Circuit has not adopted any particular criteria or set of factors to be applied in determining the reasonableness of a fee request. District courts within this Circuit, however, have made use of factors identified by the Second and Third Circuits. Those factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir. 2000) and *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (articulating additional factors including "the risk of the litigation," "the requested fee in relation to the settlement," and

"public policy considerations")). Applying these considerations to the facts of this case supports the requested fee of $1,050,000 million.

1. The Size of the Fund Created and the Number of Persons Benefitted

The size of the fund is $3,500,000, a fair and reasonable recovery given the results in numerous similar cases filed against universities in the last several years, the multiple defenses advanced by the University, the risks involved in proceeding to trial, and the possibility of reversal on appeal of any favorable judgment. Under the terms of the Stipulation of Settlement, nearly all of the nearly 15,000 members of the Class will benefit from the fund. Class Members are not required to file claim forms, as the identity of all Class Members is known to Defendant and available from its records. The allocation of the Settlement Fund to former Plan participants (*i.e.*, individuals who no longer have an account balance in either of the Plans), will be deposited into automatic rollover individual retirement accounts, thus preserving the tax-favored status of such distributions. Class Members will receive allocations of the Settlement Fund in proportion to the quarterly average of their account balances during the Class Period. This is a successful result benefiting all Class Members[2] for which Class Counsel should be fairly compensated.

2. The Presence and Nature of Any Objections

The Class was advised in the Notice of Proposed Class Action Settlement, at paragraph 13, that Class Counsel would file a motion seeking approval of reasonable attorney's fees to be paid from the Settlement Fund, not to exceed thirty percent (30%) of the Settlement Fund, plus expenses. They were also advised of the opportunity to object to the Settlement, and the process

2 Former participants whose allocation would have been less than $25 will not receive any allocation. This term of the Settlement is fashioned after a rule of the Internal Revenue Service regulating the correction of operational errors in individual account plans like the Plans. Under that rule, corrections for former participants are not required to be made if the cost of administering the correction would exceed the amount that would be distributed. The rule is designed to ensure that the greatest percentage of a recovery for the Plan is applied to benefit participants rather than to administrative expense.

for objecting, and the deadline of July 18, 2019 by which they could do so. In addition, copies of this motion and the supporting declarations (as well as previously-filed preliminary approval papers), have been posted to the Settlement website and are readily available to Class Members for a period of at least fourteen (14) days prior to the deadline for submitting objections. As that deadline does not run until July 18, 2019, it is not known at the time of this filing whether there will be any objectors and whether the amount of fees requested by Class Counsel will be a subject of any objections. If so, the Court will want to consider the merits of those objections and Plaintiff's response to each objection. However, as of the date of this filing, Class Counsel is not aware of any objections to Class Counsel's proposed compensation of thirty percent of the Settlement Fund, or for that matter, any aspect of the Settlement.

3. The Qualifications, Skill and Efficiency of Class Counsel

This Court has previously considered the qualifications of Class Counsel based upon the evidence of Class Counsel's experience and areas of expertise submitted in connection with the motion for preliminary approval. In that context, the Court found that "Plaintiffs are represented by qualified, reputable counsel who are experienced in preparing and prosecuting ERISA class actions of this type." ECF No. 47 at p. 3. In granting preliminary approval of a non-opt-out class under Fed. R. Civ. P. 23(b)(1), the Court considered favorably: "(i) the work Class Counsel has done in identifying or investigating potential claims in this Action; (ii) Class Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in this Action; (iii) Class Counsel's knowledge of the applicable law and, in particular, its knowledge of ERISA as it applies to claims of the type asserted in this Action; and (iv) the resources Class Counsel has committed to representing the class, that Class Counsel has and will continue to represent fairly and adequately the interests of the Settlement Class." *Id*. at p. 4. The record here shows that Class Counsel have extensive experience in litigating ERISA securities class action lawsuits, and Class

Counsel have demonstrated a thorough approach to all matters presently before the Court. For brevity's sake, Plaintiffs do not reiterate all evidence of Class Counsel's qualifications here, but refers the Court to its prior submissions, including: ECF Nos. 45-3 and 45-4 (Declarations of Todd S. Collins and Todd M. Schneider in Support of Plaintiffs' Unopposed Motion for Preliminarily Approving Class Action Settlement). Plaintiffs also refer the Court to the entire record in this case, which demonstrates that Class Counsel have vigorously and thoroughly prosecuted this case with a level of skill and expertise that warrants fair compensation for their efforts.

Class Counsel have also taken steps to ensure that this matter has been litigated efficiently. Each of the two Co-Lead Counsel firms has tasked two attorneys with primary responsibility for the case. The two firms have worked together collaboratively and have taken steps to avoid duplicative or inefficient work. Typically, one or two attorneys have been assigned primary responsibility for tasks such as review of documents, briefing, or preparation of the mediation statement. Conference calls and meetings of counsel have been scheduled only when necessary to address particular issues and have been limited to the topic stated in advance or other topics necessary to advance the litigation and to formulate and implement Plaintiffs' position and strategy in the litigation.

4. Complexity and Duration of the Litigation

As the Court is aware, this case was filed in July 2017 and was actively litigated for nearly two years. Plaintiffs alleged that the University failed to adequately assess and monitor the amount of overall fees for administration of the Plans and failed to monitor the performance and related fees of specific investment options made available through the Plans, in breach of its fiduciary duties under ERISA and in violation of the statutory and regulatory provisions prohibiting certain transactions. Appropriate development of the claims required analysis of

scores of financial reports of the Plans and other similar retirement plans, and more than a hundred prospectuses of offered funds and of other equivalent funds.

In ERISA breach of fiduciary duty cases, such as this, that challenge fees and investment activities in complex capital markets, the risk of non-recovery is significant. Complex ERISA litigation, and trials generally, are highly unpredictable. As one court observed: "It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743–44 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971). A case such as this, involving nascent theories and complex transactions, is inherently risky. Accordingly, the presumptive risk assumed by Class Counsel is reflected and reasonably accounted for by taking the case on a contingent fee basis. These claims gave rise to complex proof and defenses. Defendant argued that the University engaged in a robust and thorough process for evaluating administrative expenses as well as the performance of all investment choices, delivering minutes of regular committee meetings over a period of years at which fund performance and Plan administration issues were reviewed and discussed. Defendant also produced multiple reports prepared by the investment and plan administration consultant hired by the University to assist in the complex and extensive assessment of fund performance and overall plan administrative services. Defendant further questioned Plaintiffs' interpretation and application of applicable prohibited transaction exemptions and Plaintiffs' theories on the proper evaluation of fund performance and whether appropriate benchmarks were used to do so.

5. Financial Risks to the Attorneys

When Class Counsel filed this case in July 2017, there were no assurance that any fees would ever be received. No other court had yet decided whether the alleged unlawful actions were actionable or the cause of cognizable damages.

Moreover, prior to mediation, a judgment was entered in favor of Defendants on all counts after trial in a similar case against New York University. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018). And, while the parties were at mediation, a decision was released dismissing another similar university ERISA class action in which Plaintiffs are represented by the same counsel as here. *See Wilcox v. Georgetown Univ.*, No. CV 18-422 (RMC), 2019 WL 132281 (D.D.C. Jan. 8, 2019). These unknowns and developments created great uncertainty as to whether Class Counsel would be able to defeat Defendants' challenges and have any chance at prevailing on the merits. Class Counsel were aware that they would likely have to expend thousands of hours, and tens if not hundreds of thousands of dollars, in prosecuting this case through class certification, summary judgment, trial and post-trial appeals before having even a possibility of recovering a fee. Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not obtaining an order certifying a class, of prevailing at trial, or even of losing on appeal.

6. Amount of Time Devoted to the Case

Class Counsel and local counsel have devoted more than a thousand hours to this case, including hundreds of hours of analyses of thousands of pages of complex financial records and disclosures and fund prospectuses, the production and review of thousands of pages of documents, court appearances, a full day alternative dispute resolution session, and briefing on a motion to dismiss. This, of course, does not include additional hours on this motion and the final approval motion, appearing at the final approval hearing, or working with the Settlement Administrator on the distribution of the Settlement.

7. The Awards in Similar Cases

The requested fee of thirty percent of the Settlement Fund is in line with fee awards in similar class actions. *See*, *e.g.*, *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378, 379 (9th Cir.

1995) (affirming the district courts award of 33% of the $12 million dollar settlement fund and noting that although "[t]wenty-five percent is the 'benchmark' that district courts should award in common fund cases[,] ... [t]he district court may adjust that benchmark when special circumstances indicate a higher or lower percentage would be appropriate."); *In re Relafen Antitrust Litigation*, 231 F.R.D. at 82 (awarding fees of one-third percentage of the fund, representing a lodestar multiplier of 2.02); *Mazola v. May Dep't Stores Co.*, No. 97CV10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("[I]n this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions.").

In the context of complex financial class actions, the $3.5 million settlement is a modest amount, which tends to justify a percentage at the higher end of the acceptable range, in recognition that the amount of preparation and level of expertise required does not diminish based on the size of the recovery. And, while modest in the overall context of financial class actions, this recovery is among the highest as a percentage of total Plan assets. Total Plan assets as of December 31, 2017 were $1.622 billion, resulting in a recovery of .002158 of total plan assets. In comparison, the settlement in *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2579201 (M.D.N.C. June 24, 2019), resulted in a recovery of only .00175 of total plan assets of $6.084 billion. No "windfall" for the attorneys will be realized by applying a 30% percentage of the fund formula for determining Class Counsel's compensation. Indeed, as discussed below, an award of thirty percent of Settlement Fund closely approximates Class Counsel's lodestar and actually results in a slight discount in the amount that would likely be awarded under the Lodestar approach.

D. Class Counsels' Lodestar Confirms the Reasonableness of the Requested Compensation

The First Circuit does not require that district courts engage in calculating the lodestar when awarding fees based upon the percentage of the fund method. *See In re Puerto Rican Cabotage Antitrust Litig.*815 F. Supp. 2d at 464 (citing *In re In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d at 307). Nevertheless, many courts engage in a lodestar "cross-check" to ensure that the fees are reasonable in light of the actual amount of work performed. *Id.*; *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d at 265 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)). When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d at 270 (citing *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d at 307).

The lodestar is calculated by multiplying a "reasonable hourly rate by the proven number of hours reasonably expended on the case by counsel." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). As evidenced by the attached billing summaries (*See* Schneider Decl. at ¶¶ 6,7; Collins Decl. at ¶¶ 13-17; Deyoe Decl. at ¶¶ 4), which are all supported by detailed time records, Class Counsel devoted nearly one thousand hours to the analysis of hundreds of Plan financial reports, fund prospectuses, fund evaluations and plan disclosures either provided by the Class Representatives or discovered through internet research, and thousands of pages of financial reports, committee minutes, consultant reports and fund prospectuses produced by Defendant.

The aggregate lodestar for the three firms that participated in the prosecution of Plaintiff's claims through July 2, 2019 is $775,238. This amount is likely to materially increase

as a result of Plaintiffs' upcoming Motion for Final Approval of the Class Action Settlement and work that will be required in connection with the administration of the settlement. Based on recent experience in similar cases, Class Counsel anticipate that an additional 100 hours of attorney time will be needed to obtain final approval, respond to inquiries of Class Members, address data errors and incomplete records issues, and general administration of the Settlement, resulting in an additional $60,000 - $75,000 dollars of lodestar.

While the projected lodestar of $805,000 - $845,000 is smaller than the amount calculated as a percentage-of-fund (30% of $3.5 million is $1,050,000), courts have routinely applied multipliers to determine the final award. "[E]nhancing the lodestar with a separate multiplier can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved." *[1st Cir cite]*"). A final lodestar of $805,000 - $845,000 translates to a multiplier of 1.24 – 1.3, well within the normal range.

Ultimately, the question at the heart of all attorney's fee determinations is whether the proposed fee fairly and reasonably compensates counsel for what they have accomplished, not which method, percentage, or multiplier to apply. *See Branch*, 1998 WL 151249, at *4. Whether considered as a percentage of the class recovery or as a lodestar calculation, the $1,050,000 fee request is manifestly reasonable and should be approved by the Court.

E. The Requested Reimbursement of Litigation Costs and Award of Case Contribution Awards to the Named Plaintiffs Are Reasonable

The Notice of Proposed Class Action Settlement advised the Settlement Class that Class Counsel would seek an Order permitting the reimbursement of actual expenses and costs incurred in prosecuting this action, to be paid from the Settlement Fund. Plaintiffs seek reimbursement from the Settlement Fund of the amount of $18,991.95, representing the actual

out-of-pocket expenses and costs reasonably incurred in connection with this litigation to date. Class Counsel have submitted declarations identifying these amounts by category of expenditure. Schneider Decl. ¶ 9; Collins Decl. ¶ 18, Ex. X. Although Class Counsel have not provided the Court with invoices, receipts and other documentation of these costs and expenses at this time, they are prepared to do so should the Court desire to review such documentation.

Reimbursement of litigation costs from a common fund is warranted for the same reasons as the payment of attorney's fees – to ensure that the beneficiaries of the fund share in the cost of the achieving the benefits. *See In re Fidelity/Micron Securities Litigation*, 167 F.3d at 737. Lawyers responsible for creating a common fund for the benefit of a class are entitled to reasonable expenses necessary to bring the case to conclusion as well as attorney's fees). For this reason, and based on the declarations of counsel, Plaintiffs request that the Court approve payment of $18,991,95 in actual litigation costs from the Settlement Fund.

The Notice of Class Action Settlement also advised Class Members that Class Counsel would seek approval for the payment of case contribution or service awards to the Class Representatives. Class Counsel believe that an award of $5,000 for each of the three Plaintiffs, Diane G. Short, Judith Daviau and Joseph Barboza, is reasonable and request approval for that amount to be paid to each of them from the Settlement Fund. Payment of such amounts from the Settlement Fund is warranted to compensate each of these individuals for the services they provided to the Class in the prosecution of this case on behalf of the Class.

"Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit." *In re Compact Disc*, 292 F. Supp. 2d at 189. *See also In re Lupron*, 2005 WL 2006833 at *7 ("Incentive awards serve an important function in promoting class action settlements,

particularly where . . . the named plaintiffs participated actively in the litigation."). "Courts 'routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Id.* (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002)).

Although courts have considerable discretion in deciding whether to grant requests for incentive awards, the following factors have been identified as criteria that courts "typically" examine when assessing incentive awards: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *In re Puerto Rican Cabotage Antitrust Litigation*, 815 F. Supp. 2d at 468–69.

Each of these factors supports the requested incentive award for each Plaintiff. First, Plaintiffs spent considerable time and effort over a two-year period actively participating in and supporting this litigation, including downloading and delivering documents to Class Counsel, reviewing pleadings and briefs, and consulting with Class Counsel on litigation strategy.

Additionally, Plaintiffs took substantial risk in pursuing their claims against their employer or former employer. The Court should consider that a named plaintiff in any employee benefits-related litigation faces the risk that his or her employer or former employer (whether or not the employer is the defendant), will view his or her activities unfavorably and mark him or her as a potential troublemaker. In fact, the concern about possible retaliation for initiating claims under ERISA, Congress included a specific provision prohibiting employers from taking any employment-related action against any individual for exercising their rights under ERISA.

See ERISA § 510; 19 U.S.C. § 1140. While Plaintiffs are not suggesting that the University would retaliate for the pursuit of this action, it is nonetheless a serious concern for Plaintiffs. They stood little to gain yet stood up for the benefit of the Class. Accordingly, they should each be rewarded and compensated for their time and efforts undertaken on behalf of the Class.

The case contribution awards requested here are consistent with or more modest than incentive payments that have been approved for class representatives in other cases in this circuit. *See, e.g. In re Puerto Rican Cabotage Antitrust Litigation*, 815 F. Supp. 2d at 468–9 (approving payment of $8,000 for each of six plaintiffs, even though none had been deposed or subjected to discovery requests); *In re Relafen Antitrust Litigation*, 231 F.R.D. at 82 (approving incentive awards in the range of $8,000 to $14,000 for three categories of named plaintiffs); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 98 (D. Mass. 2005) (approving incentive awards in the range of $2,500 to $25,000, including $5,000 for consumer plaintiffs who were deposed and $25,000 for institutional plaintiffs, for a total of $100,000); *Bussie*, 1999 WL 342042, at *3 (approving incentive awards in the amount of $5,000 each for four named plaintiffs in 1999). Accordingly, Class Counsel respectfully request that the Court approve these payments, in addition to the attorney's fees and litigation costs discussed above.

III. CONCLUSION

The Settlement now before the Court represents the culmination of two years of hard-fought litigation and tough negotiations, with settlement negotiations conducted with the assistance of a retired federal magistrate judge. The Settlement represents an excellent recovery for the Class given the risks involved in continued litigation. The amounts requested above for attorney's fees, litigation costs, andcase contribution awards to the Class Representatives are all demonstrably reasonable. Accordingly, Class Counsel respectfully request that the Court approve the amounts requested in their entirety.

DATED: July 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I caused to be served, via electronic mail a true and correct copy of Plaintiffs' Unopposed Motion for an Order Finally Approving Class Action Settlement to the following:

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