

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KRISTINA FINK, on behalf of the Nation
Safe Drivers Employee Stock Ownership
Plan, and on behalf of a class of all other
persons similarly situated,

Plaintiff,

-vs.-

WILMINGTON TRUST, N.A., as successor
to Wilmington Trust Retirement and
Institutional Services Company, ANDREW
SMITH, MICHAEL SMITH, and FRANK
MENNELLA.

Defendants,

and

WILMINGTON TRUST, N.A., as successor
to Wilmington Trust Retirement and
Institutional Services Company.

Third-Party Plaintiff,

v.

STOUT RISIUS ROSS, INC. and
STOUT RISIUS ROSS, LLC,

Third-Party Defendants.

Case No. 19-1193-CFC

**PLAINTIFF’S OPENING BRIEF IN SUPPORT OF HER UNOPPOSED
MOTION FOR ATTORNEYS’ FEES, LITIGATION EXPENSES AND
CLASS REPRESENTATIVE SERVICE AWARD**

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I. INTRODUCTION

Plaintiff Kristina Fink, on behalf of herself and the Class, presents this opening brief in support of her motion for an order awarding attorneys' fees and litigation expenses to Plaintiff's Counsel and a Service Award to the Class Representative. First, Plaintiff's Counsel seek a fee award of 30% of the \$5,500,000.00 Class Settlement Amount, which is \$1,650,000.00. Second, Plaintiff's Counsel request reimbursement of litigation expenses advanced of \$51,730.12. Finally, the Class Representative, Kristina Fink, requests a service award of \$10,000 for the substantial time and effort she devoted to this class action.

As stated by the Supreme Court,

a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citations omitted).

The requested payments from the common fund are consistent with the Settlement Agreement (D.I. 54-1)¹ and described in the Class Notice (D.I. 54-1, Ex.

1). In its Preliminary Approval Order, the Court found that the proposed Settlement

¹ Capitalized terms used herein are defined in the Settlement Agreement.

Agreement, including the requested payments, appeared to be reasonable. D.I. 60 at 1. As discussed below, the requested payments are reasonable in light of Third Circuit precedent, the results obtained for the benefit of the Class, the litigation expenses incurred by Plaintiff's Counsel, and the time and effort devoted to this case by Plaintiff's Counsel and the Class Representative.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Procedural History

Plaintiff's claims arise out of the 2014 transaction in which Defendant Wilmington Trust, in its capacity as Trustee of the ESOP, purchased the shares of Nation Safe Drivers ("NSD") common stock from the Individual Defendants, Andrew Smith, Michael Smith and Frank Mennella ("ESOP Transaction"). Plaintiff alleged that Wilmington Trust violated ERISA in connection with the ESOP Transaction by, *inter alia*, paying more than fair market value for the stock of the Company. Next, Plaintiff alleged that the Individual Defendants engaged in prohibited transactions pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Finally, Plaintiff alleged that agreements by the Company to indemnify Wilmington Trust violated ERISA.

B. Attorneys' Fees and Costs

The Settlement Agreement provides that Plaintiff's Counsel may apply for up to one-third of the Class Settlement Amount as a common fund fee award (or \$1,833,333.33), and an award of Plaintiff's Counsel's reasonable costs of litigation

up to \$60,000. D.I. 54-1, § 10.1. All attorneys’ fees and costs approved by the Court will be paid out of the common fund. *Id.* Defendants agreed to take no position on Plaintiff’s Counsel’s fee application. *Id.*

C. Service Award

The Settlement Agreement provides that Plaintiff’s Counsel may apply for a service award of up to \$10,000 for the Class Representative, which shall be paid out of the common fund. *Id.* § 10.3.

D. Notice to Class Members

The Class Notice fully describes Plaintiff’s request for attorneys’ fees, litigation expenses and service awards. D.I. 54-1, Ex. 1. The Class Notice was sent to Class Members by U.S. Mail on June 17, 2021, and was also posted on the settlement website, <https://www.simpluris.com/case-information>. Feinberg Decl. Ex. C, Declaration of Jarrod Salinas (“Salinas Decl.”) at ¶¶ 7, 10.²

E. Preliminary Approval Order

The Court’s June 8, 2021 Order granting Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement recognized that the Settlement is “fair, reasonable, and adequate” D.I. 60 at 3. In granting preliminary approval, the Court considered the provisions in the Settlement Agreement concerning

² All declarations are submitted with the Motion for Final Approval filed herewith.

attorneys' fees and service awards in evaluating whether to grant preliminary approval of the Settlement. *Id.* at 8-9.

III. PLAINTIFF'S COUNSEL'S REQUEST FOR A FEE OF ONE-THIRD OF THE COMMON FUND IS WELL WITHIN THE RANGE OF COMMON FUND FEE AWARDS IN THIS CIRCUIT

Plaintiff's Counsel are entitled to reasonable attorneys' fees to compensate them for their work which has resulted in a common fund of \$5.5 million for the benefit of approximately 294 ESOP participants. Plaintiff's Counsel seeks a fee award of one-third of the Common Fund.

Rule 23(h) provides "[i]n a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. Rule 23(h). "[A] thorough judicial review of fee applications is required for all class action settlements." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 782 (3d Cir. 1995)); *see also In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *7 (D. Del. Nov. 19, 2018) (same).

A. The Percentage Method is the Preferred Method in this Circuit for Awarding Attorneys' Fees in Common Fund Class Actions

"Common fund cases . . . are generally evaluated using a 'percentage-of-recovery' approach, followed by a lodestar cross-check. The percentage-of-recovery approach compares the amount of attorneys' fees sought to the total size of the fund."

Halley v. Honeywell Int’l, Inc., 861 F.3d 481, 496 (3d Cir. 2017) (citation omitted).

“Courts in the Third Circuit have repeatedly approved the percentage-of-recovery method of awarding fees in common fund . . . cases ‘because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.’” *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *8 (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)); *see also Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, 2014 WL 12778314, at *7 (E.D. Pa. Sept. 15, 2014) (“The ‘percentage-of-the-fund’ method is an appropriate method for calculating attorneys’ fees in complex, common-fund class actions”).

The Third Circuit has “identified several factors to consider in determining whether attorneys’ fees are reasonable under the percentage-of-recovery approach, including, *inter alia*[:]”

- (1) the size of the fund created and the number of persons benefitted;
- (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
- (3) the skill and efficiency of the attorneys involved;
- (4) the complexity and duration of the litigation;
- (5) the risk of nonpayment;
- (6) the amount of time devoted to the case by plaintiffs’ counsel;
- and (7) the awards in similar cases, and (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations,
- (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

Halley, 861 F.3d at 496 (quotations and citations omitted). These are known as the “*Gunter/Prudential*” factors. *See In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009)

(citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) and *In re Prudential*, 148 F.3d at 338-40).¹

B. An Award of One-Third of the Common Fund is Supported by the *Gunter/Prudential* Factors

The factors identified by the Third Circuit in *Gunter* and *Prudential* also show that Plaintiff's fee request is reasonable.

1. The Size of the Fund Created and the Number of Beneficiaries

Plaintiff's Counsel has obtained a \$5.5 million common fund for the benefit of 294 Class Members – over \$25,000 for each Class Member with vested account balances which is greater than recoveries in other ERISA class actions. Declaration of Daniel Feinberg ("Feinberg Decl.") at ¶ 19. Thus, the size of the common fund created by Plaintiff's Counsel and the number of persons who will benefit from it both weigh in favor of the requested fee.

2. The Absence of Substantial Objections by Class Members

The Notice sent to the Settlement Class disclosed that Plaintiff would seek an award of attorneys' fees up to one-third of the Common Fund, and Plaintiff's Counsel has requested less than that amount. To date, no objections to the Settlement or the fee award have been filed. Salinas Decl. ¶ 11.³

³ In the event that any objections are filed before the August 25, 2021 deadline, Plaintiff's Counsel will respond to those objections separately.

3. The Skill and Efficiency of the Attorneys

“The Third Circuit has explained that the goal of the percentage fee-award device is to ensure ‘that competent counsel continue to undertake risky, complex, and novel litigation.’” *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (quoting *Gunter*, 223 F.3d at 198). Lawyers bringing a class action under ERISA must be knowledgeable about this complex and developing area of law, the many potential substantive and procedural pitfalls, be willing to risk dismissal at any stage, and be prepared to pursue many years of litigation. ERISA has been described as a “comprehensive and reticulated statute.” *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361 (1980). Plaintiff’s Counsel were able to successfully litigate this case because they are experts in this area of law. Plaintiff is represented by some of the most experienced ERISA lawyers in the country. Declaration of Gregory Porter (“Porter Decl.”) at ¶¶ 7-12; Feinberg Decl. ¶¶ 4-9. As this Court recognized in a previous ESOP case, Plaintiff’s Counsel have experience with complex ERISA litigation and have been deemed to be fair and adequate representation for similarly situated classes. *See Guidry v. Wilmington Tr.*, 333 F.R.D. 324, 330 (D. Del. 2019).

Plaintiff’s Counsel are experienced in ERISA class action litigation. Gregory Porter has been litigating ERISA fiduciary breach lawsuits since 1998. Porter Decl. ¶¶ 7-10. Those cases include numerous ERISA class actions challenging ESOP

transactions like this one. *See Brundle v. Wilmington Trust Ret. & Int'l Servs. Co.*, 241 F. Supp. 3d 610 (E.D. Va. 2017) (\$29.7 million trial judgment), *aff'd* 919 F.3d 763 (4th Cir. 2019); *Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016) (reversing trial court ruling on motion to dismiss in an ESOP class action); *Jessop v. Larsen*, No. 14-cv-00916 (D. Utah) (\$19.8 million settlement secured for ESOP plan participants in 2017); *Nistra v. Reliance Tr. Co.*, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018) (\$13.36 million settlement in ESOP litigation after a week of trial). Porter Decl. ¶ 8.

Plaintiff's Counsel Daniel Feinberg has been litigating ERISA cases since 1989. Feinberg Decl. ¶ 5. Mr. Feinberg's experience likewise includes numerous ERISA actions challenging ESOP transactions. *See Woznicki v. Raydon Corp.*, 2020 WL 1270223, at *1 (M.D. Fla. Mar. 16, 2020) (appointing Daniel Feinberg as co-counsel for class in ESOP action; subsequently settled for \$2.4 million); *Pfeifer v. Wawa, Inc.*, 2018 WL 4203880, at *3 (E.D. Pa. Aug. 31, 2018) (awarding \$5 million in attorneys' fees following settlement of ESOP class action for \$25 million); *Cunningham v. Wawa, Inc.*, 2021 WL 1626482, at *3 (E.D. Pa. Apr. 21, 2021) (approving \$21.6 million settlement of ESOP class action); *Douglin v. GreatBanc Tr. Co.*, 115 F. Supp. 3d 404, 408 (S.D.N.Y. 2015) (appointing Daniel Feinberg as co-counsel for class in ESOP action; subsequently settled for \$4.75 million); *Vincent v. Reser*, 2013 WL 621865, at *2 (N.D. Cal. Feb. 19, 2013) (awarding attorneys'

fees following settlement of ESOP class action for \$5.125 million); *Neil v. Zell*, 753 F. Supp. 2d 724 (N.D. Ill. 2010) (granting summary judgment on prohibited transaction claim arising from the Tribune Company ESOP transaction; subsequently settled for \$32 million).

Plaintiff's Counsel were able to leverage their vast experience and expertise in ESOP litigation to achieve a positive and meaningful benefit to the Class. The complexity of such litigation is substantial and supports Plaintiff's Counsel's fee request. Plaintiff's Counsel has obtained a substantial cash recovery for the Class, where the risks and uncertainties of continued litigation could result in no recovery for the Class whatsoever, even after years of costly litigation. This factor supports approval.

4. The Complexity and Duration of the Litigation

Courts have recognized that ERISA class actions like this one are particularly complex. *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *3 (E.D. Pa. Feb. 28, 2020); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) ("ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation."); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) (noting that ERISA 401(k) cases are "particularly complex").

This case involves complex statutory interpretation and damages issues. It has already been pending for over two years. Continuing the litigation would have resulted in additional complex and costly proceedings, including extensive discovery, summary judgment motions, a trial and possible appeal, which would have significantly delayed any relief to Class Members (at best), and might have resulted in no relief at all. ERISA class actions can take many years to resolve. *See Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *1 (E.D. Pa. Apr. 5, 2019) (settling ERISA class action after nearly nine years of litigation); *High St. Rehab., LLC v. Am. Specialty Health Inc.*, 2019 WL 4140784, at *1 (E.D. Pa. Aug. 29, 2019) (settling ERISA class action after nearly seven years). *See also Tussey v. ABB Inc.*, 2017 WL 6343803, at *1 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed); *Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (resolving case after nine years of litigation).

The Settlement will result in payments funds to Class Members now, rather than years from now.

5. The Risk of Non-Payment

The risk of non-payment is a significant factor in considering an award of attorney fees. *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *7 (D.N.J. Nov. 28, 2007). Where, as here, Plaintiff's Counsel's representation is undertaken on a wholly contingent basis, they assume a substantial risk that they might not be

compensated for their efforts. *Martin v. Foster Wheeler Energy Corp.*, 2008 WL 906472, at *4 (M.D. Pa. Mar. 31, 2008); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *7.

In class action litigation, “[s]uccess is never guaranteed,” and trials are unpredictable. *Martin v. Foster Wheeler*, 2008 WL 906472, at *4. Here, Plaintiff’s Counsel “accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award.” *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 281 (3d Cir. 2009) (citation omitted). In prosecuting this case, Plaintiff’s Counsel faced risks in establishing liability, proving the amount of the ESOP’s losses, and defending any judgment on appeal. *In re Rite Aid*, 396 F.3d at 304.

These risks are discussed fully in Plaintiff’s Motion for Final Approval and include disputes regarding the ESOP Transaction and the accuracy of NSD’s projections; whether the valuation methods employed by Wilmington Trust and its advisors were proper; and whether there were negative facts that were ignored by or not sufficiently investigated by Wilmington Trust during the due diligence and negotiation process.

Throughout the litigation, Wilmington Trust and the Individual Defendants have vigorously denied all of the allegations, asserted affirmative defenses and otherwise defended their actions with respect to the ESOP Transaction. There was a

substantial investment in NSD by a third-party private equity fund at a much higher valuation than the price paid by the NSD ESOP in the ESOP Transaction, resulting in a \$104 million dividend payment to participants. Furthermore, the third-party private equity investment implies a \$650 million valuation of NSD, almost double the price paid by the NSD ESOP in the ESOP Transaction. Ultimately, these subsequent events made the outcome of further litigation uncertain at best. If the Action were to proceed through trial, Plaintiff would have to overcome these defenses and arguments.

Plaintiff and Defendants also strongly disagree on damages. Defendants contend that the Plan and its participants were not harmed at all. Plaintiff, however, argued that the Plan incurred significant financial loss through its overpayment for NSD shares. Class Counsel retained an expert to assess the potential value of Plaintiff's claims. That core dispute had not been resolved at the time the Parties reached their Settlement and the uncertainty put the Parties at great risk.

6. The Amount of Time Devoted to the Case by Plaintiff's Counsel

To date, Plaintiff's Counsel have devoted approximately 600 hours of attorney and paralegal time to this action including: investigating the transaction and drafting the complaint; responding to Defendants' motions to dismiss or transfer the case; reviewing thousands of pages of documents; and analyzing valuation issues with an expert. Feinberg Decl. ¶14. The amount of time spent by Plaintiff's Counsel

demonstrates a significant commitment of resources to this litigation, and supports the reasonableness of the requested fee.

7. Awards in Similar Cases

The fee of 30% of the common fund requested by Plaintiff's Counsel is consistent with the percentage awarded in many common fund fee awards in this Circuit. *See Rossini v. PNC Fin. Servs. Grp., Inc.*, 2020 WL 3481458, at *19 (W.D. Pa. June 26, 2020) ("a percentage award of 33.3% falls squarely within the range of awards found to be reasonable by the courts."); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *8 (providing that fees of 25% to 33 1/3% of the recovery are typical in similar cases); *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *9 (E.D. Pa. Apr. 11, 2007) (awarding one-third of common fund); *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) ("[C]ourts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."). Likewise, a fee award of 30% of the common fund is consistent with fees awarded in other ERISA class actions. *See, e.g. Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *3 (D. Md. Jan. 28, 2020) (awarding one-third in ERISA class action). Finally, a fee award of 30% of the common fund is consistent with fee awards in many ESOP class actions. *See, e.g., Kaplan v. Houlihan Smith & Co.*, 2014 WL 2808801, at *3 (N.D. Ill. June 20, 2014) (awarding 30% of common fund); *Chesemore v. All. Holdings, Inc.*, 2014 WL 4415919, at *7 (W.D. Wis. Sept.

5, 2014) (awarding 35% of common fund), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016).

8. The Value of Benefits Attributable to the Efforts of Plaintiff's Counsel Relative to the Efforts of Other Groups

Here, “[t]he entirety of the value achieved for the Class was attributable to Class counsel; no other groups, such as government agencies conducting investigations, were involved in this case.” *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010) (approving 33.1% fee in consumer class action). As such, this factor supports the fee requested.

9. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement at the Time Counsel Was Retained

Plaintiff's Counsel's fee request for 30% of the common fund is reasonable in light of the contingency percentage that would have been negotiated in a private retainer agreement. *Pfeifer*, 2018 WL 4203880, at *13 (observing that in private contingency cases, the fee is between 30% and 40% of the recovery); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013) (“reasonable, paying clients typically pay one-third of their recoveries under private retainer agreements.”). In this case, Plaintiff entered into a contingency representation agreement with Plaintiff's Counsel for a fee of up to 33 1/3% of the recovery, plus reimbursement of expenses and costs. *Feinberg Decl.* ¶ 21. Thus, the common fund fee sought here

is consistent with Plaintiff Counsel’s contingent agreement with Plaintiff. This factor, too, favors the requested fee.

10. Any Innovative Terms of Settlement

Finally, the Settlement Agreement permits Class Members to roll over their settlement payments into an IRA or another tax-qualified plan in order to take advantage of tax benefits for retirement accounts. D.I. 54-1 § 8.2.2.

11. The Lodestar Cross-Check Further Supports the Requested Fee Award to Plaintiff’s Counsel

Courts may also award attorneys’ fees through the lodestar method – multiplying “the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services.” *Sullivan v. DB Inv. Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (citation omitted). Where the litigation creates a common fund, such as this case, however, the lodestar is a “cross-check of the court’s primary fee calculation using the percentage-of-recovery methodology.” *Prudential*, 148 F.3d at 342. Because the lodestar calculation serves only as a verification of the primary calculation, it “need entail neither mathematical precision nor bean-counting.” *In re Rite Aid*, 396 F.3d at 305-06 (approving as “proper” an “abridged lodestar analysis” as cross-check for percentage-of-recovery calculation); *see also Stevens*, 2020 WL 996418, at *12 (“The Court need not receive or review actual billing records when conducting [a lodestar cross-check] analysis”); *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 310 (E.D. Pa. 2003) (lodestar cross-check “only meant to be

a cursory overview”). The lodestar cross-check is “suggested,” but not mandatory. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 735 (3d Cir. 2001); *see also Moore v. GMAC Mortg.*, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (same). “The lodestar cross-check, while useful, should not displace a district court’s primary reliance on the percentage-of-recovery method.” *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006).

Here, the lodestar cross-check confirms that Plaintiff’s Counsel’s fee request is reasonable. The lodestar attorneys’ fees are \$423,690.00, as summarized in the chart below. The chart includes hours for attorneys’ and paralegals at current hourly rates:⁴

Law Firm	Hours	Fees
B&G	389.3	\$256,411.50
FJWW	196.3	\$167,278.50
Total:	585.6	\$423,690.00

The requested percentage of the common fund award constitutes a lodestar multiplier of approximately 3.9 is comparable to what has been awarded in this Circuit and reasonable given the risks involved and complexity of the case. The

⁴ Upon the Court’s request, Class Counsel will submit detailed contemporaneous billing records under seal.

Third Circuit has repeatedly observed that multipliers “ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.” *In re Diet Drugs*, 582 F.3d at 545 (quoting *In re Prudential*, 148 F.3d at 341); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approving lodestar multiplier of 6.96); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (approving lodestar multiplier of 6.16 in ERISA class action and noting that “multiples ranging from 1 to 8 are often used in common fund cases”); *Demaria v. Horizon Healthcare Servs., Inc.*, 2016 WL 6089713, at *5 (D.N.J. Oct. 18, 2016) (“A multiplier of 4.3 is consistent with the considerable risks that counsel faced in taking on this litigation, and the sophisticated legal work required to achieve success”); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2015 WL 12843830, at *6 (E.D. Pa. Oct. 15, 2015) (approving 4.12 lodestar multiplier which “is within the range of those frequently awarded in common fund cases”).

IV. PLAINTIFF’S COUNSEL’S HOURLY RATES ARE REASONABLE GIVEN THE EXPERIENCE, SKILL, AND EXPERTISE REQUIRED TO LITIGATE A COMPLEX ERISA CASE

A. The Relevant Community for Complex ERISA Class Action Attorneys is a National Market

Complex cases arising under ERISA, such as this one, “demand[] a quality of service for which relatively expensive representation is to be expected.” *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 477 (E.D. Pa. 1995); *see Pfeifer*, 2018 WL 4203880, at *14 (finding Plaintiff’s Counsel’s “hourly rates

are reasonable given the complexity of this ERISA action and the skill and experience of the attorneys involved”). Moreover, “in certain highly specialized areas of law, such as ERISA, the relevant legal community is national in scope.” *Frommert v. Conkright*, 223 F. Supp. 3d 140, 151 (W.D.N.Y. 2016), *amended on other grounds*, 2017 WL 3867795 (W.D.N.Y. May 4, 2017); *Pfeifer*, 2018 WL 4203880, at *14 (recognizing “a national market for ERISA class action attorneys”). The rates are also reasonable “given the complexity of this ERISA action and the skill and experience of the attorneys involved.” *Pfeifer*, 2018 WL 4203880, at *14. The Seventh Circuit recognized more than 20 years ago that “very few areas of the law are as unsettled and complex as ESOP valuation.” *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995). “Such uncertainty increases the risk an attorney faces. Plaintiffs claiming a breach of fiduciary duty do not often succeed.” *Id.* That observation remains true today.

As a result, courts have concluded that “the market for legal services” by plaintiffs’ firms handling ERISA breach of fiduciary duty cases “is a national one.” *Beesley v. Int’l Paper Co.*, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014); *see Amos v. PPG Indus., Inc.*, 2015 WL 4881459, at *9 (S.D. Ohio Aug. 13, 2015) (“In ascertaining the proper ‘community,’ district courts may look to national markets, an area of specialization, or any other market they believe is appropriate to fairly compensate attorneys in individual cases”) (internal quotes omitted); *Boxell v. Plan*

for Grp. Ins. of Verizon Commc'ns, Inc., 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 . . . there is a national market for the services of those attorneys.”); *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003) (“it is appropriate to consider the declarations of attorneys in other jurisdictions because ERISA cases involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts”). Here, “the subject matter—ERISA benefits, involving numerous beneficiaries—required special expertise, . . . it was reasonable for plaintiffs to use out-of-district counsel, and . . . the hourly rates to be applied here are not strictly bound by what would be typical for counsel from this district.” *Frommert*, 223 F. Supp. 3d at 151. Thus, the hourly rates for Class Counsel should take into consideration the rates for counsel with similar expertise in ERISA class actions.

The declarations submitted by Lynn Sarko and R. Joseph Barton confirm that ERISA class actions are a highly specialized area of law, the relevant legal community is national in scope and there are only a handful of law firms with expertise in representing plaintiffs in ESOP class actions. *Feinberg Decl. Ex. A*, *Sarko Decl.* ¶¶ 8, 13; *Feinberg Decl. Ex. B*, *Barton Decl.* ¶¶ 10, 13. The hourly rate for Mr. Feinberg, an attorney with 30 years of experience, is \$975. *Feinberg Decl.*

at ¶ 13. The Eastern District of Pennsylvania recently approved Mr. Feinberg's hourly rate in the lodestar crosscheck for an ERISA class action settlement. *Cunningham*, 2021 WL 1626482, at *8. The hourly rate for Mr. Porter, an attorney with 20 years of experience, is \$850. Porter Decl. at ¶ 24. The declarations of two experienced ERISA litigation attorneys submitted in support of this motion – Lynn Sarko and R. Joseph Barton – demonstrate that the requested hourly rates are in line with the market rate for ERISA litigators with comparable experience. Sarko Decl. at ¶¶ 7-8, 14; Barton Decl. at ¶¶ 14-15.

B. Counsel's Rates are Comparable to Hourly Rates in the Delaware Market for Complex Litigation

Class Counsel's hourly rates are comparable to the rates charged by counsel handling complex class actions in the Wilmington-area legal market. In 2018 a Court in this Circuit found that "rates ranging from \$235 to \$910 per hour" were "reasonable given the complexity of this ERISA action and the skill and experience of the attorneys involved." *Pfeifer*, 2018 WL 4203880, at *14. In 2017, another court in this Circuit found that rates ranging as high as \$825 per hour were "well within the range of what is reasonable and appropriate in this market." *Harshbarger v. Penn Mut. Life Ins. Co.*, 2017 WL 6525783, at *6, n.4 (E.D. Pa. Dec. 20, 2017). In an ERISA class action resolved over 10 years ago, a court in the District of New Jersey approved of hourly rates for attorneys between \$250 per hour and \$835 per hour and

rates for paralegals between \$150 per hour and \$255 per hour. *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *13 (D.N.J. Feb. 9, 2010). Once adjusted for the intervening 10 years, those rates demonstrate that Plaintiff's Counsel's rates are comparable to the rates charged by counsel in similarly complex class actions in nearby areas.

C. Plaintiff's Counsel's Rates Are Comparable to Those Charged by Defendants' Counsel

In evaluating the fees charged by Plaintiff's Counsel, it may be appropriate to consider the hourly rates charged by Defendants' counsel. *See Coal. To Save Our Children v. State Bd. of Educ. of State of Del.*, 143 F.R.D. 61, 64 (D. Del. 1992) ("The Third Circuit Court of Appeals has recognized that evidence of fees and expenditures of other parties may be relevant to the issue of the reasonableness of the petitioner's fees . . .") (citing *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984)). Counsel representing the Individual Defendants in this case, McDermott, Will & Emery LLP, sets its Partner rates as high as \$1,285. Porter Decl. Ex. 3, MWE Fee Application, *In re Melinta Therapeutics, Inc.*, No. 19-12748-LSS (D. Del. June 4, 2020), D.I. No. 682.

V. PLAINTIFF'S COUNSEL ARE ENTITLED TO REIMBURSEMENT OF EXPENSES

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the

prosecution of the class action.” *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1224-25 (3d Cir. 1995). Indeed, “[t]he common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred.” *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *3 n.6 (E.D. Pa. June 2, 2004) (quoting Report of The Third Circuit Task Force, 108 F.R.D. at 241). In *McDonough v. Toys R Us, Inc.*, the Court approved reimbursement to class counsel of over \$2 million in litigation expenses, including professional expert and consulting service and deposition costs. 80 F. Supp. 3d 626, 658 (E.D. Pa. 2015).

All the expenses were necessary and appropriate for the prosecution of this Action, and all are of the type that are customarily incurred in ERISA class action litigation. *Abrams*, 50 F.3d at 1224-25; Final Judgment, *Swain v. Wilmington Tr., N.A.*, No. CV 17-71-RGA-MPT (D. Del. June 9, 2020), D.I. 123 at 5 (approving \$776,280 in expenses in ESOP litigation that settled at a later stage but expert expenses accounted for 86% of total). To date, Plaintiff’s Counsel have advanced \$51,730.12 in prosecuting this case and are entitled to full reimbursement of this amount. Feinberg Decl. at ¶ 16. This total amount is comprised of ordinary litigation expenses such as copying, consulting experts, and process servers. *Id.* Plaintiff’s

Counsel kept expenses at a reasonable level and incurred only costs that were necessary for the prosecution of this action. *Id.*⁵

VI. THE REQUESTED SERVICE AWARD IS REASONABLE AND SHOULD BE APPROVED

Courts commonly grant service awards in class action cases to compensate named plaintiffs for the time and effort they spent in assisting the prosecution of the action, the risks they incurred by being litigants, and any other burden they bore. *See Pfeifer*, 2018 WL 4203880, at *15 (approving \$25,000 incentive awards for class representatives who had “expended substantial time and effort on this litigation”); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *19 (“[T]he amount requested, \$25,000, is comparable to incentive awards granted by courts in this district and in other circuits.”); *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *25 (E.D. Pa. Aug. 14, 2006) (approving \$25,000 incentive award for class representative who “worked closely with Plaintiffs’ Counsel throughout the investigation, prosecution and settlement of the claims in this litigation”).

Here, Class Representative Kristina Fink seeks a service award in the amount of \$10,000 for the substantial time and effort expended on this class action, as well as the significant risk borne. The Class Representative has played an integral role in fact-gathering for this case by providing key documents and background information

⁵ Upon the Court’s request, Plaintiff’s Counsel will provide an itemized list of litigation expenses under seal.

and gathering information from other former NSD employees. Feinberg Decl. ¶ 22. This case was filed as a result of the initiative of this ESOP participant. *Id.* She consulted with her counsel numerous times during the litigation. *Id.* She was readily available by telephone or email and was extremely responsive. *Id.* As a result of her efforts, the Class obtained a \$5.5 million settlement that translates into an average of approximately \$25,000 (before deduction of fees and expenses) per Class Member.

Additionally, as her name is now publicly available as a Plaintiff and Class Representative in a lawsuit against her former employer, she will now have to live with the potential stigma of having sued her former employer. *See, e.g., Guippone v. BH S & B Holdings, LLC*, 2011 WL 5148650, at *7 (S.D.N.Y. Oct. 28, 2011) (“Today, the fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person.”); *Connolly v. Weight Watchers N. Am. Inc.*, 2014 WL 3611143, at *4 (N.D. Cal. July 21, 2014) (recognizing that plaintiffs “assumed the risk of being stigmatized or disfavored by their current or potential future employers by suing their employer”). A service award is particularly appropriate where, as here, there has been media attention. *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *36 (C.D. Cal. Nov. 23, 2013).

For these reasons, the Class Representative's contributions to the recovery obtained for the Class merit a service award of \$10,000.

VII. CONCLUSION

For the reasons above, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for attorneys' fees, reimbursement of expenses to Plaintiff's Counsel, and a service award to the Class Representative. Plaintiff has submitted a Proposed Order and will submit a revised Proposed Order with her Motion for Final Approval of Class Action Settlement.

Dated: August 2, 2021

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