Chiharu Sekino (SBN 306589)
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
1230 Columbia St., Ste. 1140
San Diego, CA 92101
Telephone: (619) 235-2416
Facsimile: (866) 300-7367
Email: csekino@sfmslaw.com

Attorneys for Plaintiff, the Plan, and the Class

[Additional Counsel Listed On Signature Page]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA (OAKLAND)

MARIA KARLA TERRAZA, individually and on behalf of the SAFEWAY 401(k) Plan,

Plaintiff,

vs.

SAFEWAY INC., et al.,

Defendants.

Related Cases:
No. 4:16-cv-03994-JST
No. 4:16-cv-04903-JST

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND NAMED PLAINTIFFS' INCENTIVE AWARDS

Date: April 26, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd floor
Judge: Hon. Jon Tigar

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that Plaintiff Maria Karla Terraza ("Terraza") and Class Representative Denis M. Lorenz ("Lorenz") (who also is the Plaintiff in the related action, *Lorenz v. Safeway Inc.*, *et al*, No. 4:16-cv-04903-JST (the "*Lorenz* Action") [collectively, with this Action, the "Actions"]) (Terraza and Lorenz hereafter referred to as "Plaintiffs"), individually and on behalf of the Safeway 401(k) Plan ("Plan"), hereby move this Court for an award of attorneys' fees and expenses, and class representative incentive awards from Defendants, Safeway Inc. ("Safeway"), Benefit Plans Committee Safeway Inc. n/k/a Albertsons Companies Retirement Benefits Plans Committee (the "BPC"), Peter J. Bocian, David F. Bond, Michael J. Boylan, Robert B. Dimond, Laura A. Donald, Dennis J. Dunne, Robert L. Edwards, Bradley S. Fox, Bernard L. Hardy, Russell M. Jackson, Peggy Jones, Suz-Ann Kirby, Robert Larson, Melissa C. Plaisance, Paul Rowan, Andrew Scoggin (collectively, "Safeway Defendants"), and Aon Hewitt Investment Consulting, Inc. ("Aon") (collectively, "Defendants") in this matter. The hearing on this Motion will be held on April 26, 2021, at 2:00 p.m., in the Courtroom of the Honorable Jon S. Tigar, located at the United States District Court for the Northern District of California, Oakland Division, U.S. Courthouse, Courtroom 6 – 2nd Floor, 1301 Clay Street, Oakland, CA 94612.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed concurrently herewith, the declarations of counsel filed concurrently herewith, all other pleadings, papers, records and documentary materials on file in this action, those matters of which the court may take judicial notice, and the oral arguments made at the hearing on this Motion.

Dated: November 23, 2020

/s/ Chiharu Sekino

Chiharu Sekino
SHEPHERD FINKELMAN MILLER & SHAH, LLP
1230 Columbia St., Ste 1140
San Diego, CA 92101
Telephone: (619) 235-2416
Facsimile: (866) 300-7367
Email: csekino@sfmslaw.com

James E. Miller
Laurie Rubinow
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367
Email: jmiller@sfmslaw.com
lrubinow@sfmslaw.com

Ronald S. Kravitz
Kolin C. Tang
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
201 Filbert Street | Suite 201
San Francisco, CA 94133
Telephone: (415) 429-5272
Facsimile: (866) 300-7367
Email: rkravitz@sfmslaw.com
ktang@sfmslaw.com

James C. Shah
Michael P. Ols
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
1845 Walnut St., Suite 806
Philadelphia, PA 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367
Email: jshah@sfmslaw.com
mols@sfmslaw.com

Monique Olivier
Katharine Chao
OLIVIER SCHREIBER & CHAO LLP
201 Filbert Street | Suite 201
San Francisco, CA 94133
Telephone: (415) 433-0333
Facsimile: (415) 449-6556
Email: monique@osclegal.com
kathy@osclegal.com

Sahag Majarian
LAW OFFICES OF SAHAG MAJARIAN
18250 Ventura Blvd.
Tarzana, CA 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
Email: sahagii@aol.com

Todd M. Schneider
Jason H. Kim
Kyle Geoffrey Bates
SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS
2000 Powell Street, Suite 1400
Emeryville, CA 94608
Email: tschneider@schneiderwallace.com
jkim@schneiderwallace.com
kbates@schneiderwallace.com

Attorneys for Plaintiffs, the Plan, and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, Maria Karla Terraza ("Terraza"), and Class Representative, Denis M. Lorenz ("Lorenz") (who also is the Plaintiff in the related action, *Lorenz v. Safeway Inc., et al*, No. 4:16-cv-04903-JST (the "*Lorenz* Action") [collectively, with this Action, the "Actions"]) (Terraza and Lorenz hereafter referred to as "Plaintiffs"), by and through their counsel,[1] respectfully submit this Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Named Plaintiffs' Incentive Awards ("Motion").

I. INTRODUCTION

The relevant facts of the Actions and their procedural histories are well-known to the Court, and are comprehensively summarized in Plaintiffs' Notice of and Unopposed Motion for Preliminary Approval and supporting documents. *See* ECF Nos. 259-259-6. On September 8, 2020, the Court entered an Order Granting Preliminary Approval of a Proposed Settlement between Plaintiffs and Safeway, Inc., Benefits Plan Committee of Safeway, Inc. (n/k/a Albertsons Companies Retirement Benefit Plans Committee), Peter J. Bocian, David F. Bond, Michael J. Boylan, Robert B. Dimond, Laura A. Donald, Dennis J. Dunne, Robert L. Edwards, Bradley S. Fox, Bernard L. Hardy, Russell M. Jackson, Peggy Jones, Suz-Ann Kirby, Robert Larson, Melissa C. Plaisance, Paul Rowan, Andrew J. Scoggin, (collectively, "Safeway Defendants"), and Aon Hewitt Investment Consulting Co. (hereinafter, "Aon") (altogether with Safeway Defendants, "Defendants"), which preliminarily approved the Class Action Settlement Agreement.[2] *See* ECF No. 268 [Order Granting Preliminary Approval].

[1]Class Counsel include Shepherd, Finkelman, Miller & Shah, LLP; Schneider, Wallace, Cottrell, Konecky, Wotkyns, LLP; Olivier Schreiber & Chao LLP; and the Law Offices of Sahag Majarian II. *See* ECF No. 259-2, at ¶ 1.12 ("Settlement Agreement").

[2]The Settlement Agreement's details are summarized in (1) Plaintiffs' Notice of and Revised Unopposed Motion for Preliminary Approval of Settlement and Approval of Class Notice [ECF No. 267] and (2) Plaintiffs' Notice of and Unopposed Motion for Preliminary Approval of Settlement and Approval of Settlement [ECF No. 259], Declaration of Chiharu G. Sekino in support thereof [ECF No. 259-1], and the Settlement Agreement attached as Exhibit 1 thereto [ECF No. 259-2].

The Court provisionally certified the following class ("Settlement Class" or "Class") for settlement purposes:

> All current and former participants and beneficiaries of the Plan at any time on or after July 14, 2010 through and including July 28, 2016, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period, and any alternate payees, in the case of a person subject to a [qualified domestic relations order ("QDRO")] who was a participant in the Plan at any time during the Class Period.

Id., at 3, 9. In addition to provisionally certifying the Settlement Class, the Court also determined that the Settlement Agreement satisfied the criteria for Preliminary Approval. *Id.* at 8, 10.

In light of the substantial benefits made available by the Settlement, which a significant percentage of Class members will receive without the need to even file a claim, and in light of the complex nature of this litigation and the amount of work required of Class Counsel, the Court should grant Plaintiffs' Motion and award attorneys' fees and expenses in the amount of 30% of the Settlement Fund.

II. OVERVIEW OF CLASS COUNSEL'S WORK IN THIS ACTION

There are 268 docket entries in this action. As reflected at paragraphs 7-18 of the Declaration of James E. Miller ("Miller Decl."), the efforts of counsel and Plaintiffs included, but by no means were limited to, the following:

Pleadings:

Class Counsel worked with Plaintiffs to investigate and draft all pleadings in the Actions. Plaintiff Terraza filed her initial Complaint against the Safeway Defendants on July 14, 2016, asserting claims for breach of fiduciary duty under Section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104. ECF No. 1. Lorenz later filed his action against the Safeway Defendants and Great-West Financial Services, LLC (d/b/a "Empower"), likewise asserting claims for breach of fiduciary duty under ERISA. *See Lorenz* Action ECF No. 1.

Class Counsel also investigated and drafted amended complaints in the Actions. Terraza filed an Amended Complaint on November 18, 2016 [ECF No. 37] and a Second Amended Complaint on March 31, 2017, wherein Terraza added Aon as a Defendant. ECF No. 72. Lorenz filed an Amended Complaint on September 16, 2016 [*Lorenz* Action ECF No. 7], a Second Amended Complaint on November 21, 2016 [*Lorenz* Action ECF No. 31], and a Third Amended Complaint on March 31, 2017. *Lorenz* Action ECF No. 66. Terraza filed a Third Amended Complaint, which asserted class action allegations, named Lorenz as a Class Representative and provided that the related actions be treated as one for settlement purposes, and was filed in conjunction with Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Approval of Settlement. *See* ECF No. 258.

Motions to Dismiss:

Class Counsel opposed all motions to dismiss filed by the Safeway Defendants and Aon in the Actions. *See* ECF Nos. 53, 89, 97; *Lorenz* Action ECF No. 50.

The Safeway Defendants filed a motion to dismiss the *Lorenz* Action on December 15, 2016 [*Lorenz* Action ECF No. 38], which was granted in part and denied in part on March 13, 2017. *Lorenz* Action ECF No. 58.

The Safeway Defendants moved to dismiss Terraza's Amended Complaint on January 5, 2017 [ECF No. 46], which the Court denied on March 13, 2017. ECF No. 65. Later, Aon filed a motion to dismiss the Terraza's Second Amended Complaint on June 22, 2017 [ECF No. 83], which the Court granted in part and denied in part on December 11, 2017. ECF No. 109.

Document Discovery:

Class Counsel served discovery requests and reviewed the productions of Defendants, which altogether totaled over 80,000 pages. *See* Miller Decl., ¶ 7. Documents were reviewed and used in future briefing. Additionally, Class Counsel responded to discovery requests from Defendants and produced documents from Plaintiffs.

Fact Depositions:

Class Counsel prepared Plaintiffs for and defended their depositions. *See Id.* Furthermore, Class Counsel took nineteen (19) fact depositions, all of which required significant preparation, including review of potential exhibits. *Id.*

Expert Discovery and Motion Practice:

Class Counsel worked with expert Roger Levy ("Mr. Levy"), who offered a report in the *Terraza* Action regarding Defendants' alleged deviation from the minimum standards of care required of fiduciaries; with expert David Witz ("Mr. Witz"), who offered a report regarding Defendants' investment selection and retention process in the *Lorenz* Action; and with expert Martin Dirks, who offered a report regarding the damages suffered by the Plan in the *Terrraza* Action. *Id.* Class Counsel also worked with their experts to submit rebuttal reports in the Actions. *Id*. Specifically, Mr. Levy submitted a rebuttal report to address conclusions of the Safeway experts, Terry Dennison ("Mr. Dennison") and Steven Gissner ("Mr. Gissner"), as well as AON's expert John Minahan ("Mr. Minahan"). Moreover, Mr. Witz submitted a rebuttal report to address the conclusions of Safeway's damages expert, Russell Wermers ("Mr. Wemers"). *Id.* Class Counsel also prepared for and defended the depositions of Mr. Levy, Mr. Witz, and Mr. Dirks. *Id.*

Class Counsel also reviewed the expert reports and rebuttal reports of Safeway Defendants' experts, Mr. Wermers, who offered testimony regarding the Plan's investment choices and Plaintiffs' damages calculations, Mr. Dennison who offered testimony regarding the Safeway Defendants' governance of the Plan and process for selecting investments, and Mr. Gissner, who offered testimony regarding the Plan's costs. *Id.* Class Counsel further reviewed the report of Mr. Minahan, who offered testimony regarding Aon Hewitt's role as advisor to the Plan. *Id.* In addition to reviewing all of the expert reports in this matter, Class Counsel took the depositions of each of Defendants' experts. *Id.*

Finally, Safeway Defendants moved to exclude the testimony and opinions of Mr. Levy [ECF No. 154], Mr. Witz [*Lorenz* ECF No. 104], and Mr. Dirks [ECF No. 155]. Class Counsel

also moved to exclude Safeway Defendants' expert Mr. Gissiner. *Lorenz* Action ECF No. 135. Class Counsel successfully opposed each of Defendants' motions to exclude as the Court denied each in due course. *See* ECF Nos. 200, 202; *Lorenz* Action ECF No. 134.

Summary Judgment Motion Practice

On July 6, 2018, the Safeway Defendants filed motions for summary judgment in both Actions [ECF No. 144; *Lorenz* Action ECF No. 95], and Plaintiffs filed partial motions for summary judgment with regard to Defendants' liability [ECF No. 142; *Lorenz* Action ECF No. 101]. In addition to filing partial motions for summary judgment and oppositions to Safeway Defendants' [ECF No. 163; *Lorenz* Action ECF No. 116], Class Counsel also filed an opposition to Aon's motion for summary judgment [ECF No. 162].

Trial Preparation:

After the Court adjudicated the summary judgment motions, Aon filed four motions *in limine*, two of which the Safeway Defendants joined. [ECF Nos. 213-218]. Class Counsel opposed all four of the motions *in limine* [ECF Nos. 223; 225-227]. Class Counsel also filed a motion for reconsideration of the Court's Order Granting in Part and Denying in Part Safeway Defendants' Motion for Summary Judgment. *See* ECF No. 236.

In addition to the significant amount of pretrial motion practice in advance of the scheduled May 7, 2019 trial date, Class Counsel also worked on a joint pretrial statement, proposed findings of fact and conclusions of law, deposition designations, trial exhibit lists, and prepared witnesses. *See* Miller Decl., ¶ 7.

Settlement Negotiations:

Class Counsel, on behalf of Plaintiffs, engaged in an initial mediation session with well-respected neutral, Robert A. Meyer of JAMS on August 2, 2018. *Id.* ¶ 7. Again, Class Counsel engaged in a mediation session with Meyer on April 18, 2019. *Id.* After the second mediation session, Class Counsel reached a settlement agreement with the Safeway Defendants on April 23, 2019 [ECF No. 235; *Lorenz* Action ECF No. 144], and also reached agreement with Aon on May 2, 2019 [ECF No. 249].

Settlement Papers:

Class Counsel drafted and filed an Unopposed Motion for preliminary Approval and accompanying papers, which included the Settlement Agreement [ECF No. 259-2], Class member short-form and long-form Notices [ECF No. 259-2, at Exhibits B-1 and B2], Plan of Allocation [ECF No. 259-2, at Exhibit C], and Former Participant Claim Form [ECF No. 259-3]. After the Court identified certain minor deficiencies with the proposed notice plan [ECF No. 265], Class Counsel filed a Revised Unopposed Motion for Preliminary Approval, which resolved the issues [ECF No. 267].

III. ARGUMENT

A. THE 30% FEE AWARD IS REASONABLE UNDER THE CIRCUMSTANCES

1. The Percentage-of-the-Fund Method is the Appropriate Method for Determining Reasonable Attorneys' Fees in This Case

Class Counsel is entitled to an award of reasonable attorney fees from the common fund they created for the benefit of the Class. Fed. R.Civ. P. 23(h); *Staton v. Boeing Co*., 327 F.3d 938, 967 (9th Cir. 2003). The purpose of the "common fund" doctrine is to avoid unjust enrichment, requiring "those who benefit from the creation of the fund [to] share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1300 (9th Cir. 1994).

"In common fund cases, such as the present action, a court has discretion to award attorneys' fees as either a percentage of such common fund or by using the lodestar method." *Kanawi v. Bechtel Corp.,* No. C 06-05566 CRB, 2011 WL 782244, at *1 (N.D. Cal. Mar. 1, 2011) (internal quotations and citations omitted). The method a district court chooses to use, and its application of that method, must achieve a reasonable result. *See In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 942 (9th Cir. 2011) ("Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result"). The Ninth Circuit has recognized that the percentage-of-the-fund method is appropriate for calculating fees when counsel has created a common fund. *See, e.g*., *In re*

Bluetooth, 654 F.3d at 942 ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (finding that "use of the percentage method in common fund cases appears to be dominant").

The percentage-of-the-fund method is the appropriate method for determining a reasonable fee in this case. The benefit to the Settlement Class is easily quantified, and Class Counsel's efforts resulted in a Maximum Settlement Fund of $8,500,000. The entire Settlement Fund will be distributed to Settlement Class Members after (1) Court-approved administration costs and contingency reserve for administrative expenses; (2) Court-approved fees and costs; (3) Court-approved incentive awards; and (4) Court-approved independent fiduciary fees and costs are deducted. *See* ECF 259-2, at ¶ 1.30 [Settlement Agreement and Release]. Using the percentage method in this case will recognize Class Counsel's efficiency and their efforts to achieve the highest possible recovery for the Settlement Class. Indeed, in its March 30, 2020 Order, this Court recognized that Plaintiffs could request up to 33.33 percent of the Settlement Fund. The Court recognized that such a request was within the range of approval, but reminded Class Counsel that they would have to justify any departure from the 25% benchmark. *See* ECF 265, at pgs. 13-15 [March 30, 2020 Order].

2. Ninth Circuit Factors Counsel Approval Of The 30% Fee Request

In the Ninth Circuit, the "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund." *Williams v. MGM-Pathe Commc'ns Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997). This benchmark is just a starting place, however, and the Court must determine the appropriate percentage by "tak[ing] into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). As this Court has indicated, the following factors must be considered when deciding whether to depart from the 25% benchmark:

> the extent to which class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether

> counsel's performance generated benefits beyond the cash . . . fund, the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis. . . . Courts [will then] use Class Counsel's lodestar to cross-check the amount of fees requested.

See ECF 265, at pg. 14 [March 30, 2020 Order]. (internal citations omitted). Applying these factors, an upward adjustment of the benchmark to 30% (or $2,550,000) is warranted in this case.

i. Excellent Results Achieved for the Class

Courts have recognized that the result achieved is a major factor in determining an appropriate fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at *11 (N.D. Cal. Dec. 11, 2015)("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award").

Here, Class Counsel achieved an excellent result. After litigating these Actions for over three years against a well-funded Defendant represented by very well-qualified ERISA lawyers, Class Counsel were able to achieve a settlement in the amount of $8,500,000. This result is particularly strong considering the fact that it followed in the wake of summary judgment rulings, which removed some of Plaintiffs claims. *See Kanawi*, 2011 WL 782244, at *1)(finding Class Counsel achieved quality results because "Class Counsel negotiated the settlement after it lost summary judgment, and they still obtained a meaningful recovery"). Based on Terraza's expert,[3] the maximum damages of the surviving claims amounted to $28,667,494. *See* ECF Nos. 224, 232.[4] Thus, the Settlement of $8,500,000 represents roughly 30% of the adjusted maximum figure. After accounting for attorneys' fees (and costs), Class Members will receive over 18% of

[3]ECF No. 142, Exhibit C attached thereto, at p. 10 [Dirks Report].

[4]Based on Terraza's damages expert, Martin Dirks, the maximum damages initially amounted to $51,274,294. *See* ECF No. 142, Exhibit C attached thereto, at p. 10 [Dirks Report]. However, the Court, in its ruling on the Safeway Defendants' motion for summary judgment, removed claims involving the Interest Income Fund and Chesapeake Core Growth Fund, which reduced the maximum damages number to $28,667,494. *See* ECF Nos. 224, 232.

the maximum damages number. This Settlement fund, as a percentage of recovery, is greater than recoveries in other cases where attorney fees of 33.33% of the common fund were awarded. *See Emmons v. Quest Diagnostics Clinical Labs., Inc*., No. 113CV00474DADBAM, 2017 WL 749018, at *5 (E.D. Cal. Feb. 27, 2017) ($2.35 million settlement; 27.6% of claimed damages of $8.5 million); *Cheng Jiangchen v. Rentech, Inc*., No. 17-1490-GW, 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019) ($2.05 million settlement; 10% of maximum damages of $20 million); *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at *7 (N.D. Cal. Dec. 11, 2015) ($500,000 settlement; 14.2% of $3,512,000 in "potential liability").

Moreover, Defendants have denied and continue to deny any wrongdoing or liability and have indicated that they would continue to vigorously defend the lawsuit if the proposed Settlement is not approved. Given the inherent litigation risks in this ERISA action, the benefit is highly significant, as it provides tangible benefits to Class Members *now*, without the risks and delays of continued litigation. The Settlement Fund will benefit over 35,000 Class Members and each will receive a disbursement from the Settlement Amount on a pro-rata basis, depending on the average value of each Class Members' Plan account during the Relevant Period. *See* ECF No. 259-2, at Exhibit C [Plan of Allocation].

ii. Litigation Risk

When applying the percentage of the fund method, courts should consider the risk involved and award a higher percentage where Class Counsel accepted a great deal of risk in its prosecution of the case. "Risk is a relevant circumstance." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *In re Pac. Enter. Sec. Litig*., 47 F.3d 373, 379 (9th Cir.1995) (holding fees justified "because of the complexity of the issues and the risks").

Although Class Counsel believe that the claims presented in this litigation are meritorious, they are experienced ERISA counsel who understand the risks of a trial on the merits are always considerable. *Cervantez v. Celestica Corp*., No. EDCV 07-729-VAP, 2010 WL 2712267, at *3 (C.D. Cal. July 6, 2010)("trials of class actions are inherently risky and

unpredictable propositions").[5] The risk in "ERISA 401(k) fiduciary breach class action" are especially high because those cases "involve complex questions of law and have not been widely litigated to this point." *Waldbuesser v. Northrop Grumman Corp*., No. CV 06-6213-AB (JCX), 2017 WL 9614818, at *4 (C.D. Cal. Oct. 24, 2017). In fact, there was a clear risk at trial, demonstrated by the Court's summary judgment rulings, which removed some of Plaintiff's claims and considerably reduced Plaintiffs' maximum potential damages. *See* ECF Nos. 224, 232. Finally, even if the Court entered judgment in favor of Plaintiffs, there always remains the risk that Defendants, who have already vigorously defended against these claims, will appeal the decision for the judgment to be overturned on appeal. *Betancourt v. Advantage Human Resourcing, Inc*., No. 14-cv-01788-JST, 2016 WL 344532, at *4 (N.D. Cal. Jan. 28, 2016); *see also In re Omnivision Techs., Inc.*, 559 F.Supp. 2d 1036, 1042 (N.D. Cal. 2008) (find that, considering the likelihood of appeal, "it could be years before Plaintiffs see a dollar").

iii. Non-Monetary Relief

In this case, non-monetary relief is not part of the Parties' Settlement and, in Plaintiffs' view, is inapplicable to the issues at hand for one simple reason. Here, shortly after the *Terraza* action was filed, in connection with Safeway's acquisition by Albertsons Companies, Inc., Safeway changed its service provider to the Vanguard Group and substantially changed the investment offerings and fee structure of the Plan. Miller Decl., ¶ 8. As a result, the practices that Plaintiffs challenged were necessarily retrospective in nature because, to be frank, the Plan largely remedied the issues challenged by Plaintiffs when the transition to Vanguard occurred. *Id*.

iv. Percentage Rate Relative to Market Rate

In *Kanawi*, an ERISA class action which similarly asserted claims for breaches of fiduciary duty premised on the selection and retention of plan investment options and the

[5]Indeed, James E. Miller and Laurie Rubinow of Shepherd Finkelman Miller & Shah, LLP tried the certified ERISA class action, *Healthcare Strategies, Inc. v, ING Life Ins. & Annuity Co.*, Civil Action No. 3:11-CV-282-WGY (D.Conn.), on behalf of 18,000 retirement plans for over four weeks before the Honorable William G. Young (sitting by designation) in Boston, Massachusetts through closing arguments on liability and understand full well the risks inherent in such trials.

reasonableness of defined contribution plan fees, the court found that "[a] 25% fee award is below the market rate for similar cases" and that this "factor favors an increase in the benchmark rate" to a 30% fee award. 2011 WL 782244, at *2. Indeed, courts have routinely approved a 33.33% fee award for similar ERISA cases involving allegations of excessive fees and imprudent investment options in defined contribution retirement plans. *In re Cigna-Am. Specialty Health Admin. Fee Litig.,* No. 2:16-CV-03967-NIQA, 2019 WL 4082946, at *16 (E.D. Pa. Aug. 29, 2019) (awarding one-third fee on $8.25 million settlement); *George v. Kraft Foods Glob., Inc.,* No. 1:07-CV-1713, 2012 WL 13089487, at *1 (N.D. Ill. June 26, 2012)(approving 33.33% fee award on a $9.5 million settlement); *Clark v. Duke Univ*., No. 16-cv-1044, 2019 WL 2579201 (M.D.N.C. June 24, 2019) (approving one-third fee out of $10.65 million settlement); *Kelly v. Johns Hopkins Univ*., No. 16-cv-2835, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) (approving one-third fee out of $14 million ERISA settlement); *Will v. Gen. Dynamics Corp*., No. CIV. 06-698-GPM, 2010 WL 4818174, at *1 (S.D. Ill. Nov. 22, 2010)(approving 33.33% fee award on $15.15 million settlement). In ERISA 401(k) fee litigation "a one-third fee is consistent with the market rate." *Will v. General Dynamics Corp*., 2010 WL 481817, *3 (S.D. Ill. Nov. 22, 2010); *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (citing to a list of cases that have found that "'[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case"). Thus, Plaintiffs' request is, in essence, below the benchmark for similar cases.

Moreover, courts within this Circuit have awarded the same and/or greater percentage fee than that requested here in cases involving smaller settlements. *See, e.g.*, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 484 (E.D. Cal. 2010) (33.3% fee award in $300,000 settlement); *Weinstein v. MetLife*, No. 06-4444 (N.D. Cal. July 31, 2009 Order) [ECF 220] (30% fee award in $7.4 million settlement); *Ingalls v. Hallmark Marketing Co*., No. 08-04342 (C.D. Cal. Oct. 16, 2009 Order) [ECF 77] (33% fee award in $5,625,000 million settlement); *Weeks v. Kellogg Co*., No. CV 09-08102 MMM RZX, 2013 WL 6531177, at *30 (C.D. Cal. Nov. 23, 2013) (30% fee award of the $2.5 million settlement).

v. Financial Burden and Contingent Nature of Representation

Class Counsel undertook this action on an entirely contingent fee basis, assuming a substantial risk should the litigation have yielded no, or very little, recovery. Miller Decl., ¶ 9 Declaration of Monique Olivier ("Olivier Decl."), ¶ 15; Declaration of Jason H. Kim ("Kim Decl."), ¶ 5. A negative result would have left Class Counsel uncompensated for their time and responsible for their out-of-pocket expenses. *Id*. "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all." *Kanawi*, 2011 WL 782244, at *2. Thus, Courts in the Ninth Circuit have consistently recognized that the risk of non-payment after years of hard-fought litigation "weighs substantially in favor" of an upward adjustment from the benchmark. *Campbell v. Best Buy Stores, L.P.*, No. 12-7794-JAK, 2016 WL 6662719, at *8 (C.D. Cal. Apr. 5, 2016); *see also, Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *10 (E.D. Cal. Oct. 31, 2012) (approving one-third fee where "Class Counsel undertook considerable financial risks . . . by accepting this case on a contingency basis . . . [where] [t]here was no guarantee they would recoup their fees or the substantial costs advanced"); *Barbosa v. Cargill Meat Solutions Corp*., 297 F.R.D. 431, 449 (E.D. Cal. 2013) ("where recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate"); *Lee v. JPMorgan Chase & Co*., No. SACV13511JLSJPRX, 2015 WL 12711659, at *8 (C.D. Cal. Apr. 28, 2015) ("Courts have recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing for their work"). Moreover, "Class Counsel had to turn down opportunities to work on other cases to devote the appropriate amount of time, resources, and energy necessary to handle this relatively complex case." *Kanawi*, 2011 WL 782244, at *2. Because Class Counsel agreed to accept these risks, they were able to represent Plaintiffs, vigorously prosecute the claims at all stages, and achieve a favorable Settlement in this matter.

Application of the factors above confirms that Class Counsel's request for 30% of the common fund as an award for attorneys' fees is reasonable.

3. Lodestar Cross-Check

Comparing a percentage fee award to the lodestar "provides a check on the reasonableness of the percentage award." *Vizcaino*, 290 F.3d at 1050. "Where, as here, [when] the lodestar is being used as a cross-check, courts may do a rough calculation 'with a less exhaustive cataloging and review of counsel's hours.'" *Carlin v. DairyAmerica*, Inc., 380 F. Supp. 3d 998, 1022 (E.D. Cal. 2019), *appeal dismissed sub nom. Carlin v. Spooner*, 808 F. App'x 571 (9th Cir. 2020) (internal citations omitted); *see also Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) ("lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [and courts] may rely on summaries submitted by the attorneys and need not review actual billing records").

The cross-check analysis is a two-step process: first, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys. *See Caudle v. Bristow Optical Co*., 224 F.3d 1014, 1028 (9th Cir. 2000). Second, a court calculates the multiplier that would be required to match the lodestar to the percentage-of-the-fund request, and determines whether the multiplier falls within the accepted range. Class Counsel's request for $2,550,000 represents far less -- approximately 64% -- of Class Counsel's straight lodestar ($3,980,631) without any multiplier would produce.

i. Counsel Rates Are Reasonable

"The reasonable hourly rate must be based on the experience, skill, and reputation of the attorney requesting fees as well as the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *In re Wells Fargo & Co. S'holder Derivative Litig*., 445 F. Supp. 3d 508, 527 (N.D. Cal. 2020) (internal quotations and citations omitted). Although courts recognize that the "relevant community," when determining appropriate attorneys' rates are generally the one in which the district court sits, "it is appropriate to consider the declarations of attorneys in other jurisdictions [for ERISA cases]

because ERISA cases involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts." *Mogck v. Unum Life Ins. Co*., 289 F. Supp. 2d 1181 (S.D. Cal. 2003) (internal citation omitted); *see also Boxell v. Plan for Grp. Ins. of Verizon Commc'ns, Inc*., No. 1:13-CV-089 JD, 2015 WL 4464147, at *9 (N.D. Ind. July 21, 2015) ("ERISA is a specialized field with a limited number of attorneys who specialize in representing plaintiffs seeking disability benefits, and [plaintiff] has adequately established that there is a national market for the services of those attorneys"); *see also Frommert v. Conkright*, No. 00-CV-6311L, 2016 WL 7186489, at *7 (W.D.N.Y. Dec. 12, 2016) ("in certain highly specialized areas of law, such as ERISA, the relevant legal community is national in scope . . . . "[T]he hourly rates to be applied here are not strictly bound by what would be typical for counsel from this district.").

Class Counsel's hourly rates, between $325 and $1,005 per hour for attorneys and between $175 and $475 for paralegals and other staff members, are based on a variety of factors, including, among other things: the experience, skill and sophistication required for the types of legal services that are typically performed; the rates customarily charged in the markets where the legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. *See* Miller Decl., ¶ 13; Olivier Decl., ¶ 18; Kim Decl., ¶ 9. The rates sought by Class Counsel are reasonable in comparison to rates awarded by courts in this Circuit and elsewhere in other ERISA cases. For example, very recently, the Central District of California approved the following rates in an ERISA fiduciary breach case: "for attorneys with at least 25 years of experience, $1,060 per hour; for attorneys with 15-24 years of experience, $900 per hour; for attorneys with 5–14 years of experience, $650 per hour; for attorneys with 2–4 years of experience, $490 per hour; and for paralegals and law clerks, $330 per hour." *Marshall v. Northrop Grumman Corp*., No. 16-CV-6794 AB (JCX), 2020 WL 5668935, at *7 (C.D. Cal. Sept. 18, 2020). Similarly, Magistrate Judge Cousins of this District approved a fee petition in an ERISA 401(k) fiduciary breach class case where class counsel rates ranged "from $600 to $875 per hour for attorneys with more than 10 years of experience, $325 to $575 per hour for

attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks." *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-CV-03698-NC, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018).

In similar cases regarding alleged breach of fiduciary duties under ERISA, other courts across the country have approved similar hourly rates as those sought by Class Counsel in this Motion. *See, e.g.*, *Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *4 (M.D.N.C. Sept. 29, 2016) (approving hourly rates of $998 for attorneys with at least 25 years of experience; $850 for attorneys with 15-24 years of experience; $612 for attorneys with 5-14 years of experience $460 for attorneys with 2-4 years of experience; and $309 for paralegals and clerks); *Gordan v. Mass. Mut. Life Ins. Co.*, No. 13-CV-30184-MAP, ECF No. 120, at 29-30 (same); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same).

Furthermore, the hourly rates sought by Class Counsel are comparable to those awarded in this District in non-ERISA class actions as well. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *7 (N.D. Cal. Aug. 3, 2016) (Tigar, J.) ("billing rates between $350 and $875 are reasonable within this legal market for cases of this size, type, and complexity"). These rates have also been confirmed as reasonable in previous cases of Class Counsel. *See* Miller Decl., ¶ 14; Olivier Decl., ¶ 18; Kim Decl., ¶ 9; *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) ("affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate").

ii. Class Counsel's Hours are Reasonable

The number of hours that Class Counsel worked in this case is reasonable considering that they, *inter alia*, investigated the claims, successfully opposed multiple motions to dismiss, engaged in extensive discovery including the taking of several complex depositions, opposed and filed summary judgment motions, litigated motions *in limine* on a variety of issues, and made

significant preparations to try the case. Since the inception of this case, over four year ago, Class Counsel have worked diligently to prosecute this action. Extensive discovery was completed as the Parties took many fact and expert depositions and exchanged a great deal of documents. As discussed above, the Parties also engaged in extensive motion practice, filed documents in preparation for trial, and met twice with a respected mediator before reaching the Settlement Agreement.

Class Counsel have already dedicated approximately 6,652 hours to the investigation, development, litigation, and resolution of this case. *See* Miller Decl., ¶ 11, Exhibit A; Olivier Decl., ¶ 12, Exhibit A; Kim Decl., ¶ 7, Exhibit A. As in every case, Class Counsel will spend additional hours to see this case through final resolution, including the work necessary to prepare for final approval, attend the hearing on final approval, and ensure the claims administration process is successfully completed. The hours spent by Class Counsel is less than what other counsel have spent in other similar ERISA class actions. *See Kanawi*, 2011 WL 782244, at *2 (N.D. Cal. Mar. 1, 2011) (spent over 21,000 attorney hours); *see also In re Northrop Grumman ERISA Litig.*, No. 06-cv-6213, ECF No. 803, at 5 (C.D. Cal. Oct. 24, 2017) (spent over 23,000 hours). Class Counsel's total lodestar is $3,980,631.

iii. Multiplier is Reasonable

In the Ninth Circuit, multipliers "ranging from one to four are frequently awarded." *Vizcaino*, 290 F.3d at 1051, n.6. The Ninth Circuit collected dozens of class action lodestars and found that in 83% of the cases, the lodestar was between 1.0 and 4.0. *Id.* Courts find higher multipliers appropriate when using the lodestar method as a crosscheck for an award based on the percentage method. *See, e.g., Steiner v. Am. Broad Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within the range of multipliers that courts have allowed" when crosschecking a fee based on a percentage of the fund); *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *13 (S.D. Cal. Sept. 28, 2017) ("The one-third fee Class Counsel seeks reflects a multiplier of 2.89 on the lodestar which is reasonable for a complex class action case"); *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-

1116- IEG WMC, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) (1.5 lodestar multiplier on crosscheck of fee award equal to 33 1/3% of cash payment but only 7.5% of total settlement value); *Pan v. Qualcomm Inc*., No. 16-CV-01885-JLS-DHB, 2017 WL 3252212, at *13 (S.D. Cal. July 31, 2017) (finding a multiplier of 3.5 to be reasonable for a fee equal to 24.6% of the settlement value); *Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (finding a multiplier of 3.6 was "well within the acceptable range"). Courts may consider the following factors when assessing the reasonableness of a multiplier:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975) (abrogated on other grounds by *Vizcaino*, 290 F.3d at 1051 (noting that the district court found a 3.65 multiplier to be reasonable after considering the factors in *Kerr*).

Here, the requested attorneys' fees are *less* than Class Counsel's lodestar, representing a negative multiplier, and thus, the requested attorneys' fees respectfully should be approved. Moreover, Class Counsel took the case on a contingency basis, foregoing other, more certain, work. They were able to achieve a favorable Settlement for the Settlement Class that is comparable to other similar settlements despite the challenges presented by this complex litigation. Class Counsel have substantial experience in litigating ERISA class actions and have earned reputations for skilled representation. *See* Miller Decl., ¶¶ 3-6; Olivier Decl., ¶¶ 3-10; Kim Decl., ¶ 16. Finally, Class Counsel will continue to respond to Settlement Class members' calls, deal with any objections, prepare the materials in support of final approval, and work with the Settlement Administrator through final approval and distribution of the Settlement funds.

B. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLY INCURRED EXPENSES

FRCP 23(h) allows courts to award costs authorized by law or the parties' agreement. Class Counsel have incurred $451,257.77 in expenses in litigating this case for the past four plus years, and carried them for the duration of the case. "There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005); *see also Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also In re Immune Response Sec. Litig*., 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007). Such costs typically include "photocopying, printing, postage, court costs, research on online databases, experts and consultants, and reasonable travel expenses." *Thomas v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160-JST, 2018 WL 2234598, at *4 (N.D. Cal. May 15, 2018) (Tigar, J).

Class Counsel have provided an itemized list of expenses separated in the following various categories. *See* Miller Decl., ¶ 15, Exhibit B; Olivier Decl., ¶ 20, Exhibit B; Kim Decl., ¶ 10, Exhibit B; *see also Hefler v. Wells Fargo & Co*., No. 16-CV-05479-JST, 2018 WL 6619983, at *16 (N.D. Cal. Dec. 18, 2018) ("[t]o support an expense award, Plaintiffs should file an itemized list of their expenses by category, listing the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable"). Each of the expenses claimed here were actually incurred and were necessary to the successful prosecution of the action. Class Counsel brought this case without guarantee of reimbursement or recovery, and thus had a strong incentive to limit expenses, which they did. To the extent there were unnecessary expenses, Class Counsel removed them from the itemized list. Regardless, the expenses requested in the amount of $451,257.77 are substantially less than expenses reimbursed to firms in settlements of similar ERISA fiduciary breach cases. *See, e.g*., *Kanawi*, No. 06-5566, 2011 WL 782244, at *3 (over $1.5 million); *Waldbuesser v. Northrop Grumman Corp*., No. CV 06-6213-AB (JCX), 2017 WL 9614818, at *8 (C.D. Cal. Oct. 24, 2017) (over $1.1 million); *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *6 (W.D. Mo. Aug. 16,

2019) (over $2.2 million); *Spano v. Boeing Co*., 2016 WL 3791123, at *4 (over $1.8 million); *Abbott v. Lockheed Martin Corp*., No. 06-CV-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015)(over $1.6 million); *Beesley v. Int'l Paper Co*., No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (over $1.5 million); *George v. Kraft Foods Glob., Inc.*, No. 1:07-CV-1713, 2012 WL 13089487, at *4 (N.D. Ill. June 26, 2012)(approximately $1.5 million).

C. PLAINTIFFS REQUEST CLASS REPRESENTATIVE ENHANCEMENT AWARDS OF $10,000

As this Court has previously held:

> [N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments. Incentive awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. Courts evaluate incentive awards individually, using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation.

See ECF 265, at 15 [March 30, 2020 Order] (internal citations and quotation marks omitted). When evaluating incentive awards, courts must also "consider the proportionality between the payment and the range of class members' settlement awards." *Id.* at p. 16.

Unlike unnamed Settlement Class Members, who are passive beneficiaries of the representatives' efforts on their behalf, named class representatives agree to be the subject of discovery, including making themselves available as witnesses at deposition and trial, and subject themselves to other obligations of named parties. Enhancement awards promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. In this case, Plaintiffs together protected the interests of the Settlement Class. Each actively assisted in the prosecution of this case for over three years. The Class Representatives worked closely with Class Counsel during pre-filing investigation, reviewing and approving pleadings, responding to interrogatories and requests for production, and traveling from their

homes to sit for their depositions. *See* Miller Decl., ¶ 20; Kim Decl., ¶ 18. Specifically, Ms. Terraza met in person with counsel on six separate occasions (traveling once to Los Angeles and twice to San Francisco for such meetings) and, on several occasions, personally arranged for interpreters to be present to ensure that she fully understood all aspects of this complex litigation. Miller Decl. ¶ 20. Ms. Terraza also was regularly in contact with counsel by telephone, reviewed the complaint and amended complaints, as well as other pleadings before they were filed, responded fully to written discovery, prepared for and appeared for deposition, participated fully in the several mediation sessions and settlement discussions and prepared with counsel to testify at trial, including making work and family arrangements to be present for the entirety of the trial. *Id.* Mr. Lorenz had numerous calls with attorneys and staff at SWCK, and frequently contacted our offices for updates about the status of the case. Kim Decl., ¶ 18. Mr. Lorenz participated fully in discovery, including searching for, gathering, and producing documents and written discovery responses. *Id.* Mr. Lorenz also sat for his deposition and reviewed many pleadings in this case before they were filed. *Id.* Plaintiffs consulted with counsel throughout the litigation to ensure that an excellent result was reached for all Settlement Class Members.

Class Counsel requests $10,000 to each of the two Class representatives. The $10,000 requested incentive award is less than 0.12% of the total settlement fund, and combined are approximately 0.23%. In addition, although the average settlement recovery per Class member is likely to be less than $1,000, Plaintiffs expect that there will be Class members who receive more than $10,000 as a result of the Settlement, based upon their account balances. Miller Decl., ¶ 8. District Courts within the Ninth Circuit have approved incentive awards in the same amount or more to each class representatives in ERISA class action settlements. *Marshall v. Northrop Grumman Corp*., No. 16-CV-6794 AB (JCX), 2020 WL 5668935, at *12 (C.D. Cal. Sept. 18, 2020) (approving incentive award of $25,000 to each class representative); *Waldbuesser v. Northrop Grumman Corp*., No. CV 06-6213-AB (JCX), 2017 WL 9614818, at *8 (C.D. Cal. Oct. 24, 2017) (same); *Cryer v. Franklin Res., Inc.,* No. 16-CV-04265-CW (N.D. Cal. October 4, 2019) [ECF No. 168] (approving incentive awards of $10,000 and $15,000 to class

representatives).

Courts have also approved similar incentive awards in non-ERISA class action settlements as well. *See, e.g.*, *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116- IEG WMC, 2013 WL 163293, at *6 (S.D. Cal. Jan. 14, 2013) (approving $15,000 incentive awards to each of three class representatives); *see also Contreras v. Performance Food Grp., Inc.*, No. 4:14-CV-03380-PJH, 2016 WL 9138157, at *1 (N.D. Cal. May 4, 2016) (approving service award "in the amount of $10,000.00, for the initiation of this action, the substantial benefit conferred upon the Class, and the risks taken by stepping forward and prosecuting this action").

Here, as described above the named Plaintiffs have provided significant assistance over the course of this litigation. Thus, $10,000 Class Representative Enhancement awards are reasonable in light of the work performed by the named Plaintiffs.

IV. CONCLUSION

In light of the substantial and excellent work done, and the exceptional results achieved, and for the reasons articulated above, Plaintiffs respectfully request that their Motion be granted.

Dated: November 23, 2020

/s/ Chiharu Sekino

Chiharu Sekino
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
1230 Columbia St., Ste 1140
San Diego, CA 92101
Telephone: (619) 235-2416
Facsimile: (866) 300-7367
Email: csekino@sfmslaw.com

James E. Miller
Laurie Rubinow
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367
Email: jmiller@sfmslaw.com
lrubinow@sfmslaw.com

Ronald S. Kravitz
Kolin C. Tang
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
201 Filbert Street | Suite 201

San Francisco, CA 94133
Telephone: (415) 429-5272
Facsimile: (866) 300-7367
Email: rkravitz@sfmslaw.com
ktang@sfmslaw.com

James C. Shah
Michael P. Ols
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
1845 Walnut Street, Suite 806
Philadelphia, PA 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367
Email: jshah@sfmslaw.com
mols@sfmslaw.com

Monique Olivier
Katharine Chao
OLIVIER SCHREIBER & CHAO LLP
201 Filbert Street | Suite 201
San Francisco, CA 94133
Telephone: (415) 433-0333
Facsimile: (415) 449-6556
Email: monique@osclegal.com
kathy@osclegal.com

Sahag Majarian
LAW OFFICES OF SAHAG MAJARIAN
18250 Ventura Blvd.
Tarzana, CA 91356
Telephone: (818) 609-0807
Facsimile: (818) 609-0892
Email: sahagii@aol.com

Todd M. Schneider
Jason H. Kim
Kyle Geoffrey Bates
SCHNEIDER WALLACE COTTRELL
KONECKY WOTKYNS
2000 Powell Street, Suite 1400
Emeryville, CA 94608
Email: tschneider@schneiderwallace.com
jkim@schneiderwallace.com
kbates@schneiderwallace.com

Attorneys for Plaintiffs, the Plan, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Chiharu Sekino
Chiharu Sekino
Shepherd Finkelman Miller
& Shah, LLP