In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Regulations

Pursuant to Rule 23(h) of the Rules of the United States Court of Federal Claims ("RCFC" or "Rules"), Court-appointed Class Counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") and McChesney & Dale, P.C. ("McChesney & Dale" and, together with Kessler Topaz, "Class Counsel") respectfully submit this Motion for: (i) an award of attorneys' fees for Class Counsel in the amount of 25% of the Settlement Amount, net of expenses; (ii) payment of $513,631.77 for expenses reasonably and necessarily incurred by Class Counsel in prosecuting and resolving the Action; and (iii) a case contribution award to Class Representative Electrical Welfare Trust Fund ("EWTF" or "Class Representative") in the amount of $25,000.[1]

I. INTRODUCTION

After nearly a decade of hard-fought litigation, Class Counsel have achieved a tremendous result for the Exaction Class, successfully negotiating a $169,022,397.28 cash settlement ("Settlement") from the United States of America ("Government" or "Defendant").[2]

Class Counsel were the only firms willing to take on the significant risks associated with pursuing the Exaction Class's claims and the only firms to file such a lawsuit. After researching the Exaction Class's claims beginning in 2013, Class Counsel understood that the legal issues and Constitutional claims were novel and the litigation path was uncertain. Given the nature of the statute at issue, the language used by Congress when drafting the Affordable Care Act ("ACA"), the risk of *Chevron* deference, and the lack of case law analyzing the types of claims here, there

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Settlement Agreement dated February 16, 2024 (ECF No. 142-1) ("Settlement Agreement") and in the Declaration of Joseph H. Meltzer ("Meltzer Declaration" or "Meltzer Decl."), Appx. Ex. A. The Meltzer Declaration is an integral part of this submission and, for the sake of brevity herein, Class Counsel respectfully refers the Court to the Meltzer Declaration for a detailed description of, *inter alia*: the procedural history of the Action and Class Counsel's litigation efforts; the settlement negotiations; and the risks of continued litigation.

[2] All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

was no roadmap. While this dissuaded other firms from offering their services, Class Counsel pressed forward determined to achieve relief for the Exaction Class that felt it was treated unfairly under the ACA and its Transitional Reinsurance Program ("TRP"). They did this on ***a fully contingent basis***, shouldering all costs and receiving no fees during the course of the litigation. The litigation was not easy or quick, but it was highly successful.

Class Counsel's efforts resulted in an outstanding Settlement, which provides a recovery of ***over 91%*** of the Exaction Class's recoverable damages ***now*** while avoiding the risk and delay associated with litigating Defendant's pending appeal. The recovery is both meaningful and real for Exaction Class members. The average recovery for Exaction Class members, net of fees and expenses, is more than $350,000, with more than half of the Exaction Class (182 plans) receiving more than $100,000 each and almost 10% of the Exaction Class (30 plans) each receiving more than $1 million. This type of recovery is rare in class actions and is many times higher than the typical recovery in complex class cases like this one.

This substantial recovery is the result of Class Counsel's dedication and hard work. As detailed in the Meltzer Declaration, Class Counsel devoted more than 9,000 hours to the litigation. Class Counsel's efforts included: (i) conducting a wide-ranging investigation into the Exaction Class's claims; (ii) researching and preparing several detailed complaints based on that investigation; (iii) opposing (and defeating) Defendant's motion to dismiss in this Court; (iv) engaging in discovery, including participating in numerous meet and confers with Defendant over the scope of discovery; (v) successfully moving for class certification; (vi) overseeing a vigorous notice campaign, including the review and analysis of over 600 opt-in requests; (vii) defending the Exaction Class against Defendant's objections to Exaction Class membership, which would have erased nearly $100 million from the Judgment; (viii) successfully moving for summary judgment

and securing a Judgment for 100% of the Exaction Class's damages; and (ix) engaging in several weeks of settlement negotiations with Defendant and obtaining the Settlement—representing a mere 8.75% reduction on the total amount of the Court's Judgment.[3]

Class Counsel undertook this tremendous investment of time and resources litigating the novel and complex claims in the face of formidable opposition by the Government. To ultimately succeed, Class Counsel deployed a dedicated group of professionals to develop, support, and aggressively pursue the Action, including not only litigators skilled in complex class action litigation, but also highly experienced investigators, paralegals, and administrative staff.

As compensation for Class Counsel's successful efforts on behalf of the Exaction Class and the risks of nonpayment they faced in prosecuting the Action on a contingent basis, Class Counsel seek attorneys' fees in the amount of 25% of the Settlement Amount (net of expenses), or $42,120,941.38. As discussed below, the requested fee is well within the range of fees that courts have awarded in class actions with comparable recoveries. Moreover, the requested fee has the full support of EWTF, the Class Representative in this case, which is a sophisticated, self-administered group health plan that actively supervised Class Counsel's prosecution and resolution of the Action. EWTF has endorsed the requested fee as fair and reasonable based on the exceptional result achieved, the quality of the work performed by Class Counsel, and the risks of the litigation. *See* Appx. Ex. D, Declaration of Michael McCarron ("McCarron Decl.") at ¶ 14.

In light of the recovery obtained, the time and effort devoted by Class Counsel to the Action, the skill and expertise required, the quality of the work performed, the wholly contingent nature of the representation, and the considerable risks involved in litigating the Exaction Class's

[3] The Meltzer Declaration provides additional detail on these litigation efforts. Meltzer Decl., ¶¶ 9-121.

claims, Class Counsel respectfully submit that the requested fee is reasonable and should be approved by the Court. In addition, the expenses incurred by Class Counsel (in the total amount of $513,631.77) and the requested case contribution award to EWTF (in the amount of $25,000) are reasonable in amount and should be approved.

II. QUESTIONS PRESENTED

1. Should the Court approve Class Counsel's request for an award of attorneys' fees in an amount of 25% of the common fund, net of expenses?

2. Should the Court approve payment of Class Counsel's expenses in the amount of $513,631.77?

3. Should the Court award a case contribution award in the amount of $25,000 to EWTF?

III. STATEMENT OF THE CASE

As this Court knows, this case involves the ACA's TRP, a pool of funds meant to benefit commercial insurance issuers. 42 U.S.C. § 18061. Although EWTF and other Exaction Class members are self-insured, self-administered group health plans that do not use a third-party administrator ("SISAs"), the Department of Health and Human Services ("HHS") promulgated a rule requiring these entities to make TRP Contributions for benefit year 2014. 45 C.F.R. § 153.

On March 8, 2019, EWTF instituted this Action to recover the funds taken by Defendant in contravention of the ACA's plain language. ECF No. 1.[4] Thereafter, Defendant moved to

[4] Prior to filing the instant Action, EWTF filed an action against Defendant in the United States District Court for the District of Maryland in June 2016 ("2016 Action"), asserting claims under 28 U.S.C. § 1346(a)(1), the Admin. Procedures Act, 5 U.S.C. § 701 *et seq.*, the Due Process Clause, U.S. Const. amend. V, and the Takings Clause, U.S. Const. amend. V. The 2016 Action was ultimately dismissed for lack of subject matter jurisdiction and EWTF appealed to the Fourth Circuit. In November 2017, EWTF filed a complaint in this Court asserting substantially similar claims as the 2016 Action. The Government subsequently moved to dismiss on the basis that 28

dismiss the Action. ECF No. 6. Following oral argument, the Court entered an Order granting in part and denying in part Defendant's Motion to Dismiss and for Summary Judgment ("MTD Order"). ECF No. 22. As to EWTF's exaction claim, this Court found that the "plain language of section 18061(b)(1)(A) requir[ing] 'health insurance issuers, and third-party administrators on behalf of group health plans . . . to make [reinsurance contributions],'" did not apply to self-administered plans like EWTF. MTD Order, 155 Fed. Cl. 169, 183 (2021). The Court further held that "Defendant's interpretation is in complete contravention of . . . well-established tenet[s] of statutory interpretation and effectively reads 'third party administrators' out of the statute" and that "[i]f Congress meant that all group health plans would pay the TRP, it could have easily omitted its third-party administrator qualifier." *Id.* Further, the Court found that "HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency." *Id.* at 184. The Court dismissed Operating Engineers Trust Fund of Washington, D.C. ("OETF") and The Stone & Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund's ("Stone Masons") illegal exaction claim, but allowed these plaintiffs (and EWTF) to pursue takings claims.[5]

Following its MTD Order, the Court entered an initial Scheduling Order on September 1, 2021. ECF No. 27. EWTF, OETF, and Stone Masons (collectively, "Plaintiffs") filed an Amended Complaint on September 14, 2021 (ECF No. 28) and a Second Amended Complaint on May 2,

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U.S.C. § 1500 deprived this Court of subject matter jurisdiction over the claims during the pendency of the appeal in the Fourth Circuit. The parties subsequently stipulated to dismissal of the action without prejudice. This Action was filed after the Fourth Circuit affirmed dismissal. Meltzer Decl., ¶¶ 14-37.

[5] The Court also denied the Government's motion to dismiss the takings claims—prior to ultimately prevailing on its exaction claim, EWTF and all members of the subsequently certified Exaction Class pursued a takings claims. *Id.* at 188 n.11 (noting "if EWTF ultimately succeeds on its illegal exaction claim, it cannot also proceed under its Takings Claim").

2022 modifying the class definitions (ECF No. 59). At the parties' joint request, the schedule was twice extended. ECF Nos. 30, 47. The operative Scheduling Order ultimately provided separate tracks for Plaintiffs' illegal exaction claim and takings claim, which allowed the exaction claim to be brought to resolution on a more expeditious timeline. ECF No. 47. Meltzer Decl., ¶¶ 73-76.

Throughout the litigation, Class Counsel diligently pursued discovery from the Government. They served comprehensive interrogatories and discovery requests, and reviewed productions from the Government. Meltzer Decl., ¶¶ 50-79. EWTF also actively participated in discovery, submitting verified responses to 16 interrogatories and producing more than 2,000 pages of documents in response to Defendant's discovery requests. EWTF likewise actively supervised the litigation, and received regular updates from Class Counsel. McCarron Decl., ¶¶ 7-11.

The Court certified the Exaction Class on June 22, 2022. 160 Fed. Cl. 462, ECF No. 70. Class Counsel thereafter conducted a complex and thorough opt-in campaign, which lasted several months. This included an exhaustive notice campaign, near daily communications with putative Exaction Class members, a careful and thoughtful vetting process culminating in a final certification to the Court, and overcoming the Government's objections to Exaction Class membership. Meltzer Decl., ¶¶ 85-108. At the culmination of this process, Class Counsel submitted a Final Certification of the Exaction Class, which was ultimately accepted by the Court. Meltzer Decl., ¶¶ 96-108.

Following the Court's acceptance of the Final Certification of the Exaction Class, EWTF and the Exaction Class moved for summary judgment. Meltzer Decl., ¶¶ 109-112. The decision to defer a summary judgment motion was made so that the anticipated granting of judgment in favor of EWTF would apply to all Exaction Class members. Meltzer Decl., ¶ 111.

On December 21, 2022, the Court granted EWTF's Motion for Summary Judgment brought on behalf of the Exaction Class. ECF No. 97. The Court entered Rule 54(b) Judgment in favor of the Exaction Class on May 12, 2023, which represented 100% of all available damages. ECF No. 124.

On June 26, 2023, the Government filed a Notice of Appeal of the Judgment. ECF No. 128. The Parties subsequently negotiated a settlement, which resolved all claims brought by the Exaction Class in exchange for the Government's payment of roughly $169 million, or 91.25% of the Judgment amount. Meltzer Decl., ¶¶ 113-121.

IV. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Class Counsel Are Entitled to Fees from the Common Fund

The propriety of awarding attorneys' fees from a common fund is well established. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or 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 policy rationale for awarding attorneys' fees from a common fund is that "those who benefit from the creation of the fund should 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); *see also Moore v. United States*, 63 Fed. Cl. 781, 786 (2005) ("[C]lass counsel may request an award of fees from the common fund on the equitable notion that lawyers are entitled to reasonable compensation for their professional services from those who accept the fruits of their labors.").[6]

[6] "The precedent interpreting the Federal Rules of Civil Procedure applies with equal force to the comparable Rules of the Court of Federal Claims," *Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1253 n.4 (Fed. Cir. 2018), including case law evaluating fee awards, *Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1371 (Fed. Cir. 2023).

In addition to providing just compensation, an award of fair attorneys' fees from a common fund ensures that "competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").

B. The Court Should Calculate the Fee as a Percentage of the Common Fund

An award of attorneys' fees in a common-fund case is within "the sound discretion of the court, which must consider the individual circumstances of the case." *Moore*, 63 Fed. Cl. at 786.

Many courts, including Federal Claims courts, routinely employ the percentage-of-recovery method when determining a common fund fee award. *See, e.g.*, *Kane Cnty. v. United States*, 145 Fed. Cl. 15, 18 (2019) (awarding 33.33%); *Raulerson v. United States*, 108 Fed. Cl. 675, 680 (2013) (awarding 33%); *Quimby v. United States*, 107 Fed. Cl. 126, 133-34 (2012) (awarding 30%); *Ciapessoni v. United States*, 145 Fed. Cl. 564, 565 (2019) (awarding 25%); *Mercier v. United States*, 156 Fed. Cl. 580, 591 (2021) (awarding 20%). *See also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (noting percentage method "is generally favored 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'"). Indeed, courts across the country have overwhelmingly endorsed the percentage-of-the-fund method for determining an award of attorneys' fees in common fund cases. *See, e.g.*, *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020) (finding percentage-of-the-fund method "'overwhelmingly' preferred") (collecting cases).

Further, from a policy standpoint, the percentage-of-recovery method is preferable because it: (i) parallels the use of percentage-based contingency fee contracts, which are the norm in private

litigation; (ii) aligns the lawyers' interests with those of the class in achieving the maximum possible recovery in the shortest amount of time under the circumstances; and (iii) reduces the burden on the Court by eliminating the detailed and time-consuming analysis of time records. *See generally* Appx. Ex. F, Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.") at ¶¶ 9-12.

C. Class Counsel's 25% Fee Request Is Fair and Reasonable

In determining whether an award is fair and reasonable, Federal Claims courts are guided by the seven factors enumerated in *Moore v. United States*:

> (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award.

63 Fed. Cl. at 787.[7] Consideration of these factors here demonstrates that the fee requested by Class Counsel is reasonable.

1. The Quality of Counsel Supports the Requested Fee

"The quality of representation is best measured by results," which are "calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007); *see also In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("The single clearest factor reflecting the quality of class counsels' services to the class are the results obtained.").

Here, Class Counsel won outright the illegal exaction claim on behalf of the Exaction Class. ECF No. 124. In order to avoid the risks on appeal and any further delay to Exaction Class

[7] *See also Health Republic*, 58 F.4th at 1372 (citing *Moore*'s "multi-factor test approach"); *Kane Cnty.*, 145 Fed. Cl. at 18 (noting "a number of judges on this court . . . have used [the *Moore*] multi-factor test to make that determination") (citing cases); *Quimby*, 107 Fed. Cl. at 133 (noting *Moore* factors provide guidance when considering reasonableness of attorneys' fee request).

members who paid the exaction nearly a decade ago, Class Counsel negotiated a significant Settlement, primarily discounted for the time value of money over the course of the appeal. Indeed, when factoring in the time value of money, this recovery is roughly the same as the $185 million Judgment.[8] Through the Settlement, Class Counsel obtained a cash payment of roughly $169 million for the Exaction Class—over ***91%*** of the Exaction Class's recoverable damages to be paid ***now***—a truly exceptional result by any measure. Fitzpatrick Decl., ¶ 20.

The percentage recovery obtained here is indeed rare.[9] In fact, courts routinely approve and extol settlements representing far less in damages than achieved here. *See, e.g.*, *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 723 (Del. Ch. 2023) (when approving the settlement, the court found it represented a substantial fraction—9.35%—of the likely recoverable damages); *Pearlstein v. Blackberry Ltd.*, 2022 WL 4554858, at *6 (S.D.N.Y. Sept. 29, 2022) (approving settlement representing approximately 13.75% of damages and noting the recovery to be "well within the range of reasonableness and, in fact, considerably above the high end of historical averages"); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *3 ("[A]n all-cash settlement of over $65 million, plus interest, is a very significant amount for the class members here, who can expect to recover roughly one-third of their damages in the settlement. By contrast, the more typical recovery rate in class actions is between 5% and 6%.").

[8] *See Median Time to Disposition in Cases Terminated After Hearing or Submission*, U.S. Court of Appeals for the Fed. Cir., https://cafc.uscourts.gov/wp-content/uploads/reports-stats/FY2023/MedDispTimeMERITS-Table-FY23.pdf (last visited Mar. 25, 2024) (median time for disposition of appeal from Court of Federal Claims was 13.5 months in 2023)

[9] While there is no statistically significant data set on recoveries in actions such as this, looking to average securities and antitrust settlements provides a meaningful comparison. The median recovery in securities class actions in 2022 was between 1.5% and 2.5% of potential damages, and the weighted average of antitrust cartel settlements between 1990 and 2014 was 19%. *See* Fitzpatrick Decl., ¶ 20.

Moreover, there is no doubt that the quality and persistence of Class Counsel led directly to the extraordinary result achieved for the Exaction Class. Throughout the pendency of this Action, Class Counsel devoted significant time, energy and resources to the prosecution of the Exaction Class's claims. In particular, Class Counsel:

- Beginning in 2013, researched, developed, and pioneered the novel and complex legal claims at issue in the Action. Meltzer Decl., ¶¶ 9-13; Appx. Ex. C, Declaration of William P. Dale ("Dale Decl."), at ¶¶ 5-13.

- Responded to and overcame Defendant's attacks on the sufficiency of the pleadings at the motion to dismiss stage. Meltzer Decl., ¶¶ 40-49.

- Negotiated separate schedules for the illegal exaction and takings claims, so the Exaction Class's claims could be brought to resolution as quickly as possible. This strategy worked. Summary judgment for the Exaction Class was entered in December 2022, roughly seven months before summary judgment was entered as to the takings claims in July 2023, which is now on appeal to the Federal Circuit. Meltzer Decl., ¶¶ 73-76.

- Obtained certification of the Exaction Class. Meltzer Decl., ¶¶ 80-84.

- Conducted a vigorous and thorough opt-in campaign to ensure the participation of as many Exaction Class members as possible, a process that lasted several months. Meltzer Decl., ¶¶ 85-95.

- Carefully vetted all opt-in submissions. Meltzer Decl., ¶¶ 96-102.

- Defeated Defendant's objections to Exaction Class membership, which would have erased nearly $100 million from the Judgment. Meltzer Decl., ¶¶ 103-108.

- Obtained summary judgment for the Exaction Class. Meltzer Decl., ¶¶ 109-112.

- Obtained the Judgment for the Exaction Class, representing 100% of recoverable damages. Meltzer Decl., ¶¶ 109-112.

- Negotiated a cash Settlement for 91.25% of the Judgment amount. Meltzer Decl., ¶¶ 138-140.

In addition to the successes noted above, Class Counsel's ability and willingness to litigate the case through appeal allowed for the successful negotiation of the highly favorable recovery for

the Exaction Class (i.e., an 8.75% reduction on the Judgment in recognition of the risks of continued litigation and the time value of money).

Clearly, the recovery obtained here is the direct result of the significant efforts of highly skilled attorneys and their staff who possess substantial experience in the prosecution of complex class actions.[10]

Class Counsel also had to overcome significant adversity in prosecuting the Exaction Class's claims, which were novel and without a clear litigation path. Class Counsel initially filed an action in the District of Maryland (where EWTF is located) in 2016, attempting to recover TRP Contributions under the Tax Refund Statute, 28 U.S.C. § 1346(a)(1). Meltzer Decl., ¶¶ 14-15. After fully litigating a motion to dismiss, that court dismissed Plaintiffs' claims, determining that the TRP Contributions were not a tax and that it lacked subject matter jurisdiction to hear the case. Meltzer Decl., ¶¶ 16-20. During the pendency of an appeal of that decision, Class Counsel filed a separate action in this Court in November 2017. Meltzer Decl., ¶¶ 28-36. Class Counsel voluntarily agreed to dismiss that action without prejudice pending the outcome of the Fourth Circuit appeal (*id.*, ¶ 36); and when the Fourth Circuit ultimately upheld the lower court's dismissal, offering in concluding remarks that the "Court of Federal Claims has exclusive jurisdiction over [EWTF]'s action," *EWTF v. United States*, 907 F.3d 165, 168-70 (4th Cir. 2018), the present Action was filed in this Court. Meltzer Decl., ¶¶ 21-27, 36, 38. The path here was long and circuitous and required Class Counsel to be resilient and unwavering in their commitment to seek vindication for EWTF

[10] The Court has recognized the skill and experience of Class Counsel. 160 Fed. Cl. at 469 (appointing Class Counsel and noting the Court is "satisfied that [Class Counsel] has the experience and expertise necessary to adequately represent the class"); *see also* Hr'g Tr. at 62, ECF No. 21 (complimenting "exceptional lawyers" on a "wonderful job").

and the Exaction Class over the course of this hard-fought litigation, which has lasted nearly a decade.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Class Counsel. *See, e.g., In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 195 (E.D. Pa. 2000); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, the Department of Justice ("DOJ") was more than a formidable opponent and the DOJ attorneys representing the Government in this Action possess undeniable experience and skill. The ability of Class Counsel to obtain a favorable outcome for the Exaction Class in the face of this opposition further confirms the quality of their representation and the reasonableness of their fee request. *See In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *8 (D. Del. Nov. 19, 2018) ("Plaintiffs' Counsel's ability to successfully litigate against and negotiate with [Defendant's Counsel] further shows Plaintiffs' Counsel's legal prowess.").

2. The Complexity and Duration of the Litigation Weighs in Favor of the Requested Fee

The complexity and duration of litigation have been recognized among the "most important factors." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005). Courts consistently recognize that the prosecution of class actions is complex and difficult. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("[C]lass actions 'have a well-deserved reputation as being most complex.'"). This case is no exception; class action litigation of illegal exaction and takings claims in this Court is rare and presented significant risks to Class Counsel who litigated this case on a contingency basis. Fitzpatrick Decl., ¶ 20.

Notably, no other counsel was willing to take on the risk. Dale Decl., ¶ 8. Courts regularly find that a greater fee award is warranted where counsel is able to successfully prosecute complex cases like this one. *See In re Citigroup Inc. Bond Litig*., 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award."); *see also In re Dell Techs. Inc. Class V S'holders Litig*., 300 A.3d at 693 ("Awarding increasing percentages as counsel pushes deeper into a case ensures that counsel's incentives remain aligned with the case."). The Settlement here resolves almost a decade of litigation, during which Class Counsel investigated and pioneered the untested theory of liability and negotiated a highly favorable settlement. Moreover, the parties were preparing to brief Defendant's appeal of the Judgment when the Settlement was reached. The legal and procedural complexities presented in this case as well as the duration of the litigation further support the requested fee.

i. Legal Complexity

The legal questions presented in this case were untested, risky, and anything but certain. The ACA "is a notoriously complex statute, health insurance is notoriously difficult to administer effectively, and the federal health-care bureaucracy is notoriously cumbersome." *Minuteman Health, Inc. v. United States Dep't of Health & Human Servs*., 291 F. Supp. 3d 174, 179 (D. Mass. 2018). Further, Constitutional claims of the sort brought here are rarely litigated and it is rarer still to prevail against the Government.

For example, to succeed on its illegal exaction claim, Class Representative had to overcome the Government's argument that HHS was entitled to *Chevron* deference in interpreting the ACA. Over the Government's strenuous objections, Class Counsel ultimately persuaded the Court to sustain the claim as to EWTF under step one of *Chevron*, which looks to the plain language of the

statute. Demonstrating the nuance of these claims, however, the Court reached the opposite conclusion with respect to the exaction claims brought by OETF and Stone Masons (self-insured plans who, unlike EWTF, used third party administrators). *See* MTD Order, 155 Fed. Cl. at 187 ("proceed[ing] to *Chevron* step two" and explaining "[w]hether or not this Court agrees with *Chevron*, it is bound to follow it as a lower court, and HHS's interpretation is entitled to deference"); *id.* at 188 ("Even if this Court disagrees with HHS's rationale, it is not this Court's job to make policy.").

ii. Procedural Complexity

This case also presented many procedural complexities. *See Moore*, 63 Fed. Cl. at 787 ("many procedural complexities" supported fee award); *Raulerson*, 108 Fed. Cl. at 680 (finding complexity favored approving counsel's fee request where litigation "lasted nearly three years and has involved 260 class members with claims for approximately 300 separate properties"); *Bishop v. United States*, 2013 WL 4505991, at *5 (Fed. Cl. Aug. 19, 2013) (finding class counsel's fee arrangement reasonable because the "litigation has lasted three years and has involved 68 class members with complex valuation issues, negotiated by experienced counsel").

First, the Government opposed Plaintiffs' proposed class definition, an issue that was ultimately resolved by Class Counsel's agreement to eliminate HHS's *de minimis* exception for purposes of this litigation. Meltzer Decl., ¶ 82. Then, once the Exaction Class was certified and notice was approved, Class Counsel oversaw a comprehensive opt-in campaign designed to ensure the participation of as many qualifying SISAs as possible. The notice campaign was predicated on direct notice (by mail) to roughly 650 entities identified by the Government in discovery as potential Exaction Class members. Meltzer Decl., ¶ 87. When it became clear that many of the contacts in the Government's records were stale—as the information was derived from forms filled

out in 2014—Class Counsel undertook their own research, aided by Kessler Topaz's investigative department, to identify current contact information. Meltzer Decl., ¶ 88.

Class Counsel then personally reached out to hundreds of potential Exaction Class members. Meltzer Decl., ¶ 94. Class Counsel also sought and, ***over the Government's objection***, obtained an extension of time to complete the opt-in campaign given the significant time and effort involved. Meltzer Decl., ¶¶ 88-93. In granting Class Counsel's requested extension, this Court specifically noted the "difficulty [of] effecting notice on a quarter of the potential class members" with stale contact information, and found "[i]t was reasonable and proper, even necessary, for Plaintiff, as class representative, to ensure each potential class member received a notice." ECF No. 92 at 2, 4. Class Counsel made sure that happened.

Over the course of several months—from September 2022 to February 2023—Class Counsel were in near daily contact with potential Exaction Class members. Questions from potential Exaction Class members ranged from administrative (How can I submit a claim?), to procedural (When will the Court rule on summary judgment?), to substantive (Is my plan eligible?). One of the most complex and difficult questions posed during this time was whether a given plan fell within the class definition, a determination complicated by the objection raised by the Government during class certification briefing. As referenced above, while HHS allowed for a *de minimis* exception (a plan would still qualify as self-administered even if it used third party administrators for up to 5% of its operations), the Exaction Class definition did not. Many plans were confused and even upset by this and it fell on Class Counsel to not only explain this seeming incongruity, but to also act as a gatekeeper to ensure only qualifying SISAs were allowed to opt in to the Exaction Class. Meltzer Decl., ¶ 94.

Through the considerable efforts of Class Counsel, 634 opt-ins were ultimately received. Class Counsel then undertook the complex and time-consuming task of evaluating each of the hundreds of opt-in forms for eligibility in the Exaction Class. Of the opt-ins received, 330 plans were matched to the Government's SISA Records using all available information submitted by each plan (including the plan unique ID, name, address, Employee Identification Number ("EIN"), and/or plan contact(s)). Matching these plans to the SISA Records was a laborious, highly technical, and time-consuming process. All plans that submitted an opt-in form that was matched to the SISA Records were included in the Exaction Class. Meltzer Decl., ¶ 98.

Class Counsel also developed and implemented a protocol to screen and evaluate the 267 plans who submitted opt-ins that could not be matched to the Government's records. These plans were first notified that Class Counsel intended to recommend their exclusion from the Exaction Class unless they submitted additional evidence to verify their eligibility. Approximately 90 plans submitted additional documentation and evidence (primarily IRS Form 5500, payment confirmations, and Summary Plan Descriptions ("SPDs")). Over the course of several weeks, Class Counsel then reviewed the additional evidence submitted by plans, spoke to representatives from nearly all 90 plans individually, and consulted with an expert on a number of issues related to eligibility questions raised by putative Exaction Class members. Following this review, Class Counsel determined that 27 additional plans (less than a third of the plans who submitted additional evidence) should be included in the Exaction Class. Meltzer Decl., ¶¶ 99-101.

Class Counsel determined that the remaining 63 plans were not eligible based on either their failure to provide additional documentation confirming that it was a SISA, or Class Counsel's review of supplemental information provided by the plan, including payment confirmations and SPDs. In certain instances, insufficient supplemental information was provided (for example, some

plans failed to provide payment confirmations) and in other instances, the information provided demonstrated exclusion was appropriate (for example, certain SPDs identified that plans were not self-administered). Meltzer Decl., ¶ 101.

After the extensive outreach and verification program run by Class Counsel, a total of 357 plans with damages totaling $185,230,024.42 was certified to this Court for entry of Rule 54(b) Judgment. Damages calculations were aided by Class Representative's forensic accountant, who reviewed and synthesized thousands of individual payment confirmations to assign individual damages amount to each plan. Class Counsel had multiple meetings with this expert during the process. Meltzer Decl., ¶ 102.

And thus the path should have ended there, with 357 plans vetted and certified for inclusion in the Exaction Class with damages of approximately $185 million. But on this road, nothing came easy—the Government mounted one final challenge, this time seeking to exclude nearly half of the plans (157) included in the Final Certification, arguing that, based on its review of IRS Form 5500, the plans purportedly used third party administrators and were thus ineligible to participate ("Objection"). Collectively, the 157 plans challenged by the Government paid more than $100 million into the TRP and the Government's Objection sought to preclude the plans from participating in the recovery.

Class Counsel forcefully opposed the Objection, explaining how the self-identification process used in the opt-in campaign here closely mirrored the self-identification process used by the Government in originally collecting TRP Contributions. Of particular note, Class Counsel also attached a letter received from an Exaction Class member explaining how the Government's purported conclusions drawn from the Form 5500 were inconsistent with how plans actually operate. Based on Class Counsel's strong opposition, the Government ultimately dropped its

objection, but not until immediately prior to the scheduled hearing. Class Counsel's fortitude in standing up and advocating for Exaction Class members ensured all qualifying plans were able to participate in the Exaction Class and the challenged plans could recover their $100 million in damages. Meltzer Decl., ¶¶ 103-108.

By all accounts, Class Counsel's opt-in campaign was not just arduous and complex but extremely successful. The plans ultimately included in the Exaction Class are incredibly diverse: they are located in nearly every state in the country; some have thousands of members and others have less than one hundred; and they provide benefits to hotel workers, public employees, masons, painters, and service workers, to name a few. Despite their differences, all share a common characteristic (they are SISAs) and all are united by a common cause (seeking redress from the Government for the illegal exaction).

Critically, the recoveries for Exaction Class members are real and meaningful. As noted above, the average Exaction Class recovery, net of fees and expenses, is more than $350,000. More than half of the Exaction Class (some 182 plans) will receive more than $100,000 and almost 10% (30 plans) will receive more than $1 million. Payments of this magnitude to individual class members in a class action like this are exceedingly rare.

Considering the complexity of the Exaction Class's claims, along with the amount of time these claims have been litigated, Class Counsel's fee request is reasonable and this factor weighs in favor of its approval.

3. The Risk of Nonrecovery Strongly Supports the Requested Fee

"Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of [the requested fee]." *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012). Thus, "[w]hen determining the

reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 847-48 (N.D. Ill. 2015); *see also Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."); Fitzpatrick Decl., ¶ 20.

Here, Class Counsel have litigated the Exaction Class's claims since 2016 on an entirely contingent fee basis. For nearly a decade, Class Counsel single-handedly funded the expenses of this Action while carrying the significant risk that they would receive no compensation whatsoever unless they prevailed. As discussed in detail below, Class Counsel have expended more than 9,000 hours (and a lodestar of $6,351,779.50) on behalf of the Exaction Class and have incurred $513,631.77 in expenses.

Notably, Federal Claims courts have found that the risk of non-recovery supports the award of a substantial fee where there was little or no controlling precedent at the time the case was filed, *see Moore*, 63 Fed. Cl. at 789; similar lawsuits have been unsuccessful, *see Kane Cnty.*, 145 Fed. Cl. at 19; and plaintiffs' key positions were disputed by the government, *see Quimby*, 107 Fed. Cl. at 133. All of these circumstances were present here. The Constitutional claims at issue were completely untested and risky; all of these claims have been dismissed as to the other Plaintiffs in the Action (as was EWTF's initial tax refund claim); and the Government ably defended itself at every stage of the litigation.

And while it might be tempting to discount these risks now, it is crucial that such risk of non-recovery is not viewed with the benefit of hindsight. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("[H]indsight alters the perception of the suit's riskiness."). Moreover, a

fee in this case has always been at risk, and completely contingent on the result achieved. This factor strongly favors the reasonableness of the requested fee.

4. The Fee That Likely Would Have Been Negotiated Between Private Parties in Similar Cases Favors Approval of a 25% Fee

As noted above, Class Counsel undertook this case on an entirely contingent fee basis. If this were an individual action, the "typical" contingent fee arrangement would likely range "between 33 and 40 percent." *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. at 194 ("[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."). Further, Federal Claims courts have found "[a] fee of one third the total recovery is consistent with the fee that likely would have been negotiated by private parties." *Kane Cnty.*, 145 Fed. Cl. at 19. Class Counsel's requested fee of 25% is fully consistent with and even less than what would be negotiated privately. Fitzpatrick Decl., ¶ 14 ("It is well known that [25%] is well below what private parties negotiated when they hire lawyers on contingency.").

Moreover, the opt-in Notice mailed to potential Exaction Class members provided that Class Counsel would request no more than 25% of any judgment or settlement obtained for the Exaction Class. The fact that 357 entities elected to opt into the Exaction Class after receiving this Notice "is as close to a consensual, privately negotiated fee percentage that you can get in class action litigation." Fitzpatrick Decl., ¶ 14. Accordingly, this factor supports Class Counsel's 25% fee request.

5. The Absence of Objections to Date Supports the Fee Request

The Court also should "consider the responses of the class members to the proposed settlement, 'taking into account the adequacy of notice to the class members of the settlement terms.'" *Sabo v. United States*, 102 Fed. Cl. 619, 628-29 (2011).

The Notice, which was sent to all 357 Exaction Class Members, provides that Class Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund plus litigation expenses. ECF No. 142-2. The Notice also advises Exaction Class members that they can object to the fee request and explains the procedures for doing so. *Id*. While the deadline for objecting has not yet passed, to date, no objections have been received. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement."); *Sabo*, 102 Fed. Cl. at 629 ("When only a small number of class members object to a proposed settlement, the Court should consider that as evidence weighing in favor of approving the settlement.").

6. The Percentage Applied in Other Class Actions Supports the Requested Fee

Class Counsel's 25% fee request is well within the range of fee percentages awarded by Federal Claims courts. *See Moore*, 63 Fed. Cl. at 787 (noting that awards "typically range between 20% to 30% of the total fund, with 50% being the upper limit") (citing cases); *Kane Cnty.*, 145 Fed. Cl. at 19 ("[A]n award equal to one third . . . is commensurate with attorney fees awarded in other class action common fund cases.").

Courts across the country have similarly found fee awards of 25% (or more) to be appropriate in cases that involve substantial class recoveries such as this one. Fitzpatrick Decl., ¶ 19. *See, e.g.*, *In re: Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1110 (D. Kan. 2018)

(awarding 33.33% of $1.5 billion); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (awarding 31.33% of $1.075 billion); *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679 (Del. Ch. 2023) (awarding 27% of $1 billion); *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million); Order, *Dahl v. Bain Cap. Partners, LLC*, No. 07-cv-12388 (D. Mass. Feb. 2, 2015), ECF No. 1095 (awarding 33% of $590.5 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33% of $510 million); *Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc.*, 2006 U.S. Dist. LEXIS 111403 (D.S.C. Aug. 15, 2006) (awarding 24% of $490 million).[11] The fee requested here is in line with these benchmarks. *See also* Fitzpatrick Decl., ¶¶ 15, 19.

[11] *See also In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (30% of $410 million); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10, *14 (D.D.C. July 16, 2001) (34% of $359 million); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (20% of $350 million); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-cv-00660 (S.D. Ill. Dec. 16, 2018), ECF No. 981 (33.33% of $250 million); *In re Tricor Direct Purchaser Antitrust Litig.*, 2009 WL 10744518, at *5-6 (D. Del. Apr. 23, 2009) (33% of $250 million); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538, at *11-12 (S.D.N.Y. Apr. 11, 2003) (33% of $220 million); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *1 (E.D. Pa. June 2, 2004) (30% of $202 million); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 734 (E.D. Pa. 2001) (25% of $193 million); *In re Relafen Antitrust Litig.*, 2004 U.S. Dist. LEXIS 28801, at *20-22 (D. Mass. Apr. 9, 2004) (33% of $175 million); *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *22 (E.D. Mo. June 30, 2005) (20% of $146 million); *Nieman v. Duke Energy Corp.*, 2015 WL 13609363, at *2 (W.D.N.C. Nov. 2, 2015) (18% of $146 million); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at *9 (D. Ariz. Apr. 20, 2012) (33% of $145 million); *In re Doral Fin. Corp. Sec. Litig.*, No. 05-md-01706, (S.D.N.Y. July 17, 2007), ECF No. 107 (15% of $129 million); *In re Combustion Inc.*, 968 F. Supp. 1116, 1142 (W.D. La. 1997) (36% of $127 million); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (25% of $126.6 million); *Kurzwell v. Philip Morris Cos.*, 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (30% of $123 million); *Ferrick v. Spotify USA Inc.*, 2018 WL 2324076, at *10 (S.D.N.Y. May 22, 2018) (12% of $112.6 million). *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. at 197 (30% of $111 million); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 908-09 (S.D. Ill. 2012) (33% of $105 million); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (20% of $100 million); *Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, at *18 (N.D. Cal. Dec. 8, 2021) (22% of $95.7 million).

Moreover, a lower fee percentage should not be awarded because Class Counsel successfully obtained a large settlement for the Exaction Class. Fitzpatrick Decl., ¶ 18. And in fact, courts in other Circuits have expressly warned against this. *See, e.g., id.*; *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1213 ("While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2013 WL 12327929, at *17 n.16 (C.D. Cal. July 24, 2013) ("The Court also agrees with . . . other courts, e.g., *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1213, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class.").

Additionally, there are compelling policy reasons not to lower the amount of the award based on the size of the settlement alone—in particular, awarding lower fees in larger settlements creates an incentive for attorneys to resolve cases for less rather than more. Fitzpatrick Decl., ¶ 17. This is particularly true in actions like this one, where Class Counsel fought especially hard to obtain a settlement that represents a ***near total recovery of damages*** for the Exaction Class. This type of advocacy would be rewarded by private litigants and there is no reason it should not be rewarded here. *Id*. Accordingly, the 25% fee requested here is comparable to fees awarded in other class action settlements and this factor strongly supports approval of the requested fee.

7. The Size of the Award Strongly Supports the Requested Fee

Finally, the Court should consider the size of the award relative to the total recovery for the Exaction Class. *Raulerson*, 108 Fed. Cl. at 680 (2013). As the Supreme Court has noted, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. . . . The result is what matters." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *see also In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d at 735 (approving attorneys' fees in the amount of 26.67% of a $1 billion settlement fund and noting that the primary factor when awarding fees is the results achieved); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d at 587 (finding the unprecedented result of achieving the "largest class recovery on record against an auditor in a [securities] 10b-5 action" justified the fee award of 25% of the settlement fund, resulting in $31.7 million).

Here, the Settlement provides a common fund of roughly $169 million, which equates to ***over 91%*** of the Exaction Class's total damages. Class Counsel's 25% fee request reflects the truly exceptional result achieved for the Exaction Class. This is not a case where Exaction Class members will receive little, and the attorneys will be enriched. Class Counsel have vigorously litigated this Action, the Exaction Class has received a tremendous recovery, and there is no windfall for Class Counsel here. Fitzpatrick Decl., ¶¶ 15, 20. If the fee request is approved, members of the Exaction Class will receive roughly 68 cents on the dollar for their 2014 TRP Contributions, and Class Counsel will receive a fair fee for the many years spent litigating this risky case without any payment. This factor also favors the requested fee award.

* * *

Application of the *Moore* factors makes clear that Class Counsel's 25% fee request is fair and reasonable.

D. The Reasonableness of the Requested Fee Is Confirmed by a Lodestar Cross-Check

In assessing the reasonableness of a fee awarded under the percentage-of-recovery method, courts may cross check the proposed fee award against counsel's lodestar "to ensure that the award is neither too low, nor too high." *See Kane Cnty,* 145 Fed. Cl. at 19. Importantly, "the lodestar cross-check does not trump the [Court's] primary reliance on the percentage of common fund method." *Geneva Rock Prods., Inc. v. United States*, 119 Fed. Cl. 581, 594 (2015), *rev'd on other grounds*, 2016 WL 9445914 (Fed. Cir. Nov. 14, 2016). In other words, as the Federal Circuit recently explained, the lodestar cross-check "does not exclude taking full account of the relevant attorney-fees considerations as they apply to a particular case," such as "the risk of nonpayment in a contingency-fee commonfund arrangement" and "the interest 'in sustaining the incentive for attorneys to continue to represent such clients.'" *Health Republic*, 58 F.4th at 1375.

In conducting a lodestar cross-check, courts multiply the hours spent by the attorneys and professional support staff on the case by each timekeeper's hourly rate.[12] Courts then typically adjust the lodestar, by applying a multiplier, to take into account the various factors in the litigation that affect the reasonableness of the requested fee, including "the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation." *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010); *Haggart v. Woodley*, 809 F.3d 1336, 1355

[12] The Supreme Court has approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Mo. v. Jenkins*, 491 U.S. 274, 284 (1989). Further, "[m]ore relaxed specificity and documentation standards apply to examination of the lodestar in a percentage-of-the-fund case," like this one, "compared to the standards applied when the lodestar method is directly used to set the fee (especially where paid by the adverse party)." *Health Republic*, 58 F.4th at 1378; *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-07 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

n.19 (Fed. Cl. 2016) (noting in lodestar approach courts apply multiplier to account for counsel's "risk of prevailing on the merits of the case and the length of the proceedings"). The Federal Circuit has recognized that "[f]or a lodestar cross-check, 'the resulting multiplier need not fall within any pre-defined range.'" *Health Republic*, 58 F.4th at 1375.

Here, through March 22, 2024, Class Counsel have collectively spent over 9,000 hours of attorney and other professional support time prosecuting the Action for the benefit of the Exaction Class, resulting in a total lodestar of $6,351,779.50. Meltzer Decl., ¶ 147.[13] The hourly rates utilized by Class Counsel in calculating their lodestar range from: (i) $500 to $1,195 per hour for partners; (ii) $750 per hour for counsel; (iii) $370 to $620 per hour for other attorneys; (iv) $250 to $405 per hour for paralegals; and (v) $300 to $400 per hour for in-house investigators. Meltzer Decl., ¶ 148. These are Class Counsel's current hourly rates, and these rates are comparable to those previously submitted by Class Counsel (and accepted by courts) in other complex contingent class actions for purposes of performing a lodestar cross-check against a proposed percentage fee. *See, e.g., In Kraft Heinz Sec. Litig.*, No. 19-cv-01339 (N.D. Ill. Aug. 8, 2023), ECF No. 484-7; *In re HP Inc. Sec. Litig.*, No. 20-cv-01260 (N.D. Cal. June 23, 2023), ECF No. 132-6; *In re Luckin Coffee Inc. Sec. Litig.*, No. 20-cv-01293 (S.D.N.Y. June 10, 2022), ECF No. 327-7. *See also In re Remicade Antitrust Litig*., 2023 WL 2530418, at *28 (E.D. Pa. Mar. 15, 2023) (finding that class counsel hourly rates ranging from $115 to $1,325 "fall well within the range of rates charged by other attorneys in this market"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee following lodestar

[13] Class Counsel will continue to perform legal work on behalf of the Exaction Class should the Court approve the Settlement. Additional resources will be expended assisting the Court-approved Settlement Administrator, JND Legal Administration LLC ("JND") with Exaction Class member payments and related inquiries.

cross-check in which "billing rates rang[ed] from $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals").

The requested fee of 25% net of expenses (or, $42,120,941.38) represents a multiplier of approximately 6.63 on Class Counsel's total lodestar.[14] A 6.63 multiplier is within the range of multipliers awarded in similar class actions and other complex litigation. Fitzpatrick Decl., ¶ 25. Several examples are worth highlighting.

Stop & Shop Supermarket Co. v. SmithKline Beecham Corp. is instructive. There, plaintiffs brought an antitrust class action suit against a drug manufacturer alleging violations of the Sherman Act. 2005 WL 1213926, at *1. After roughly a year of litigation (and close to the conclusion of merits discovery), the parties reached a $100 million dollar settlement. *Id*. at *17 (commending plaintiffs for an "early and excellent result in an extremely complex and risky case"). The settlement represented "11.4% of total damages to the Settlement Class." *Id.* at *9 (noting settlement "compares favorably with the settlements reached in other complex class action lawsuits"). The court awarded a $20 million fee, which equated to a 15.6 lodestar multiplier. In so doing, it cited the "extraordinary support" provided with the plaintiffs' fee application, specifically: (1) the fact that "[n]ot one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected to the Motion for Award of Attorneys' Fees, even though the Notice informed members of the Settlement Class that Plaintiffs' counsel would apply for an award of fees amounting to 33% of the Settlement Fund," and (2) "the General Counsel of The Stop and Shop Supermarket Company provided a Declaration in support of

[14] Class Counsel have removed time from their lodestar that is attributable to the takings claim after summary judgment was granted in favor of the Exaction Class.

counsels' request for fees, in which he states that all three named Plaintiffs assent to counsel's request for a 30% fee." *Id.* at *18.

All of the considerations identified by the *Stop & Shop* court are present here. First, the Settlement here represents ***more than 91%*** of the Exaction Class's recoverable damages, far more than the 11% in *Stop & Shop*. To date, not one of the 357 Exaction Class members—all sophisticated entities familiar with complex litigation—has objected to the fee request. Importantly, like *Stop & Shop*, all Exaction Class members were sent the Notice, advising them of Class Counsel's intent to request a 25% fee. Likewise, EWTF's Fund Manager, Michael McCarron, who has supervised this litigation for years, submitted a declaration in support of Class Counsel's fee application stating EWTF's assent to the requested fee and resulting 6.63 lodestar multiplier. McCarron Decl., ¶¶ 12-17. Finally, unlike *Stop & Shop*, this Action did not involve an early settlement. Rather, settlement was only possible after Class Counsel litigated this case for nearly a decade, in three separate courts, and ultimately obtained the Judgment in this Court.

New England Carpenters Health Benefits Fund v. First Databank, Inc. is another example where a court assessed factors relevant to the case in awarding a significant multiplier. In that case, plaintiffs brought suit against a drug price publisher and a drug wholesaler alleging that they fraudulently increased the published average wholesale price in violation of RICO. 2009 WL 2408560, at *1. Over the course of four years, class counsel survived two rounds of motions to dismiss and successfully certified a class. *Id*. at *2. The parties settled the matter for $350 million, and the court awarded $70 million in attorneys' fees, which equated to an 8.3 lodestar multiplier. *Id*. In awarding this fee, the court noted that "[s]everal factors militate in favor of a significant multiplier," including: (1) the "mega-amount" of the settlement, (2) the "near-unanimous" support

for the settlement, and (3) the fact that plaintiffs' counsel had been "excellent in this complex, hard-fought litigation and innovative in its notice program and efforts to find class members." *Id.*

Again, all of the factors cited by the Court in *New England Carpenters* are present here. Class Counsel created a large fund for the benefit of the Exaction Class, there has thus far been unanimous support for the Settlement, and Class Representative zealously pursued this case for many years, which included overseeing a complex, time consuming, and thorough opt-in notice program. Moreover, unlike *New England Carpenters*, where the court noted that "much of the spade work" in learning the legal and factual complexities had been done in a related litigation, *id.*, Class Counsel here pioneered the theory of liability from its inception.

Many other decisions are in line with *Stop & Shop*, *New England Carpenters*, and the multiplier here. *See, e.g.*, *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679 (Del. Ch. 2023) (awarding a $267 million fee, equating to a lodestar multiplier of 7); *Spartanburg Reg'l Health Servs. Dist., Inc.*, 2006 U.S. Dist. LEXIS 111403 (awarding a $117.2 million fee, equating to a 6.22 lodestar multiplier); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d at 734 (awarding a $48.3 million fee, equating to an 8.5 lodestar multiplier); *Nieman*, 2015 WL 13609363, at *2 (awarding a $26.3 million fee, equating to a 6.43 lodestar multiplier); *In re Doral Fin. Corp. Sec. Litig.*, ECF No. 107 (awarding a $19.7 million fee, equating to a 10.26 lodestar multiplier).

Mercier v. United States does not compel a contrary result. In *Mercier*, plaintiffs brought suit against the United States Department of Veteran Affairs for failing to pay them overtime. 156 Fed. Cl. at 583. Six weeks before trial, the parties reached a settlement of $160 million. *Id.* at 592. The court there rejected a 30% fee request, instead awarding a $32 million fee, equating to 20% of the common fund, equivalent to a 2.95 lodestar multiplier. *Id.* Several factors, however, distinguish *Mercier* from this case.

First, and perhaps most importantly, the result achieved for the Exaction Class is significantly higher than the recovery in *Mercier*. Exaction Class members here will benefit from a recovery of more than 91% of recoverable damages compared with a 65% recovery in *Mercier* (in fact, even net of fees, Exaction Class members will still receive a higher percentage recovery (roughly 68%) than was achieved in *Mercier*). *Mercier* is also distinguishable because there was at least one objector to the fee award and three objectors to the settlement. And whereas *Mercier* involved a claim for unpaid overtime, and the plaintiffs undoubtedly benefited from litigating a claim that has been the subject of countless cases, here the legal theory was novel and entirely untested—Class Counsel were working without a net pursuing relief in an undeveloped area of the law.

Finally, unlike *Mercier*, Class Counsel here created substantial benefits for which they are not being compensated. Several plans with aggregate damages in excess of $26 million filed direct actions asserting materially identical claims ***only after*** Class Counsel and the Exaction Class prevailed in this Action. *See, e.g.*, Notice & Unopposed Mot. to Transfer at 1, *Blue Cross & Blue Shield of S.C. v. United States*, No. 23-156C (Fed. Cl. Mar. 8, 2023), ECF No. 7. These tag-along cases were filed ***after*** the Exaction Class won summary judgment in this Action (and 3 of the 12 plans filed ***after*** the Judgment was entered). Any recovery these plans achieve will undoubtedly be because of the work done by Class Counsel.

While Class Counsel have not moved for a set-aside order to compensate them for their work that has clearly benefited these plaintiffs, it is within their right to do so. *See, e.g.*, *Boeing Co.*, 444 U.S. at 478 (stating that the common-benefit doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense"); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2022 WL 18108387, at *4

(E.D. Va. Nov. 8, 2022) ("Without a set-aside order, tag-along plaintiffs could file their individual cases at the last possible minute, request and rely on the record developed by class counsel, and reap the savings in legal fees. That situation presents a classic problem of unjust enrichment, which the common benefit doctrine is meant to remedy.").

Class Counsel's fee request is even more reasonable in light of this additional $23.7 million in damages (applying the 8.75% discount), which equates to $5.9 million (at 25%) that is not a part of this fee application.

There are additional reasons a downward adjustment of the requested 25% fee and resulting lodestar multiplier would not be appropriate here. Most significantly, Class Counsel have been litigating this case for nearly a decade—almost three times as long as class counsel typically fight before they settle, *see* Fitzpatrick Decl., ¶ 26—on a purely contingency basis. By fighting so long and so hard, Class Counsel recovered 91.25% of the Exaction Class's total recoverable damages. As Professor Fitzpatrick explained: "Windfalls result when class action lawyers settle cases quickly for very little. They do not result from years of litigation that results in a complete and total victory for the class." *Id*. There is nothing that remotely resembles a windfall here. Moreover, rejecting Class Counsel's fee request "simply because they did not log more hours will only incentivize lawyers in the future to drag things out, churn hours, and inefficiently staff cases." *Id.* Such a result would not benefit anyone.

The lodestar cross-check confirms the reasonableness of a 25% fee requested here.

V. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Attorneys in a class action also may be reimbursed for their reasonable out-of-pocket expenses. *See* RCFC 23(h). Here, Class Counsel respectfully request that this Court approve payment of $513,631.77 for expenses that Class Counsel incurred in connection with this Action.

All of these expenses, which are set forth in declarations submitted by Class Counsel, were reasonably necessary for the prosecution and settlement of this Action, and are properly recovered by counsel. *See In re Facebook, Inc., IPO Sec. & Deriv. Litig*., 343 F. Supp. 3d 394, 418 (S.D.N.Y. 2018) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation").

The expenses for which Class Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, document management costs, expert/consultant fees, notice administrator fees, online research, court reporting and transcripts, photocopying, postage expenses, and travel-related costs. *See Quimby*, 107 Fed. Cl. at 135 (finding expenses for "such items as travel for court appearances, expert witnesses and consultants, courier and shipping services, copying and business services, filing fees, hearing transcripts, local counsel fees, legal research, and class action administration" to be "reimbursable as part of an attorneys' fee award").[15] The foregoing expenses were necessarily incurred for the effective prosecution of the matter and thus, payment of these expenses is reasonable and appropriate.

VI. A CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE IS APPROPRIATE

Class Counsel also seek the Court's approval of a case contribution award in the amount of $25,000 to EWTF. The Notice advises Exaction Class members of this request and, to date, there have been no objections received.

[15] The expenses incurred by Class Counsel in the Action are reflected on the books and records of the firms. These expense items are not duplicated in Class Counsel's hourly rates. *See* Meltzer Decl., ¶ 153 and Appx. Ex. B, Declaration of Charles F. Fuller at ¶ 7.

Case contribution awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1218; *see also Mercier*, 156 Fed. Cl. at 589 (awarding case contribution awards totaling $120,000 to the six named plaintiffs and noting these awards "recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions"). Courts routinely approve these types of awards in amounts equal to or greater than the amount requested here. *See, e.g.*, *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (finding payments of $300,000 to each class representative appropriate "in light of the substantial services performed on behalf of the Class" in obtaining the $103.5 million settlement); *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d at 735 (approving $50,000 award to plaintiff, describing the amount as "reasonable, even modest").

EWTF—the lone representative of the Exaction Class in this Action—has provided invaluable services to Class Counsel over the course of this lengthy litigation. EWTF's commitment to this Action, along with its diligent efforts on behalf of the Exaction Class, helped achieve the $169 million recovery. EWTF's efforts included, among other things: (i) engaging in initial discussions with Class Counsel for purposes of gathering facts to assist in the development of EWTF's claims; (ii) reviewing and commenting on all material Court submissions and other case documents; (iii) participating in discovery, including responding to initial disclosures, 24 document requests, and 16 interrogatories served by Defendant and gathering and producing more than 2,000 pages of documents; (iv) participating in discussions with Class Counsel regarding litigation strategy and developments in the litigation, including settlement; and (v) approving the Settlement. McCarron Decl., ¶¶ 7-11, 18. These are precisely the types of activities that courts

have found to support awards to class representatives. *See, e.g.*, *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

The case contribution award sought by EWTF is reasonable and justified and warrants the Court's approval.

VII. CONCLUSION

For the reasons stated herein and in the accompanying declarations, Class Counsel respectfully request that the Court: (i) award attorneys' fees in the amount of 25% of the Settlement Amount (net of expenses); (ii) approve payment of expenses in the amount of $513,631.77; and (iii) approve payment of a case contribution award in the amount of $25,000 to Class Representative.

DATED: March 27, 2024

Respectfully submitted,

/s/ Joseph H. Meltzer

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Attorneys for Class Representative EWTF and Class Counsel for the Exaction Class

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2024, a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court, is available for viewing and downloading from the ECF system, and will be served by operation of the Court's electronic filing system (CM/ECF) upon all counsel of record.

/s/ Joseph H. Meltzer
Joseph H. Meltzer