IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RIGOBERTO SANDOVAL, individually and as a representative of a class of similarly situated plan participants and beneficiaries, on behalf of the EXELA 401(k) PLAN, the successor-in-interest of the NOVITEX ENTERPRISE SOLUTIONS RETIREMENT SAVINGS PLAN,	:	Civil Action No. 3:17-cv-1573 (MPS)
Plaintiff,	:	
vs.	:	
EXELA ENTERPRISE SOLUTIONS, INC., NOVITEX ENTERPRISE SOLUTIONS EMPLOYEE BENEFITS COMMITTEE and DOES NO. 1-10, Whose Names Are Currently Unknown,	:	
Defendants.	:	August 3, 2021

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEYS' FEES, AND SERVICE AWARD

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Plaintiff, Rigoberto Sandoval ("Plaintiff"), on behalf of the proposed Settlement Class (defined below) and the Exela 401(k) Plan (the "Exela Plan"), the successor-in-interest of the Novitex Enterprise Solutions Retirement Savings Plan (the "Novitex Plan"), respectfully submits this Memorandum of Law in Support of his Motion for Final Approval of Class Settlement, Attorneys' Fees, and Service Award ("Motion") pursuant to the Court's Order Granting Plaintiff's Revised Motion for Preliminary Approval and Approval of Class Notice dated April 26, 2021 ("Preliminary Approval Order"). *See* ECF No. 87. Defendants, Exela Enterprise Solutions, Inc. and the Novitex Enterprise Solutions Employee Benefits Committee (together, "Defendants") do not oppose this Motion.

I. INTRODUCTION[1]

On April 26, 2021, the Court entered the Preliminary Approval Order, which preliminarily approved the Settlement Agreement[2] (ECF No. 86-3, "Settlement Agreement" or "Agreement") between Plaintiffs and Defendants and conditionally certified the following class ("Class" or "Settlement Class") for settlement purposes:

> All participants and beneficiaries of the Novitex Plan prior to the merger of the Novitex Plan with the SourceHOV 401(k) Plan, at any time during the Class Period, including any beneficiary of a deceased person who was a participant in the Novitex Plan at any time during the Class Period, and any alternate payees, in the case of a person subject to a QDRO who was a participant in the Novitex Plan at any time during the Class Period.
>
> The Class Period shall mean at any time on or after January 1, 2014 through and including December 31, 2018. The Class shall exclude all Defendants.

In conditionally certifying the Class, the Court also determined that the Settlement—a hard-

[1]To the extent any capitalized terms in this Motion are not defined herein, such terms will have the meaning ascribed to them in the Settlement Agreement (ECF No. 86-3).

[2]The Settlement details are provided in the Settlement Agreement and summarized in Plaintiff's Unopposed Motion for Preliminary Approval of Settlement ("Preliminary Approval Motion") (ECF No. 86).

fought compromise resulting from adversarial, arm's length negotiations—was sufficiently fair, reasonable, and adequate. There have been no objections to the Settlement by members of the class,[3] and the terms of the Settlement have been reviewed and separately approved by an independent fiduciary. *See* Declaration of Josephine Bravata ("Supplemental Mailing Decl."), at ¶ 8; Report of the Independent Fiduciary for the Settlement in *Sandoval v. Exela Enterprise Solutions, et al.* ("Independent Fiduciary Determination"), ECF No. 95. In light of the substantial benefits made available by the Settlement, which a great percentage of Class Members will receive without the need to file a claim, and in order to avoid the burden, expense, inconvenience, and uncertainty of continued litigation, Plaintiff now requests that the Court grant final approval of the Settlement, as well as the requested attorneys' fees and service award.

II. FACTUAL BACKGROUND[4]

A. The Settlement

Following this Court's ruling on Defendants' motion to dismiss on March 30, 2020, the parties began undertaking extensive discovery. The discovery exchanges totaled over 50,000 pages relating to the administration of the Novitex Plan. *See* Rubinow Decl., ¶ 3. The Parties also retained experts and exchanged their affirmative expert reports on October 30, 2020. *See* ECF No. 74. After engaging in constructive discussions throughout this litigation, including a one-day mediation with a respected neutral and several subsequent discussions about the possibility of resolving the action, the parties were able to reach an agreement-in-principle in

[3]Although the deadline for objections is August 15, 2021, notices were mailed almost six weeks ago and no class member has objected as of the date of filing.

[4]Additional factual and procedural background are contained in the Preliminary Approval Motion and supporting papers. *See* ECF No. 86-1, at 3-5.

January 2021, which they memorialized in a written agreement on February 18, 2021. The Amended Settlement Agreement of April 22, 2021 reflects these efforts.

The Agreement provides that Defendants will make payment in an aggregate amount of $750,000.00 into a Qualified Settlement Fund in exchange for the Settlement Class' release of its claims described in the Agreement. The Settlement Fund will be used to pay the following amounts associated with the Settlement: (1) Compensation to Class Members determined in accordance with Section 3.2; (2) Any Case Contribution Award approved by the Court; (3) All Attorneys' Fees and Expenses approved by the Court; (4) Independent Fiduciary Fees and Costs; (5) Administration Costs; and (6) Taxes and Tax-Related Costs. *See* Settlement Agreement, ECF No. 86-3. at 3.1(j).

1. Distribution of Settlement Funds to Class Members

The amount to be paid to each Class Member has been determined by the Plan of Allocation, which provides for *pro rata* allocation of settlement proceeds based on the average size of each Class Member's account during the Class Period. *See* Settlement Agreement, ECF No. 86-3, Ex. C. To be eligible for a payment from the Net Settlement Amount, one must be a Participant, an Authorized Former Participant, a Beneficiary, or an Alternate Payee. *See id.*

Participants, and Beneficiaries or Alternate Payees who have Active Accounts, will not be required to submit a Former Participant Claim Form; their accounts in the Exela Plan will be credited automatically. *See id.*, Ex. C, at Section 1.6. Authorized Former Participants, Beneficiaries, and Alternate Payees who no longer have Active Accounts are required to submit a Former Participant Claim Form by August 24, 2021 to be eligible to receive Settlement Funds, which, at their election, can be made either by check or rollover to an individual retirement account or other eligible employer plan. *See id.*, Ex. C, Section 1.7.

Over 4,000 Class Members will automatically receive the benefit of the Settlement. *See* Declaration of Cornelia Vieira ("Mailing Decl."), at ¶ 10. In addition, SCS has received 383 Former Participant Claim Forms to date, of which 287 represent former participants. *See* Supplemental Mailing Decl., at ¶ 9. The deadline for submitting the Former Participant Claim form is August 24, 2021. *See id.* After payments have been issued to Class members, any amount remaining in the Settlement Fund from uncashed checks after 180 days will be distributed back to the Settlement Fund to be utilized as set forth in the Plan of Allocation. *See* Settlement Agreement, ECF No. 86-3, Ex. C, at Section 3.4. There shall be no reversion to Defendants.

2. Attorneys' Fees, Costs, And Case Contribution Awards

Plaintiff seeks fees for Class Counsel in the amount of 25% of the Settlement Fund, inclusive of all expenses, and Case Contribution Awards for Plaintiff in the amount of $15,000.

B. Preliminary Approval and Class Notice

On April 26, 2021, this Court granted Preliminary Approval of the proposed Settlement, and approved the Notice Plan. *See* ECF No. 87. In compliance with the Preliminary Approval Order, Strategic Claims Services ("SCS") disseminated the Settlement Notice via electronic and/or first-class mail to 6,954 Class Members and the Former Participant Claim Form to each Class Member without an Active Account on June 25, 2021. *See* Mailing Decl., at ¶ 4. The original list was run through the United States Postal Service national change of address service to obtain new address information prior to the initial mailing. *See id.* SCS re-mailed Notices returned as undeliverable for which forwarding addresses were available. *See id.*, at ¶ 3; *see also* Supplemental Mailing Decl., at ¶ 4. For those returned as undeliverable for which no forwarding address was available, SCS utilized Experian "skip tracing" to obtain a new address and re-

mailed Notices to each individual for whom an updated address was discovered. *See* Mailing Decl., at ¶ 3. SCS re-mailed a total of 185 Notices that were initially returned as undeliverable. *See* Supplemental Mailing Decl., at ¶¶ 4-5.

Pursuant to the terms of the Settlement, SCS also established a website for the Settlement (https://www.strategicclaims.net/sandoval401k/), which provides information about the case and relevant deadlines and also makes available a number of pertinent documents, including the following: (i) Former Participant Claim Form; (ii) Long Notice; (iii) Preliminary Approval Order; (iv) Court Transcript of Preliminary Approval Conference Call; (v) Plaintiff's Unopposed, Renewed Motion for Preliminary Approval Order of Class Settlement; (vi) Amended Settlement Agreement and Release; (vii) Second Amended Complaint. Furthermore, in accordance with the Settlement Agreement and the Preliminary Approval Order, SCS established a toll-free telephone number and email address, to which Class Members could direct questions about the Settlement. SCS also issued the Summary Notice as a national press release via PRNewswire on June 25, 2021. *See* Mailing Decl., at ¶¶ 6-7. In addition to the foregoing, SCS mailed a notice of proposed class action settlement to the appropriate federal and state officials pursuant to Section 1715 of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, and 1711-1715. *See id.*, at ¶ 11.

SCS provided a full accounting of expenditures made in connection with the Settlement, and has provided all information requested by the parties or their counsel during the administration process. *See id.*, at ¶ 12. In accordance with Section 3.1(b) of the Settlement Agreement, Defendants paid a preliminary amount into an escrow account following entry of the Preliminary Approval Order to fund administration and independent fiduciary costs, and they shall pay, or cause to be paid, the remaining portion of their Settlement Amount obligation

within thirty (30) calendar days following the Court's entry of the Final Approval Order and Judgment, subject to the provisions of Section 8.5.

Finally, SCS has not received any objections to the fairness, reasonableness, or adequacy of the Settlement, any terms therein, or to the proposed Administrative Expenses, Attorneys' Fees, or Plaintiffs' Case Contribution Awards. *See* Supplemental Mailing Decl., at ¶ 8. Likewise, no objections have been filed on the docket.

C. The Settlement has been Approved by an Independent Fiduciary

To further ensure that the Settlement Agreement is fair, reasonable, and adequate, as well as compliance with ERISA's prohibited transaction provisions, the Parties retained an independent fiduciary, Fiduciary Counselors ("Independent Fiduciary"), to approve and authorize the Settlement on behalf of the Plan and Class Members. *See* Independent Fiduciary Determination, at 1. The parties and their counsel provided the Independent Fiduciary with sufficient information so that the Independent Fiduciary could review and evaluate the Settlement. *See id.*, at 1-2. Furthermore, the Independent Fiduciary complied with all relevant conditions set forth in Prohibited Transaction Class Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended ("PTE 2003-39"), in making its determination, for the purpose of Defendants' reliance on PTE 2003-39. *See id.*, at 1, 7-9. As reflected in the Report of the Independent Fiduciary, the Settlement is fair and adequate in all respects. *See id.*, at 7-9.

III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Court has Already Provisionally Certified the Settlement Class and Appointed Plaintiff's Counsel as Class Counsel

In its April 26, 2021 Order, the Court found provisional certification of the proposed class to be appropriate for the purposes of settlement and approved Miller Shah LLP as class

counsel pursuant to Rule 23(g). *See* ECF No. 87, at 2-3. For the reasons identified in the Court's Preliminary Approval Order and in Plaintiff's Preliminary Approval Motion (ECF No. 86-1, at 10-15), the Settlement Class meets the requirements of Federal Rules of Civil Procedure 23(a) and (b)(1).

B. Legal Standard

"Rule 23(e) of the Federal Rules of Civil Procedure provides that the settlement of a class action must be approved by the district court." *In re Sony Corp. SXRD*, 448 Fed. Appx. 85, 86 (2d Cir. 2011). While the approval of a class settlement is within the district court's discretion, it "should be exercised in light of the general judicial policy favoring settlement." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 159–60 (S.D.N.Y. 2011) (internal quotation marks and citation omitted).

The district court may approve the Settlement only if it determines that the Settlement is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116–17 (2d Cir. 2005) (citation omitted). The court determines that a settlement is fair "by looking at both the settlement's terms and the negotiating process leading to settlement." *Id.* at 116. In doing so, the court "review[s] the settlement for both procedural and substantive fairness." *In re Giant*, 279 F.R.D. at 159–60 (citing *Wal–Mart*, 396 F.3d at 116).

For procedural fairness, a presumption of fairness, adequacy and reasonableness "may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Edwards v. N. Am. Power & Gas*, LLC, No. 3:14-CV-01714 (VAB), 2018 WL 3715273, at *10 (D. Conn. Aug. 3, 2018) (citing *Wal–Mart*, 396 F.3d at 116 (citations omitted). For substantive fairness, courts in the Second Circuit "examine the fairness, adequacy, and reasonableness of a class settlement according to the '*Grinnell* factors.'" *Id.* (citing *Wal-Mart*, 396 F.3d at 117).

C. The Settlement is Procedurally Fair because it was Reached in Arm's-Length Negotiations Between Experienced Counsel

For procedural fairness, a presumption of fairness, adequacy and reasonableness "may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Edwards*, 2018 WL 3715273 at *10 (citing *Wal–Mart*, 396 F.3d at 116) (citations omitted).

Here, the Settlement Agreement was negotiated at arm's-length, over the course of several months, by adverse parties, each represented by counsel experienced in complex ERISA litigation. The parties participated in a one-day mediation with a respective neutral as part of their negotiations. Before and after the mediation, the parties communicated their respective positions concerning Plaintiff's likelihood of success on his claims and potential recovery and conducted independent analyses to support the Settlement. *See* Rubinow Decl., at ¶ 3. As demonstrated by substantial progress in discovery efforts and multiple rounds of briefing with respect to Plaintiff's pleadings, and the extensive settlement negotiations (including in mediation with the assistance of a respected neutral), there has been no collusion or complicity of any kind in connection with the Settlement or related negotiations. *See id.* Moreover, Class Counsel and Defendants' counsel have had significant experience in similar litigation and are well-informed as to the specifics of this Action. *See id.*

D. The Settlement is Substantively Fair because it Meets the *Grinnell* Factors

For a settlement to be substantive deemed "fair, reasonable, and adequate" according to Federal Rule of Civil Procedure 23, the Second Circuit considers the following *Grinnell* factors:

(1) the complexity, expense and likely duration of the litigation;
(2) the reaction of the class to the settlement;
(3) the stage of the proceedings and the amount of discovery completed;
(4) the risks of establishing liability;
(5) the risks of establishing damages;
(6) the risks of maintaining the class action through the trial;
(7) the ability of the defendants to withstand a greater judgment;
(8) the range of reasonableness of the settlement fund in light of the best possible recovery;
(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See Edwards, 2018 WL 3715273 at *10 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). However, "[d]istrict courts have wide discretion in assessing the weight and applicability of each factor." 5 MOORE'S FEDERAL PRACTICE, § 23.85[2][a] (Matthew Bender 3d ed.).

Just as it has already provisionally certified the Settlement Class, the Court has also found that the Settlement falls within the range of possible approval. *See* ECF No. 87. Indeed, the factors considered at final approval mirror those contemplated at preliminary approval. Having already preliminarily approved the fairness of the Settlement, and because there have been no intervening circumstances that would alter that conclusion, the Court should find the same here, as Notice has been completed in accordance with the Court's Preliminary Approval Order and all of the *Grinnell* factors support final approval of the Settlement.

1. The Expense, Complexity and Likely Duration of Further Litigation

The first factor requires the Court to consider the complexity, expense, and likely duration of litigation. *See Wal-Mart*, 396 F.3d at 117. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them" and courts therefore favor class action settlements. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Furthermore, ERISA breach of fiduciary duty actions are difficult to prosecute and "involve a complex and rapidly evolving area of law." *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432, 2012 WL 1964451, at *5 (D.N.J. May 31, 2012); *In re Wachovia Corp. ERISA Litig.*, No. 09-cv-0262, 2011 WL 7787962, at *4 (W.D.N.C. Oct. 24, 2011). Significant time spent on a case may also be an indicator that the first factor is met. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.), *aff'd* 117 F.3d 721 (2d Cir. 1997) (holding that first element of *Grinnell* supports approval where parties had litigated for "nearly 1,000 days" and "consumed large sums of money and many thousands of hours of labor.").

In addition to the presumptively complex nature of class actions, ERISA breach of fiduciary duty cases are particularly complex due to the constant development of the law. As set forth in the Preliminary Approval Motion, any trial would be complex given the legal issues relevant to Plaintiff's allegations. Moreover, even if Plaintiff were to prevail, it could be years before any recovery would be received in light of the possibility of appeals, on top of which, parties have already spent significant time on this case—nearly four years.

2. The Reaction of the Class to the Settlement

"One of the factors most courts consider is the reaction of the absent class members, specifically the quality and quantity of any objections and the quantity of class members who opt out." 4 NEWBERG ON CLASS ACTIONS § 13:54 (5th ed.). Courts consider two reactions: opt-outs and objections. *See id.* "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart*, 396 F.3d at 118 (quoting 4 NEWBERG ON CLASS ACTIONS § 11.41); *Edwards*, 2018 WL 3715273 at *10 (approving settlement where no objections and only seventeen opt-outs); *Sykes v. Harris*, No. 09 Civ. 8486 (DC), 2016 WL 3030156, at *12 (S.D.N.Y. May 24, 2016) (approving settlement where "a miniscule number" of plaintiffs—38 individuals out of a potential 215,000 class members—requested exclusions); *Charron v. Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 197 (S.D.N.Y. 2012) (approving settlement where "fewer than 1% of the tenants who received notice opted out of the lawsuit, and an even smaller percentage objected.").

SCS provided Notice to Class Members via U.S. mail and e-mail on June 25, 2021. As of the filing date, no Class Members had filed an objection to the Settlement, or the proposed Administrative Expenses, Attorneys' Fees, or Plaintiffs' Case Contribution Awards. *See* Supplemental Mailing Decl., at ¶ 8. While the Settlement Class was preliminarily approved under Federal Rule of Civil Procedure 23(b)(1), which does not allow for opt-outs, the absence of any objections indicates strong approval of the Settlement. Since this factor is one of the most important factors courts consider, it weighs heavily in favor of final approval here.

3. The Stage of the Proceedings and the Amount of Discovery Completed

The third factor is meant to assure the parties "entered into settlement only after a thorough understanding of their case." *Wal-Mart Stores, Inc.*, 396 F.3d at 118 (2d Cir. 2005). "To approve a proposed settlement, the Court need not find that the parties have engaged in extensive discovery." *In re Holocaust Litig.*, 80 F. Supp. 2d at 176 (citing *Plummer v. Chem. Bank*, 668 F.2d 654, 658 (2d Cir. 1982)). "Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement." *Id.* (quoting *Plummer*, 668 F.2d at 660; citing *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954, 1999 WL 38179, at *2 (S.D.N.Y. Jan. 28, 1999)); *see also Simerlein v. Toyota Motor Corp.*, No. 3:17-CV-1091 (VAB), 2019 WL 2417404, at *20 (D. Conn. June 10, 2019) (finding third factor was met despite informal discovery only taking place); *D'Amato*, 236 F.3d at 87 ("[T]he district court properly recognized that, although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information. Thus, the 'stage of proceedings' factor also weighed in favor of settlement approval.").

Here, Class Counsel's thorough investigation and significant discovery efforts have allowed the parties to be sufficiently informed about the strengths and weaknesses of the case, which has been demonstrated in the multiple rounds of briefing and settlement negotiations. In addition, Class Counsel relied upon expert consultation in assessing the claims, defenses, and potential damages, which further supports a finding that the parties had adequate information in connection with their negotiations and Settlement. Accordingly, this factor also weighs in favor of final approval.

4. The Risks of Establishing Liability and Damages

Factors four and five appraise "the likelihood that the class would prevail at trial in the face of the risks presented by further litigation." *In re AOL Time Warner*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 WL 903236, at *11 (S.D.N.Y. Apr. 6, 2021). It is no secret that "litigation inherently involves risk." *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). In determining the risks of establishing liability and damages, courts need not

"adjudicate the disputed issues or decide unsettled questions; rather, [courts] need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 439, 459 (S.D.N.Y. 2004) (citing *In re Holocaust Litig.*, 80 F. Supp. 2d at 177).

These factors therefore weigh in favor of approving the settlement. *Edwards*, 2018 WL 3715273 at *11 (fourth and fifth factors were met because, if defendants' arguments were accepted by the Court or jury, it would dispose of plaintiffs' claims, and defendants contested plaintiffs' expert claim and damages model). These risks are especially heightened where, as there, claims and defenses heavily rely on expert testimony, since reliance on expert testimony "often increases the risk that a jury may not find liability or would limit damages." *Simerlein*, 2019 WL 2417404, at *21 (citations omitted).

Here, there are significant factual issues to be decided and issues regarding the measurement of damages on a class-wide basis. For Plaintiff to succeed on the merits, he would need to establish not only that Defendants' fiduciary process was deficient, but overcome Defendants' assertion of affirmative defenses and likely arguments for a judgment in their favor at the summary judgment phase, not to mention the risk of proving liability and damages at the trial phase. As discussed above, because the claims and defenses at issue in this action include complex issues that require expert testimony, further proceedings would undoubtedly entail a battle of the experts, which only increases the risks of litigation.

5. Risks of Maintaining Class Certification

The sixth *Grinnell* factor "is how certain the court is that the class certification requirements are met and maintainable." *Edwards*, 2018 WL 3715273, at *12 (citing 4 NEWBERG ON CLASS ACTIONS § 13:51). While this consideration is separate from the Court's determination that the class should be certified for settlement purposes, it is related. *See Id.* Where risks are present in maintaining class certification, but the merits of class certification are strong enough for settlement purposes, this factor weighs in favor of settlement approval. *See Simerlein*, 2019 WL 2417404, at *21.

Although Plaintiff is confident in its ability to maintain class certification even absent the Settlement, he nonetheless faces risks of maintaining this class action through trial. For instance, Defendants might argue that certain of their affirmative defenses require individualized determinations that defeat class certification. Likewise, circumstances or law could change, and the Court could find a reason to deny class certification or decertify the class at a later stage. The Settlement recognizes and alleviates that risk, weighing this factor in favor for final approval.

6. Ability of Defendants to Withstand a Greater Judgment

The seventh factor assesses whether Defendants would not be able to withstand a greater judgment. This factor "standing alone, does not suggest that the settlement is unfair," especially where the "other *Grinnell* factors weigh heavily in favor of settlement . . . ." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). The Court may still approve the settlement agreement if other *Grinnell* factors are sufficiently met. *See Kemp-DeLisser v. St. Francis Hospital & Medical Center*, No. 15-cv-1113 (VAB), 2016 WL 6542707, at *10 (D. Conn. Nov. 3, 2016) ("Thus, even if the Defendants here could afford to pay more than the $107 million Settlement Amount, this does not prevent the Court from approving this Settlement as fair and reasonable."); *Edwards*, 2018 WL 3715273, at *12 (finding that, where other factors were met, the Court need not look to whether defendant "truly could have withstood a larger judgment.")

While there are no facts in the record to suggest that Defendants would not be able to withstand a greater judgment, there is no certainty that Plaintiff would be able to collect his best-case judgment after trial and appeals have been exhausted. Nonetheless, because all of the other factors weigh in favor of approval, this factor is of little consequence to the merits of final approval of the Settlement.

7. The Range of Reasonableness of the Settlement

The last two *Grinnell* factors require examination of the "range of reasonableness" of the settlement fund "in light of the best possible recovery" and "in light of all the attendant risks of litigation." *Wal-Mart Stores, Inc.*, 396 F.3d at 117. A court should "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of

business judgment in determining whether the proposed settlement is reasonable." , 495 F.2d at 462; *see also Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) (the range of reasonableness "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion."). In considering these factors, "the settlement amount's ratio to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement's fairness." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 495 (S.D.N.Y. 2008) (approving settlement where plaintiffs did not offer damages estimate).

As the Preliminary Approval Motion outlined, the Settlement amount represents a substantial portion of the maximum possible damages recoverable by the Class. Plaintiff's expert calculated the range of potential realistic recoveries as being between $832,254 and $1,210,687, exclusive of attorneys' fees and expenses. *See* Independent Fiduciary Determination, at 8. At $750,000.00, the Settlement recovery represents approximately 90.1% of the low-end of Plaintiff's damages calculation and 61.9% of the high end, inclusive of interest. The recovery proposed in the Settlement is well within the ranges accepted by other courts in this Circuit. *See, e.g., In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 697 (S.D.N.Y. 2019) (13-17%); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (10-15%); *In re Interpublic Sec. Litig.*, No. 02 CIV.6527(DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) (10-20%); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293 VLB, 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012) (3.5%). *See also Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590JCH, 2011 WL 2050537, at *13 (D. Conn. May 16, 2011) ("the Second Circuit has long held that even settlements which represent a fraction of the best possible result may be appropriate in light of the risks associated with bringing such claims") (citing *Grinnell*, 495 F.2d at 455 n.2).

Moreover, after weighing the expense and risk of further litigation, the difficulty in prevailing on the merits and establishing damages, and delay that would have resulted in providing any relief to the Class if the matter proceeded to trial, the Independent Fiduciary found

that the Settlement amount and all other terms are reasonable. *See* Independent Fiduciary Determination, at 8. In light of all the uncertainties and risks associated with obtaining maximum damages even with a successful trial, the Settlement represents a very reasonable outcome for Class Members. Thus, these final factors also weigh in favor of approval.

IV. THE COURT SHOULD FIND THE REQUESTED ATTORNEYS' FEES AND SERVICE AWARD ARE REASONABLE AND FAIR

If the Court finally approves the Settlement, Plaintiff and Class Counsel respectfully submit that it should approve the request for attorneys' fees and a service award for the Class Representative.

A. The Requested Attorneys' Fees and Costs are Reasonable

Plaintiff seeks 25% of the gross settlement amount, inclusive of expenses (*i.e.*, no separate or additional award for the expenses outlaid by Class Counsel in prosecuting this litigation). In calculating reasonable attorneys' fees, this Court has discretion to choose between the lodestar method and the percentage of recovery method. However, "[t]he trend in this Circuit 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 litigation." *Wal-Mart Stores*, 396 F.3d at 121. The lodestar method is disfavored because the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Id.* at 122 (internal quotations and citation omitted).[5]

Under the percentage of recovery method, the Court considers the traditional six factors and sets a percentage of the settlement as a fee "based on scrutiny of the unique circumstances of each case." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47, 51-53 (2d Cir. 2000). Although the Second Circuit has rejected benchmarks (*see id.* at 51-53), 25% of the common fund falls within the standard range of awards. *See, e.g.*, *In re Colgate-Palmolive Co. ERISA*

[5]Even if the Court were to consider Class Counsel's lodestar, it should find (as the Independent Fiduciary did) that the requested fee award is reasonable. In fact, the requested fee award would produce a lodestar multiplier of 0.39. *See* Independent Fiduciary Determination, at 6.

Litig., 36 F. Supp. 3d 344, 351 (S.D.N.Y. 2014) (noting median fee of 25% to 28% of the fund in ERISA cases).

Regardless of methodology, in determining a reasonable award of attorneys' fees, the court seeks to balance the "overarching concern for moderation with the concern for avoiding disincentives to early settlements." *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 376 (S.D.N.Y. 2005) (internal quotations and citations omitted).

1. Time and Labor Expended by Counsel

The first of the traditional factors in determining a reasonable common fund fee requires consideration of the time and labor expended by counsel. *See Goldberger*, 209 F.3d at 50. This factor weighs in favor of granting Class Counsel's request because Class Counsel has spent significant time, in addition to considerable resources, in the investigation, prosecution, and resolution of this action.[6]

Indeed, Class Counsel vigorously litigated this action for more than three years, and thereafter, just as aggressively negotiated the Settlement terms. Moreover, the work in this case is not over—because even if the Court were to grant final approval of the proposed Settlement, Class Counsel will continue to incur additional time and expend resources in overseeing the administration of the Settlement and in responding to inquiries and issues from members of the Settlement Classes. *See, e.g.*, *Johnson v. Brennan*, No. 10-cv-4712, 2011 WL 4357376, at *16 (S.D.N.Y. Sept. 16, 2011) (recognizing that "the requested fees are not based solely on time and effort already expended; they are also meant to compensate Class Counsel for time that will be spent administering the settlement in the future"). Class Counsel will continue to represent the interest of the Plan and oversee administration of the Settlement. *See* Rubinow Decl., at ¶ 5.

All of these efforts were undertaken despite the risk that Plaintiff would not prevail in this action, and that Class Counsel would therefore receive nothing for their efforts. The "time and labor expended by counsel" in producing an excellent settlement therefore support fee

[6]Class Counsel's expenses alone, for which they are not seeking a separate award, total over $26,800. *See* Independent Fiduciary Determination, at 6.

requested. *See, e.g.*, *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (27.5% fee award was justified where counsel "were required to expend substantial amounts of professional time and money away from other professional business in order to prosecute the action, with no certainty of recovery thereof from any source").

2. The Magnitude and Complexity of the Litigation

The second *Goldberger* factor requires the Court to consider the complexities and magnitude of the litigation. *See Goldberger*, 209 F.3d at 50. The scope and complexity of this action also weigh in favor of the Court approving the requested award. As analyzed above, the claims hinge on numerous complex legal and factual issues under ERISA which require comprehensive evidentiary support and testimony. *See supra* III.D.1. The magnitude and complexity of this action have been borne out by the time and effort Class Counsel put into litigating the case for over three years; thus, this factor also weighs in support for the fees requested.

3. The Risks of Litigation

The risk of the litigation is "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.2d at 54 (internal quotations and citations omitted). The risk undertaken by Class Counsel is measured by, among other things, the presence of government action preceding the suit, the ease of proving claims and damages, and, if the case resulted in settlement, the relative speed at which the case was settled. *See In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 139-40 (S.D.N.Y. 2008).

As consistently described herein, this action involves significant risk as to both liability and damages, given the complexity of the issues and vigorous defense. *See supra* III.D.4. The government was not involved, proving claims and damages would require expert testimony, and settlement was considered thoughtfully and thoroughly. *See, e.g.*, *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) ("The determination, like the determination of liability, is a complicated and uncertain process, typically involving expert opinions."). Being able to present such a favorable Settlement despite those risks tends to

support an award of fees in the amount requested. As a result, this factor weighs in favor of granting Class Counsel the requested fees.

4. The Quality of the Representation

The fourth factor is the "quality of representation" delivered in the litigation. *Goldberger*, 209 F.3d at 50. The quality of representation is best measured by results achieved. *Id.* Clearly, the Settlement represents a recovery to the Settlement Classes which is well within the range of reasonableness in a case of complexity, magnitude and risk. *See supra* III.D.7.

The nature of the opposition faced by counsel should also be considered in assessing the quality of Class Counsel's performance. *See In re Merrill Lynch Tyco*, 249 F.R.D. at 141. Here, the caliber of opposing counsel, O'Melveny & Myers, LLP, was of the highest order and required that Class Counsel deliver comparable representation. *See, e.g.*, *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 412 (D. Conn. 2009) (approving fee request where "the Class received high legal representation and obtained a very large settlement in the face of vigorous opposition by highly experienced and skilled defense counsel"). Class Counsel has significant experience in complex ERISA litigation and brought their experience and resources to bear in prosecuting this action. *See* Rubinow Decl., at ¶¶ 3-4.

The reaction of Settlement Class members, which has been uniformly positive, also supports the requested fee. *See, e.g.*, *In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 985 F. Supp. 410, 416 (S.D.N.Y. 1997) ("In determining the reasonableness of a requested fee, numerous courts have recognized that 'the lack of objection from members of the class is one of the most important reasons"') (citation omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) ("The reaction by members of the Class is entitled to great weight by the Court."). Although this factor will be re-evaluated after the deadline for objections has run, the lack of objections to Class Counsel's fee application to date suggests the requested fee is fair.

The ability of Class Counsel to obtain a substantial recovery for the Class Members under the circumstances of this litigation strongly favors the requested attorneys' fees.

5. The Award Requested in Relation to the Settlement Amount

The fifth factor for determining the appropriate percentage fee award in class actions is the "requested fee in relation to the settlement," *i.e.*, whether the requested fee represents a fair percentage of the settlement achieved. *Goldberger*, 209 F.3d at 50 (citation omitted). This factor also supports the requested award.

The requested amount of attorneys' fees, representing 25% of the total recovery to the Class, is well within the range of fees commonly awarded in other class action settlements in this Circuit. *See*, *e.g.*, *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 351 (S.D.N.Y. 2014) (noting median fee of 25 to 28 per cent of the fund in ERISA cases); *In re Sumitomo Copper Litigation,* 146 F. Supp. 2d 436, 441-42 (S.D.N.Y. 2001) (awarding approximately one-third of settlement as attorney fee award in commodities case); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini,* 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (approving fee award of one-third in securities class action); *see also Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005) (approving of fee award at 40% of the settlement fund). Additionally, because the request is inclusive of Class Counsel's costs and expenses, it is effectively below the percentages regularly awarded in such cases.

6. Public Policy Considerations

The Second Circuit has also noted that "public policy considerations" should be considered in determining the fee awarded to plaintiffs' counsel in class actions. *Goldberger*, 209 F.3d at 50. Here, protecting workers' retirement funds is of genuine public interest. Private enforcement of ERISA's fiduciary duties, in the nature of this action, is a vital mechanism for protecting workers' retirement funds because the Department of Labor lacks the resources to police even a small fraction of the distributions made by plans across the country. That is why it is critical that remuneration in successful enforcement actions like this one is both fair and rewarding—to make certain that injured parties are represented by counsel capable of effectively fighting for their rights. *See, e.g.*, *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 468 (S.D.N.Y. 2004) (recognizing "the need to encourage [counsel for] plaintiffs to undertake worthy cases that vindicate the rights of injured [parties]"); *Sines v. Service Corp. Int'l*, No. 03 Civ.

5465 (PKC), 2006 WL 1148725, at *1 (S.D.N.Y. May 1, 2006) (counsel [should] receive full and fair compensation for their work lest an inadequate award serve as a disincentive to filing meritorious suits in the future").

B. The Class Representative Deserves to be Compensated for his Time and Effort

"Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 483 (S.D.N.Y. 2013). Where plaintiffs are involved in complex cases, a higher range of contribution awards may be sought. *See, e.g.*, *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.,* 09 Civ. 686, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding $50,000 to each of the three named class representatives); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 151 (S.D.N.Y.2010) (awarding case contribution awards in the amount of $15,000 to each of the three named plaintiffs); *Strougo v. Bassini,* 258 F.Supp.2d 254, 264 (S.D.N.Y.2003) (collecting cases and granting an award of $15,000 to class representative).

Plaintiff was engaged in all phases of this complex litigation, which he commenced by providing information to Class Counsel and filing the initial complaint on September 20, 2017. *See* Declaration of Rigoberto Sandoval ("Sandoval Decl."), at ¶¶ 1-2. Plaintiff remained active throughout this litigation, including by providing documents to counsel and answering discovery requests, participating in regular conference calls with Class Counsel, and reviewing pleadings and other court documents in order to stay apprised of developments in the litigation and fulfill his duties to the Class. *See id.*, at ¶ 3. Plaintiff participated in settlement discussions on an ongoing basis and was in touch with Class Counsel during the mediation. *See id.*, at ¶ 5. In addition, Defendants served Plaintiff with a deposition notice prior to the resolution of this action and Plaintiff began to prepare for his anticipated deposition. *See id.*, at ¶ 4. Given Plaintiff's involvement in this action, the Independent Fiduciary has determined that the requested service

award is reasonable. *See* Independent Fiduciary Determination, at 7. Accordingly, a service award of $15,000 is warranted in recognition of Plaintiff's time and efforts, and because it is well in line with class representative awards routinely awarded in this circuit.

V. CONCLUSION

For the foregoing reasons and those already identified in Plaintiffs' Initial Preliminary Approval Motion and the Court's Preliminary Approval Order, Plaintiffs respectfully request that the Court grant Plaintiffs' Unopposed Motion for Final Approval of the Settlement, Service Award, and Attorneys' Fees.

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Respectfully submitted,

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