IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RODNEY CHOATE, on behalf of the MRMC ESOP, and on behalf of a class of other persons similarly situated, Plaintiff, v. WILMINGTON TRUST, N.A. as successor to Wilmington Trust Retirement and Institutional Services Company, Defendant.	No. 1:17-cv-250-RGA

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARD

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I. INTRODUCTION

This ERISA class action settled after over three years of litigation involving extensive discovery that included fifteen fact and five expert depositions, motion practice that included cross-motions for summary judgment and a motion for class certification, and arm's length negotiations that spanned months. The Parties agreed to settlement terms when the case was ready for trial.

To compensate them for their efforts, Class Counsel request a fee award of approximately 25% of the $19,500,000 Settlement Fund, or $4,800,000, which recognizes the excellent result they obtained for the Class given the risks they faced at trial and their high-quality work.[1] A lodestar crosscheck confirms the reasonableness of this request.

Class Counsel also request reimbursement of $1,200,000 in litigation costs, and request that the Court approve a Service Award to Plaintiff Rodney Choate in the amount $20,000 for his work on behalf of the Class. Captain Choate has actively participated in this action for three years. He responded to written discovery requests, assisted in Class Counsel's investigation, sat for deposition, conferred with Counsel on settlement discussions, and was ready and willing to testify at trial.

The proposed Final Judgment and Order Approving Class Settlement and Dismissal with Prejudice, attached as Exhibit A to Plaintiff's Motion for Final Approval, addresses these requests as well.

II. STATEMENT OF FACTS

A. Plaintiff and His Counsel Vigorously Litigated On Behalf Of The Class

Following an investigation, Plaintiff Lyle Guidry filed this class action on March 10,

[1] Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

2017 on behalf of participants and beneficiaries of the MRMC Employee Stock Ownership Plan ("Plan" or "ESOP"). Plaintiff Rodney Choate filed a related action on April 28, 2017, and the two actions were consolidated on May 17, 2017. (D.I. 12.) Mr. Guidry died during the pendency of the Action leaving Captain Choate as the sole named Plaintiff. (D.I. 124.)

Plaintiff alleged that Defendant Wilmington Trust, the ESOP trustee, violated ERISA when it purchased Martin Resource Management Corporation ("MRMC") stock in transactions on October 2, 2012 and December 23, 2013 (the "ESOP Transactions"). Specifically, his Complaint alleged that Wilmington Trust violated ERISA § 406, 29 U.S.C. § 1106, because it engaged in a prohibited transaction under ERISA by, *inter alia*, causing the Plan to acquire MRMC shares from MRMC, members of the Martin family, and other selling shareholders for more than fair market value and violated the ERISA fiduciary duties of prudence and loyalty in the ESOP Transactions, *inter alia*, because the Transactions were part of a settlement of lawsuits between the members of the Martin family and were not primarily for the benefit of Plan participants.

The Parties engaged in extensive discovery. They served and responded to written discovery requests. Plaintiff's and Wilmington Trust's counsel received and reviewed almost 30,000 documents produced by MRMC, Wilmington Trust, and various non-parties. Plaintiff's Counsel retained and consulted with two experts, who prepared reports and rebuttal reports on valuation and due diligence. Wilmington Trust's counsel retained three experts, who prepared reports and rebuttal reports on similar topics.

The Parties also took 15 fact depositions. Plaintiff took the depositions of Wilmington Trust's employees, Wilmington Trust's financial advisors, MRMC executives (including CEO Ruben Martin, who was also a selling shareholder), an investment banker who advised MRMC

shareholders, and the financial advisor to the trustees of a prior MRMC ESOP. Wilmington Trust took the depositions of the named Plaintiff and witnesses who provided reports and testimony in prior litigation involving members of the Martin family.

Plaintiff filed a Motion for Class Certification (D.I. 80), which the Court granted on December 10, 2019. (D.I. 134 and 135.) After discovery was completed, the Parties filed cross-motions for summary judgment. (D.I. 99 and D.I. 103.) The Parties participated in a Pretrial Conference on November 25, 2019, and trial was set for December 9, 2019. (D.I. 130.)

The Court continued the trial date due to a schedule conflict. The Parties engaged in settlement discussions after the Court continued the trial date and agreed to a settlement in principle on January 28, 2020. (D.I. 139.)

B. Plaintiff and His Counsel Negotiated an Outstanding Settlement for The Class

In 2017 and in 2018, the Parties, through their counsel, participated in arm's length settlement discussions and, in 2019, sought the assistance of Mediator Robert A. Meyer, Esq. of JAMS. Declaration of Gregory Porter ("Porter Decl."), attached as Exhibit B to Plaintiff's Motion for Final Approval, ¶ 16. The Parties submitted comprehensive mediation statements to Mr. Meyer. *Id*. Although the Parties did not resolve the dispute during the in-person mediation, Mr. Meyer continued to mediate the lawsuit. *Id*. Ultimately, after the case was ready for trial, Mr. Meyer made a mediator's proposal that the Parties accepted on January 28, 2020. *Id*. The process of documenting the Settlement continued in the weeks following agreement to the mediator's proposal. *Id*. The final settlement terms are set forth in the Settlement Agreement filed as an Exhibit to Plaintiff's Motion for Preliminary Approval. (D.I. 145-1.)

The proposed Settlement requires Wilmington Trust to pay $19.5 million into a "Settlement Fund." Settlement Agreement ¶¶ 7.2, 7.3. Subject to Court approval, the Settlement

Fund will be used to make payments to Class Members; pay the Settlement Administrator the costs of Class Notice and Settlement Administration Expenses; pay a Service Award in the amount of $20,000 to the named Plaintiff; and pay Class Counsel's attorneys' fees and expenses in an amount not to exceed $6,000,000. *Id*. ¶¶ 8.2, 9.1. Litigation expenses total over $1,200,000. Porter Decl. ¶¶ 25, 26; Declaration of Daniel Feinberg ("Feinberg Decl."), attached as Exhibit D to Plaintiff's Motion for Final Approval, ¶ 14. Class Counsel's fee request is $4,800,000. After payment of Court-approved administrative expenses, attorneys' fees and expenses, and Service Award, the Settlement Fund will be distributed to Class Members in accordance with the Plan of Allocation, based on the proportion to the company shares that he or she held in the ESOP. Settlement Agreement ¶ 8.2.2.2. No claims are required.

There are approximately 3,200 Class Members to whom claims administrator Angeion provided notice. See Declaration of Daniela Bracy of Angeion ("Bracy Decl.") ¶¶ 4-7, attached as Exhibit C to Plaintiff's Motion for Final Approval. Class Counsel estimate that on average each Class Member will receive almost $6,100, before Court approved deductions. Porter Decl. ¶ 17.

C. The Court Grants Preliminary Approval Of The Proposed Settlement

On April 16, 2020, Plaintiff filed his Unopposed Motion and Incorporated Memorandum of Law for Preliminary Approval of Settlement. (D.I. 144.) On April 17, 2020, this Court granted preliminary approval of the Settlement and approved the issuance of Class Notice. (D.I. 146.)

D. The Parties Satisfied the Notice Requirements

The Notice Plan approved by the Court was implemented by the Parties. Class Notice was mailed to Class Members in accordance with the schedule contained in the Order Granting Preliminary Approval (D.I. 146 at 3) and a website was established with detailed information about the Settlement.

III. ARGUMENT

A. The Percentage Of Fund Method Is The Appropriate Method For Determining A Reasonable Attorneys' Fee In This Case

The Supreme Court has long recognized that "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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The common fund doctrine is 'based on the equitable notion that those who have benefited from litigation should share its costs,' and that unless the costs of litigation are spread to beneficiaries of the fund they will be unjustly enriched by the attorney's efforts." *Petruzzi's Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 603 (M.D. Pa. 1996) (quoting Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 15 (Oct. 8, 1985), 108 F.R.D. 237, 237 (1985)).

The Third Circuit favors the percentage of fund method when the fee is paid from a common fund. *Godshall v. Franklin Mint Co*., 2004 WL 2745890, at *5 (E.D. Pa. Dec. 1, 2004) (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 333 (3d Cir.1998)); *see also Dewey v. Volkswagen Aktiengesellschaft*, 558 Fed. App'x. 191, 196-97 (3d Cir. 2014) (accord). That method "allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re AT&T Corp. Secs. Litig*., 455 F.3d 160, 164 (3d Cir. 2006) (citation omitted). The percentage-of-the-fund method thus "'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, Inc. v. Visa U.S.A.*, 396 F.3d 96, 122 (2d Cir. 2005) (citation omitted). Even so, courts sometimes use a second method, the lodestar method, "to cross-check" their initial fee calculation. *In re Rite Aid Corp. Secs. Litig*., 396 F.3d 294, 300 (3d Cir. 2005). But "[t]he 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. Secs. Litig.*, 455 F.3d at 164.

Ultimately, "[t]he awarding of attorneys' fees in a class action settlement is within the Court's discretion, provided that the Court thoroughly analyzes and reviews an application for such fees." *Landsman & Funk, P.C. v. Skinder-Strauss Assocs*., 2015 WL 2383358, at *7 (D.N.J. May 18, 2015), *aff'd*, 639 F. App'x 880 (3d Cir. 2016) (citing *In re Rite Aid*, 396 F.3d at 299).

B. The Requested Fee Will Fairly Compensate Class Counsel For Their Work On Behalf Of The Class

In determining a reasonable award under the percentage-of-recovery approach, the Third Circuit directs district courts to consider the ten factors identified in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the "*Gunter/Prudential* factors"), which are:

> (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 plaintiff's counsel; (7) the awards in similar cases; (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.

Gunter, 223 F.3d at 195 n.1; *see also Prudential*, 148 F.3d at 336-40; *In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009). The relevant factors here support a fee award of approximately 25% of the Settlement Fund, or $4,800,000.

1. The Size Of The Fund Created And The Number Of Persons Benefitted

The Class includes approximately 3,200 Plan participants. Each Class Member will receive a *pro rata* benefit from the Settlement Fund. Settlement Agreement ¶ 8.2.2. Class

Counsel estimates that on average, each Class Member's benefit before the deduction of Court approved fees costs, administrative expenses, and a Service Award will be about $6,100, which is greater than recoveries in other ERISA class actions. Porter Decl. ¶ 16. *See also* Plaintiff's Motion for Final Approval of Settlement at p.16-18. Thus, the size of the Settlement fund created by Class Counsel and the number of persons who will benefit from it both weigh in favor of the 25% fee requested.

2. The Presence Or Absence Of Substantial Objections

The Notice issued to the Settlement Class disclosed that Plaintiff would seek an award of attorneys' fees and expenses not to exceed $6 million in the aggregate, and Counsel has requested that amount. As of yet, no objections to the Settlement or the fee award have been filed. Bracy Decl. ¶ 14.[2]

3. The Skill And Efficiency Of The Attorneys Involved

The quality of the representation is relevant in determining fee awards. "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).

Given all the challenges discussed below, 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). Class Counsel were able to successfully litigate this case because they are experts in this area of law.

[2] In the event that any objections are filed before the September 10, 2020 deadline, Counsel will respond to those objections separately.

Plaintiff is represented by some of the most experienced ERISA lawyers in the country. Porter Decl. ¶¶ 8-13; Feinberg Decl., ¶¶ 4-8.

Class Counsel are pioneers in ERISA class action litigation. Gregory Porter has been litigating ERISA fiduciary breach lawsuits since 1998. Porter Decl. ¶¶ 8-11. Those cases include numerous ERISA 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 Trust Co.*, 16-cv-4773 (N.D. Ill.) ($13.36 million settlement in Bradford Hammacher ESOP litigation after a week of trial); *Swain v. Wilmington Tr., N.A.*, No. CV 17-71-RGA-MPT, 2018 WL 934598 (D. Del. Feb. 16, 2018) (denying in part motion to dismiss; case later settled for $5 million); *Casey v. Reliance Trust Co.*, 18-cv-424 (E.D. Tex.) (D.I. 176) ($6.25 million settlement). Porter Decl. ¶ 9.

Class Counsel Daniel Feinberg has been litigating ERISA cases since 1989. Feinberg Decl. ¶¶ 4-6. Mr. Feinberg's experience likewise includes numerous ERISA actions challenging ESOP transactions. *See Neil v. Zell*, 753 F. Supp. 2d 724, 726 (N.D. Ill. 2010) (granting summary judgment on prohibited transaction claim arising from the Tribune Company ESOP transaction; subsequently settled for $32 million); *Pfeifer v. Wawa, Inc.*, 214 F. Supp. 3d 366, 370 (E.D. Pa. 2016) (denying motion to dismiss claims arising from forced liquidation of former participants' stock in Wawa ESOP; subsequently settled for $25 million); *Vincent v. Reser*, No. C 11-03572 CRB, 2013 WL 621865, at *2 (N.D. Cal. Feb. 19, 2013) (awarding attorneys' fees following settlement of ESOP class action for $5.125 million); *Woznicki v. Raydon Corp.*, No.

618CV2090ORL78GJK, 2020 WL 1270223, at *1 (M.D. Fla. Mar. 16, 2020) (appointing Daniel Feinberg as co-counsel for class in ESOP action; pending settlement for $2.4 million); *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).

Class 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 fee request. Class Counsel has obtained a substantial non-reversionary 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. *See 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 *2 (S.D. Ill. July 15, 2015) (noting that ERISA 401(k) cases are "particularly complex").

This case in particular involves complex statutory interpretation issues, damages issues, and class certification issues. It has already been pending for over three years. Continuing the litigation would have resulted in additional complex and costly proceedings, including 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 Street 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 *3 (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 filed on September 11, 2006).

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

5. The Risk Of Nonpayment

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, Class 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*, at *4. Here, Class 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). In prosecuting this case, Class 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 Transactions and the accuracy of MRMC'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 vigorously denied all the allegations, asserted affirmative defenses and otherwise defended its actions with respect to the ESOP Transactions. Wilmington Trust pointed to evidence of a subsequent purchase of an interest in MRMC's rights as General Partner of Martin Midstream Limited Partnership by a third party, which in its view, supported the conclusion that it has no liability. It also retained experts who supported such conclusions. If the Action were to proceed through trial, Plaintiff would have to overcome these defenses and arguments.

Plaintiff and Wilmington Trust also strongly disagree on damages. Wilmington Trust contends that the Plan and its participants were not harmed at all. Plaintiff, on the other hand, argued that the Plan incurred significant financial damage through its overpayment for MRMC shares. The Parties have exchanged expert reports supporting their differing views on damages and were prepared to present their positions at trial. That core dispute had not been resolved at the time the Parties reached their Settlement and the uncertainty put both Parties at great risk.

These fact intensive inquiries would have led to a battle of experts and conflicting evidence and testimony, which would have placed the ultimate outcome of the litigation in doubt, because no party could reasonably be certain that its expert or evidence would carry the day.

The risk factor weighs in favor of approval.

6. The Amount of Time Devoted to The Case By Class Counsel

Class Counsel has, to date, collectively expended approximately 4,100 hours litigating this case since its inception. Porter Decl. ¶¶ 20, 22; Feinberg Decl. ¶ 11. This results in an aggregate lodestar to date of approximately $2,625,000. Porter Decl. ¶ 20. The amount of time spent by Class Counsel demonstrates a significant commitment of resources to this litigation, and the lodestar cross check confirms the reasonableness of the 25% fee.

A lodestar "cross-check" is performed by "multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Schuler v. Meds. Co.*, 2016 WL 3457218, at *10 (D.N.J. June 24, 2016) (quoting *Rite Aid*, 396 F.3d at 305). After calculating the lodestar, the court can increase or decrease that amount by applying a lodestar multiplier. "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Diet Drugs*, 582 F.3d at 540 (citing *Rite Aid*, 396 F.3d at 305–06).

The 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); *Schuler v. Meds. Co.*, 2016 WL 3457218 (multiplier of 3.57 reasonable under the Third Circuit's precedent); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d at 172 (noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in ... a case [that] was neither legally nor factually complex"); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 741-42 (remanding the case and suggesting that a lodestar multiplier of 3 would be appropriate, even though the Third Circuit found the case was lacking in legal and factual complexity); *Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, at *24 (E.D. Pa. Apr. 22, 2005) (awarding fees as a percentage of the fund that translated to a 3.15 multiplier); *In re Ikon Office Sols., Sec. Litig.*, 194 F.R.D. 166, 195 (E.D. Pa. 2000) (conducting a lodestar cross-check of the percentage fee award and finding a 2.7 multiplier, calculated at counsel's then-current rates, to be well within an appropriate range); *Pfeifer v. Wawa, Inc.*, No. CV 16-497, 2018 WL 4203880, at *14 (E.D. Pa. Aug. 31, 2018) (same).

The fee requested here represents a lodestar multiplier of approximately 1.8, well within the range of multipliers routinely approved of in the Third Circuit, and is appropriate given the risks involved and the quality of counsel's work, described in subsections 5 and 3, *supra.*

7. Awards In Similar Cases

The fee requested is in line with awards in other ERISA class actions, both in this Circuit and in courts throughout the country.

While the Third Circuit has not set a benchmark percentage fee for common fund cases, the court has noted that reasonable percentage-based fee awards generally range from nineteen to forty-five percent of the common fund. *In re Gen. Motors*, 55 F.3d at 822. And, in complex ERISA class actions "courts in this Circuit and others also routinely award attorneys' fees in the amount of one-third of the total settlement fund." *Stevens*, 2020 WL 996418, at *12 (citing *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010) (awarding one-third fee)); *In re Schering-Plough Corp. Enhance ERISA Litig*., 2012 WL 1964451, at *1 (D.N.J. May 31, 2012) (awarding one third fee in ERISA case alleging defendants breached their fiduciary duties to Plan, particularly with regard to the Plans' holdings of Schering–Plough stock); *High St. Rehab*., *LLC*, 2019 WL 4140784, at *10 (awarding 33% fee in ERISA class action regarding health insurance benefits); *Krueger v. Ameriprise Fin., Inc*., 2015 WL 4246879, at *2, 4 (awarding one third fee in ERISA 401k class action settlement and citing numerous cases, noting that courts have consistently awarded one-third contingent fees in ERISA 401k breach of fiduciary duty cases). *See also Spano v. Boeing Co*., 2016 WL 3791123, at *2 (S.D. Ill. Mar. 31, 2016); *Will v. Gen. Dynamics Corp*., 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) (all awarding a fee of 33 1/3% of the monetary recovery in ERISA 401(k) excessive fee cases).

Thus, the requested fee of approximately 25% of the common fund is consistent with awards in similar cases.

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

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

"[T]he goal of the fee setting process is to 'determine what the lawyer would receive if he were selling his services in the market rather than being paid by Court Order.'" *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *15 (E.D. Pa. June 2, 2004). "'[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.'" *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 340 (E.D. Pa. 2007) (quoting *In re Ikon Office Sols.*, 194 F.R.D. at 194)). In this case, Plaintiff entered into a contingency representation agreement with Class Counsel for a fee of up to 33 1/3% of the recovery, plus reimbursement of expenses and costs. Feinberg Decl. ¶ 16. Thus, the 25% common fund fee sought here is within Class Counsel's contingent agreement with Plaintiff. This factor, too, favors the 25% fee requested.

10. Any Innovative Terms Of Settlement

Although this is a complex case, the terms of the Settlement are relatively straightforward. As such, "this factor neither weighs in favor nor against the proposed fee request." *Med. Mut. of Ohio v. Smithkline Beecham Corp.*, 291 F.R.D. 93, 105 (E.D. Pa. 2013) (lack of innovative terms is neutral factor).

C. Class Counsel's Expenses Are Reasonable and Should Be Reimbursed

"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 (quoting Report Of The Third Circuit Task Force, 108 F.R.D. at 241).

Class Counsel combined have paid out $1,205,939.18 in expenses on this case to date. Porter Decl. ¶ 25. Over 80% of expenses were fees paid to experts on valuation and due diligence issues. *Id.* The expenses and fees combined amount to $6 million, in accordance with the Settlement Agreement.

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; *Swain*, 17-cv-71, (D.I. 188-1, 123) (approving $776,280 in expenses in ESOP litigation that settled at an earlier stage but expert expenses accounted for 86% of total) . From the beginning of the case, Class Counsel were aware that they might not obtain any recovery as discussed above and, at the very least, would not recover anything until the Action was successful in producing a recovery. Class Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced to prosecute this Action. As set forth in the accompanying Porter Declaration, the expenses incurred are reasonable in the circumstances and should be approved. *See Tavares v. S-L Distribution Co.*, 2016 WL 1743268, at *15 (M.D. Pa. May 2, 2016) ("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.") (citations omitted); Porter Decl. ¶¶ 25-28.

D. The Requested Service Award Should Be Approved

Class Counsel also request a Service Award for Captain Choate for the time and effort he expended in prosecuting this case to a successful resolution. Such awards acknowledge the named plaintiff's efforts on behalf of the Class, as well as his promotion of the public interest. A service award of $20,000 to Plaintiff is reasonable. "Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 334 n.65 (3d Cir. 2011) (citation omitted). "'The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation,' and to 'reward the public service of contributing to the enforcement of mandatory laws.'" *Id.* (quoting *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011)).

Here, Plaintiff took steps to protect the interests of the Class and spent time pursuing the claims in this case. To start, Plaintiff's decision to pursue this case as a class action, and not simply seek individual damages, directly benefited the Class. Without Plaintiff's involvement there would be no Settlement Fund for the Class. Plaintiff was actively involved in the litigation, communicated with counsel, prepared for and sat for his deposition, and had made arrangements to appear at trial when the Parties agreed to settle.

Moreover, Plaintiff willingly put himself forward in litigation against his former employer regarding his personal finances. "ERISA litigation against an employee's current or former employer carries unique risks, including alienation from employers or peers." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *3 (issuing service awards of $25,000 each to five named plaintiffs alleging former employer selected 401(k) funds for disloyal reasons). In

recognition of Capt. Choate's commitment to the Class and selfless service, the requested Service Award is reasonable.

The requested Service Award is approximately one-tenth of one percent of the total Settlement Fund and is well within the range typically awarded in comparable cases. *See*, *e.g.*, *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *19 (approving $25,000 to each of five representatives); *Pfeifer*, 2018 WL 4203880, at *14 (approving $25,000 each to three representatives in ESOP class action); *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *6 (M.D.N.C. Sept. 29, 2016) (approving $25,000 service awards in ERISA action); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *3 (same); *Lockheed Martin*, 2015 WL 4398475, at *4 (same); *Godshall*, 2004 WL 2745890, at *6 (approving $20,000 in ERISA class action); *Tussey v. ABB, Inc*., 2012 WL 1113291, at *21 (W.D. Mo. Nov. 2, 2012) (awarding $25,000 to each class representative in ERISA 401(k) fee class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of $25,000 to class representative).

The Class Notice advised Class Members that Class Counsel intended to ask the Court for a Service Award up to $20,000 for Plaintiff for his service in representing the Class. Bracy Decl. ¶ 5. No Class Member has objected to the Service Award. *Id.* at ¶ 14.

For all of the foregoing reasons, the Service Award is "fair and reasonable" and should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve Class Counsel's request for a fee award of $4,800,000; reimbursement of $1,200,000 in litigation costs; and a Service Award to Plaintiff in the amount $20,000 for his work on behalf of the Class.

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