UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN ORR, KATERINA DODBIBA, LESLIE LEMKE, MELISSA MOTA, KRISTINE STEELY, MELINDA KONCZAL, ANN-MARIE HAMMOND, KATHRYN HOFFMAN, JESSICAH MCGAFFIE, CAROLINE BUCCI, ANYA GAU, GINA GIURICEO, AND JENNIFER MAYNARD, on behalf of themselves and all others similarly situated, **PLAINTIFFS,** **-- against –** **NOVARTIS CORPORATION and ALCON LABORATORIES, INC.,** **DEFENDANTS.**	**Case No. 15-cv-1980-GHW**

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF UNOPPOSED MOTION FOR:
(1) FINAL CERTIFICATION OF SETTLEMENT CLASSES AND COLLECTIVES;
(2) FINAL APPROVAL OF SETTLEMENT; (3) ATTORNEYS' FEES AND COSTS;
AND (4) SERVICE PAYMENTS TO REPRESENTATIVE PLAINTIFFS

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I. INTRODUCTION AND SUMMARY

This case involves class and collective action claims alleging that Defendants Novartis Corporation and Alcon Laboratories, Inc. ("Alcon") engaged in systemic gender discrimination in pay, promotions, and assignments against four groups of female employees at Alcon. Following an extensive preliminary approval process that included in-person and telephonic conferences with the Court, supplemental submissions to the Court providing detailed information about the proposed settlement, and substantive revisions supervised by the Court, the Court preliminarily approved the parties' Class and Collective Action Settlement Agreement and Release and the First Amendment to the Class and Collective Action Settlement Agreement and Release (collectively, the "Settlement" or "Agreement") on August 3, 2016.

The Settlement Agreement was reached after months of intensive, arms' length negotiations, including three separate mediations. The Settlement requires Alcon to make an $8 million non-reversionary payment that will benefit over 2,300 Class Members. Each Class Member, without taking any affirmative steps, will receive a Base Payment that is computed based on her individual estimated damages, and Class Members who allege discrimination in promotions or assignments are eligible to receive Supplemental Payments for these claims.

A detailed Court-approved Notice of Pendency of Proposed Class Action and Collective Action Settlement ("Notice") was sent to Class Members, outlining the Settlement terms at length and directing Class Members to a website with additional information about the Settlement – including the Agreement itself and a financial overview containing the results of Plaintiffs' expert analysis. *The Class response has been overwhelming: Class Members resoundingly approve the Settlement.* Not a single Class Member has objected to the Settlement, and only 29 individuals (approximately 1.2% of potential Class Members) timely excluded themselves from this action.

Further, 307 Class Members (approximately 13.1% of the final number of Class Members) returned timely notices in order to be eligible to receive Supplemental Payments. The Class response constitutes a remarkable show of support for approval of the Settlement, including the requested attorneys' fees, costs, and service payments – all of which were disclosed to Class Members in the Court-approved Notice.

In accordance with the "strong judicial policy in favor of settlements, particularly in the class action context," *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (citation omitted), the Court should therefore endorse the Settlement and grant final approval. A Settlement result like the one achieved here should be accorded a presumption of fairness where it is reached through a fair process, "between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005). Plaintiffs here procured meaningful relief for the Classes without engaging in protracted and inefficient litigation. The Court carefully reviewed the Settlement at the preliminary approval phase, and, as detailed below, the factors for final settlement approval are easily met. Prominent among these factors, Class Members' overwhelmingly positive reaction confirms that the Settlement is fair, reasonable, and adequate. The Settlement should be approved in all respects.

Accordingly, Plaintiffs seek final approval of the Settlement and the dismissal of this action. In conjunction with the Settlement, Plaintiffs also seek (1) reasonable attorneys' fees totaling one-third of the Settlement to compensate Counsel for three years of legal work; (2) an award of costs for the Claims Administrator and for the other reasonable litigation expenses that Counsel has incurred in the course of investigating, prosecuting, and settling this action; and (3) reasonable service payments for the Representative Plaintiffs ranging from $5,000 to $20,000

each, tailored to their contributions to the case, their services to the Class Members, and the efforts, risks, and expenditures they undertook in this litigation.

II. HISTORY OF LAWSUIT, DISCOVERY, AND SETTLEMENT

Class Counsel has been investigating claims of systemic gender discrimination at Alcon Laboratories, Inc. ("Alcon") since late 2013. Declaration of David Sanford in Support of Plaintiffs' Unopposed Motion ("Decl.") at ¶ 18. On March 17, 2015, Plaintiff Susan Orr, joined by Plaintiff Elyse Dickerson, filed this gender discrimination action in the United States District Court for the Southern District of New York. Dkt. No. 1; Decl. at ¶ 14. Dr. Orr brought claims, *inter alia*, on behalf of female employees in Director-Level Positions at Alcon under the Equal Pay Act of 1963, 29 U.S.C. § 206, *et seq*. ("Equal Pay Act" or "EPA"). Decl. at ¶ 14.

On April 27, 2015, Plaintiffs' Counsel notified Defendants that they were prepared to file an amended complaint adding additional named plaintiffs who, on behalf of female employees in Manager-Level Positions, Specialist/Analyst-Level Positions, and Sales Positions, would assert class claims of gender discrimination in pay, promotion, and assignments under Title VII, as well as collective claims of gender discrimination in pay under the EPA. Decl. at ¶ 19.

Subsequently, the parties agreed to a process of voluntary discovery for settlement purposes pertaining to these class and collective claims. *Id*. at ¶ 20. During this process, Defendants produced pertinent human resources and payroll data relating to employee compensation, promotions, and assignments. *Id.* Class Counsel retained an experienced expert labor economist, Dr. Alexander Vekker, to analyze the data.[1] Dr. Vekker spent months analyzing the data and worked closely with Counsel to evaluate Plaintiffs' claims of systemic gender

[1] Dr. Vekker has extensive experience performing economic and statistical analysis in employment discrimination litigation. *See* Dkt. Nos. 54-1 and 74 at ¶¶ 2-3 & Exs. 1 & 2 (detailing Dr. Vekker's professional credentials as an expert); *see also, e.g., Easterling v. Dep't of Corrections*, 783 F. Supp. 2d 323, 327-328 (D. Conn. 2011) (relying, in part, on Dr. Vekker's expert testimony to grant summary judgment to class of prospective female prison guards).

disparities in these areas. *Id*. at ¶ 21. Class Counsel further investigated the claims of systemic gender disparities by reviewing pertinent documents, including human resources policies, practices, and procedures, and through numerous, lengthy discussions with the Representative Plaintiffs, potential Class Members, and witnesses. *Id*. at ¶ 22. Based upon their respective investigations and their respective expert analyses, the parties each assessed the merits, risks, and potential damages associated with Plaintiffs' class-based claims. *Id*. at ¶ 23.

The parties subsequently retained Hunter R. Hughes, III, an experienced and well-respected mediator skilled in the mediation of complex class actions.[2] Assisted by their respective experts, the parties engaged in three days of mediation on July 22, July 27, and August 31, 2015, but were unable to reach settlement. *Id*. at ¶¶ 24-25. Only in the days following the third unsuccessful day of mediation did the parties reach an agreement in principle. *Id*. at ¶ 25. Even then, it took nearly four months of intensive arm's length negotiations for the parties to reach full agreement on all settlement terms. These negotiations culminated in the execution of the parties' Class and Collective Settlement Agreement and Release on December 21, 2015. *Id*. at ¶ 26.[3]

Throughout this litigation and the settlement process, Defendants have denied any wrongdoing and have denied all allegations of discrimination. Defendants asserted several affirmative defenses, including that the claims were based on individualized facts and were not appropriate for class certification. Defendants maintain that they have acted lawfully at all times. Absent this Settlement, Defendants would have contested the propriety of class treatment both in response to a motion for certification and through the trial. Decl. at ¶ 17.

[2] *See, e.g. Aponte v. Comprehensive Health Mgmt*., No. 10 Civ 4825, 2013 U.S. Dist. LEXIS 47637, at *9 (S.D.N.Y. Apr. 2, 2013) (recognizing Hunter Hughes as an "experienced employment mediator[ ]" whose involvement in the negotiations supported the "presumption that the settlement achieved meets the requirements of due process").

[3] As indicated in Plaintiffs' preliminary approval papers, Plaintiffs have entered into a separate Confidential Individual Settlement Agreement that settles their non-class claims, including claims for sexual harassment, retaliation, constructive discharge, and wrongful termination.

III. PRELIMINARY APPROVAL PROCESS

Plaintiffs moved for preliminary approval of the Class and Collective Settlement Agreement and Release on December 22, 2015. *See* Dkt. Nos. 36, 37, and 38; Decl. at ¶ 27. Thereafter, the Court directed the parties to submit additional materials and to attend conferences regarding the fairness and reasonableness of the settlement. In response to questions and concerns raised by the Court, Class Counsel supplied the Court with voluminous supplemental materials on, *inter alia*, January 12, 2016 (Dkt. No. 54), May 17, 2016 (Dkt. No. 84), August 2, 2016 (Dkt. No. 94), and September 6, 2016 (Dkt. No. 110). *See* Decl. at ¶ 27.

The parties ultimately entered into a revised agreement – reflected in their First Amendment to the Class and Collective Settlement Agreement and Release (Dkt. No. 94-1) – that satisfied the Court's concerns. Decl. at ¶ 28. On August 3, 2016, the Court preliminarily approved the Settlement as "fair, reasonable, and adequate." Dkt. No. 95. The Court also preliminarily certified the following Rule 23 Classes and EPA Collectives for settlement purposes:

(i) *Director Class and Director Collective:* All female employees who held a Director-Level Position at Alcon in the United States for at least one month from March 17, 2012 to November 12, 2015, excluding individuals who entered into individual releases of Class Claims as part of individual agreements with Alcon prior to August 3, 2016 that did not contain an exception for participation in this Settlement.

(ii) *Manager Class and Manager Collective:* All female employees who held a Manager-Level Position at Alcon in the United States for at least one month from March 17, 2012 to November 12, 2015, excluding individuals who entered into individual releases of Class Claims as part of individual agreements with Alcon prior to August 3, 2016 that did not contain an exception for participation in this Settlement.

(iii) *Specialist/Analyst Class and Specialist/Analyst Collective:* All female employees who held a Specialist/Analyst-Level Position at Alcon in the United States for at least one month from March 17, 2012 to November 12, 2015, excluding individuals who entered into individual releases of Class Claims as part of individual agreements with Alcon prior to August 3, 2016 that did not contain an exception for participation in this Settlement.

(iv) *Sales Class and Sales Collective:* All female employees who held a Sales Position at Alcon in the United States for at least one month from March 17, 2012 to November 12, 2015, excluding individuals who entered into individual releases of Class Claims as part of individual agreements with Alcon prior to August 3, 2016 that did not contain an exception for participation in this Settlement.

Finally, the Court appointed Class Counsel, appointed a Claims Administrator, and ordered issuance of the class-wide Notice detailing the terms of the Settlement. *Id*.

IV. THE CLASS MEMBERS OVERWHELMINGLY APPROVE THE SETTLEMENT

Following preliminary approval, the Claims Administrator sent the Court-approved Notice (Dkt. No. 109-1) to 2,365 female Alcon employees who came within the Settlement Class definitions.[4] *See* Decl. at ¶ 30. The Notice comprehensively advised employees of the terms of the Settlement, including the method of computing payments (with sample calculations for each Class), the claims that would and would not be released, and the provision for attorneys' fees, costs, and service awards for the Representative Plaintiffs. *See* Dkt. No. 109-1. Further, the Notice directed Class Members to a website with additional documents, including the Agreement itself and the results of Plaintiffs' expert's analyses, including damages calculations. *Id.*

The Class response has been nearly universal in support of the Settlement. Not a single individual objected to the Settlement. Decl. at ¶ 42. There were only 29 timely opt-outs, amounting to 1.2% of the Class.[5] *Id*. Additionally, 307 women timely returned a Notice of Intent to Submit Claim Form, indicating that they believe they are entitled to Supplemental Payments under the Settlement.[6] *Id*. This amounts to 13.1% of Class Members, well within the range

[4] Notice was subsequently provided to an additional Class Member who had been inadvertently omitted from the list that Defendants initially provided to the Claims Administrator. Decl. at ¶ 30. The final number of individuals who fell within the Settlement Class definitions was slightly lower than previously estimated by Defendants' expert at Dkt. No. 87-2 at Ex. C.

[5] Two Class Members submitted untimely requests for exclusion. Decl. at ¶ 30.

[6] Eight Class Members submitted untimely Notices of Intent to Submit Claim Form. Decl. at ¶ 30.

contemplated by the Court when it preliminarily approved the Settlement.[7]

Given the Court's preliminary approval of the Settlement and the overwhelming endorsement of Class Members, the Settlement should be approved in its entirety.

V. KEY TERMS OF THE SETTLEMENT

The Class Settlement provides for a significant monetary payment to each Class Member. Alcon will make a total, non-reversionary payment of $8 million. This includes payments to Class Members, administrative expenses incurred in connection with the Class Settlement, attorneys' fees and costs, and service payments. Following all anticipated deductions, Class Members are estimated to receive awards totaling $5,069,143.40. Decl. at ¶ 34.

A. PAYMENT TO CLASS MEMBERS

Each Class Member will receive a share of the Settlement (called a *Base Payment*) for alleged pay discrimination, without any need to submit a claim form or take other affirmative steps. Decl. at ¶ 35. A Class Member may recover an additional payment, called a *Supplemental Payment*, if she submits a Claim Form detailing discrimination in promotions or in assignment to jobs, compensation grades, and/or compensation bands. *Id*. Carol Wittenberg, an experienced third-party neutral, determined that 85% of the Class Monetary Awards Settlement Fund should go toward Base Payments and 15% should go toward Supplemental Payments. *Id.* at ¶ 36. The Court has examined the determinations made by the third-party neutral, and Class Counsel agrees that this is an appropriate allocation. This allocation is reasonable in light of the participation of 13.1% of Class Members in the Supplemental Payment Fund.[8] *Id.* at ¶ 40.

[7] At a Conference on June 29, 2016, Counsel estimated that between 10 and 20 percent of Class Members would elect to participate in the Supplemental Payment Fund. *See* Transcript of Proceedings at 21:3-15, ECF No. 88.

[8] The basis for the Third-Party Neutral's allocation is detailed in Ms. Wittenberg's declaration. *See* Dkt. No. 74-2 at ¶¶ 6-7. As previously described for the Court, the Third-Party Neutral reviewed submissions detailing the class and collective claims in this case, including Dr. Vekker's analysis of gender disparities and potential damages (Dkt. No. 87-1 at Ex. 2A) and an unfiled, draft amended complaint containing anecdotal descriptions of gender discrimination in promotions and grade assignments (Dkt. No. 87 at Ex. 1C). *See* Dkt. No. 74-2 at ¶ 6.

The precise method for computing Base Payments and Supplemental Payments is set forth in Amended Paragraphs 6.2(b) and 6.3 of the Settlement. Generally speaking, each Class Member's Base Payment and (if eligible) Supplemental Payment will be calculated based on (i) her Total Compensation – regular earnings and short-term and long-term incentive compensation – during the Eligibility Period, and (ii) the percentage gender disparity ("gender coefficient") for her Class under Plaintiffs' expert's analysis.[9] Payments will be calculated by multiplying together these amounts for each individual and then allocating each fund on a *pro rata* basis. Decl. at ¶ 37. The average pre-tax Base Payment for Class Members will be approximately $1,843.72, and the average pre-tax Supplemental Payment for Class Members will be approximately $2,476.78. Decl. at ¶¶ 38-39. The amount that each Class Member will receive will vary based on her Total Compensation during the Eligibility Period and the gender coefficient for her Class under Plaintiffs' expert's analysis, and Base Payments will be adjusted to ensure that no Class Member receives an award of less than $50. *Id.* at ¶ 37. Defendants' expert has estimated that Base Payment awards will range up to more than $13,500. *Id.* at ¶ 38.

B. SERVICE PAYMENTS TOTALING $110,000

In accordance with the parties' Settlement, Plaintiffs seek service awards in a combined amount of $110,000, including $20,000 for lead Plaintiff Susan Orr; $15,000 each for Katerina Dodbiba and Jessicah McGaffie; $10,000 each for Melinda Konczal and Caroline Bucci; and $5,000 for each of the other Representative Plaintiffs. Settlement Agreement at ¶ 7.3. The awards are designed to compensate the Representative Plaintiffs for their dedicated service in pursuing the class and collective claims and for procuring the Settlement. Each of the Representative Plaintiffs has undertaken substantial efforts, risks, and expenditures on behalf of

[9] Supplemental Payments will be computed based on the Class Member's Total Compensation following the first event of alleged discrimination in promotion or assignments. Decl. at ¶ 35.

the Class Members, without which the Settlement could not have been achieved. Decl. at ¶¶ 56, 60-63. The aggregate payments constitute 1.375% of the Total Settlement Amount – an amount that is more than justified in light of the recipients' substantial participation in this action and the personal risks they assumed in leading this case. These service payments reduce the average settlement share by a mere $47, a nominal amount under the circumstances.

C. ATTORNEYS' FEES AND COSTS

The Class Settlement permits counsel to seek up to $2,800,000 in attorneys' fees (which represents 35% of the Total Settlement Amount). However, Class Counsel is seeking attorneys' fees of $2,666,666, or one-third of the Total Settlement Amount. To date, Sanford Heisler attorneys and staff have put in well over 3,100 hours on this matter, and the Firm's lodestar exceeds $1.8 million. Decl. at ¶¶ 47-48. In addition, Class Counsel expects to devote at least 700 additional hours overseeing and administering the Settlement going forward, particularly because the Claims Form process, entailing detailed submissions by more than 300 Class Members, will take place after Final Approval. *Id.* at ¶ 47. This is expected to increase Class Counsel's lodestar by several hundred thousand dollars. *Id.* at ¶ 48.

In addition, Counsel requests an award of reasonable litigation expenses. The Claims Administrator's costs will total up to $75,000 through the conclusion of the Claims Administration process. *Id*. at ¶ 53. Additionally, Sanford Heisler's records indicate that Class Counsel has incurred $79,190.60 in costs in connection to this matter to date, including (a) expert fees totaling $38,111.66; (b) expenses incurred in connection with three mediation sessions totaling $16,375.48; (c) costs for the services of the third-party neutral totaling $6,576.00; and (d) court filings, storage of electronic documents, and other miscellaneous costs. *Id* at ¶ 54.

The Notice approved by the Court informed Class Members that Class Counsel would

seek attorneys' fees of $2,666,666 and costs in the anticipated amount of $175,000. Dkt. No. 109-1. No Class Members have filed any objections to these proposed expenses. Decl. at ¶ 42. In fact, expenses are over $20,000 less than the $175,000 estimate in the Notice. *Id.* at ¶ 52.

ARGUMENT

I. TO EFFECTUATE THE SETTLEMENT, THE COURT SHOULD FINALIZE ITS CERTIFICATION OF THE RULE 23 CLASSES

On August 3, 2016, the Court conditionally certified the Classes for settlement purposes pursuant to Rule 23(b)(3). *See* Dkt. No. 95. During the preliminary approval process, the Court spent months reviewing the Settlement, including the basis for proposed Classes. The Court engaged in the requisite Rule 23 analysis. Nothing has changed since the preliminary approval order that would affect the propriety of certification of the settlement Classes. *See Gonqueh, v. Leros Point to Point, Inc*., No. 1:14-cv-5883-GHW (GWG), 2016 U.S. Dist. LEXIS 24231, at *3-8 (S.D.N.Y. Feb. 26, 2016) (Woods, J.) (granting final certification of settlement classes on final approval after conditionally certifying on preliminary approval). Accordingly, the Court should grant final certification of these Classes for settlement purposes. Plaintiffs briefly recap the relevant analysis here.

A. THE ELEMENTS OF RULE 23(a) ARE SATISIFED

1. The Classes Are Sufficiently Numerous

"Courts generally presume numerosity where a class consists of 40 or more members." *Meyer v. U.S. Tennis Ass'n*, 297 F.R.D. 75, 82 (S.D.N.Y. 2013); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("Numerosity is presumed at a level of 40 members"). Numerosity is satisfied here. The settlement Classes include a total of 2,337 individuals, with each subclass consisting of hundreds of Class Members. Decl. at ¶¶ 32-33.

2. Commonality is Satisfied

Just one common question of law or fact will satisfy the commonality requirement. *Meyer*, 297 F.R.D. at 84. Commonality does not require "that all issues must be identical as to each member, but rather require[s] that plaintiffs identify some unifying thread among the members' claims that warrant[s] class treatment." *Id.* at 83 (internal quotation omitted). *See also Murphy v. Lajaunie*, No.13-cv-6503 (RJS), 2015 U.S. Dist. LEXIS 97531, at *11-13 (S.D.N.Y. July 24, 2015); *Romero v. La Revise Assocs., L.L.C.*, 58 F. Supp. 3d 411, 418 (S.D.N.Y. 2014).

Here, Plaintiffs allege, Defendants discriminated against female employees in pay, promotions, and assignments. Plaintiffs further allege that Defendants effectuated this discrimination through common employment policies and centralized decision-making. Plaintiffs assert that numerous common questions of law and fact underlie these claims, including: (1) whether Defendants, through the use of their system of assignments to jobs, compensation grades, and compensation bands, placed female employees in jobs, compensation grades, and compensation bands lower than similarly-situated male employees; (2) whether Defendants, through the use of their compensation system, paid female employees less than similarly-situated male employees in salary, bonus, equity grants, and/or other perquisites; (3) whether Defendants, through the use of their promotion system, precluded or delayed the promotion of female employees into higher jobs traditionally held by male employees; and (4) whether Defendants engaged in unlawful, systemic gender discrimination in its job assignment, banding, promotion, and compensation policies, practices, and procedures. *See* Amended Complaint ¶¶ 139-140.

These common questions satisfy Rule 23(a)(2) for settlement purposes. *See, e.g., Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012); *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *26 (S.D.N.Y. Nov. 30, 2010) (commonality established

where "[a]ll Class Members bring the common claim that Novartis discriminated against female sales employees with respect to wages, promotion and pregnancy"); *Bellifemine v. Sanofi-Aventis* U.S. LLC, 2010 U.S. Dist. LEXIS 79679, at *4 (S.D.N.Y. Aug. 5, 2010) ("The commonality requirement is met because the Named Plaintiffs' claims involve allegations of common pay and promotion claims arising from the same alleged policies and practices of the company.").

3. The Class Representatives' Claims are Typical of the Class

The typicality requirement is met where "the lead plaintiffs' and absent class members' claims arise from the same course of events, and each class member will make similar legal arguments to prove defendants' liability." *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 406 (S.D.N.Y. 2015). *See also Meyer*, 297 F.R.D. at 86.

Here, the Class Representatives' claims and those of the Class Members arose from the same alleged course of conduct. Specifically, the Class Representatives contend that Defendants' alleged discriminatory policies and practices resulted in female employees being denied equal pay, promotions, and assignments to jobs, compensation grades, and compensation bands compared to similarly-situated male employees.[10] The Class Representatives contend that there are no defenses to these claims that are unique to the Class Representatives. Accordingly, the Class Representatives' claims are typical of the class for settlement purposes. *See Velez*, 2010 U.S. Dist. LEXIS 125945, at *27 (plaintiffs found to be typical where they alleged that they and all class members were discriminated against on the basis of their gender); *Ellis*, 285 F.R.D. at 533-35 (no unique defenses that will become a "major focus" of the litigation).

[10] Plaintiffs' claims are further detailed in the unfiled, draft complaint submitted at Dkt. No. 87 at Ex. 1C.

4. Rule 23(a)(4) and Rule 23(g) are Satisfied – the Class Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Class' Interests

Both the Class Representatives and Class Counsel adequately represent the Class. The Class Representatives and Class Counsel have actively and intensively investigated this case. Throughout the pendency of this action, the Class Representatives have adequately and vigorously represented their fellow female employees. They have spent significant time assisting the lawyers, providing information regarding Defendants' policies and practices, providing pertinent documents, and assisting in settlement negotiations. Decl. at ¶¶ 56-63.

Class Counsel is highly experienced and well-versed in complex class litigation, particularly gender discrimination actions. Decl. at ¶¶ 6-11. *See, e.g., Velez*, 2010 U.S. Dist. LEXIS 125945 at *28 ("[Sanford Heisler], has just the sort of established record contemplated by the Rules."); *Bellifemine*, 2010 U.S. Dist. LEXIS 79679 at *4 (recognizing Sanford Heisler as having "an established record of competent and successful prosecution of large . . . class actions").[11] As in *Gonqueh*, Class Counsel here is "qualified, experienced, and has successfully litigated this case, thereby demonstrating their adequacy as counsel for the Settlement Classes." 2016 U.S. Dist. LEXIS 24231, at *10.

Accordingly, both Rule 23(a)(4) and Rule 23(g) are satisfied.

B. THE REQUIREMENTS OF RULE 23(b)(3) ARE SATISFIED

1. Common Issues Predominate

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Meyer*, 297 F.R.D. at 87 (citation omitted). This requirement is satisfied "if resolution of some of the legal or factual questions that qualify each class member's

[11] *See also Zolkos v. Scriptfleet, Inc.*, No. 12 Civ. 8230 (GF), 2014 U.S. Dist. LEXIS 172519, at *11 (N.D. Ill. Dec. 12, 2014) (acknowledging that Sanford Heisler "is very experienced in complex class and collective litigation . . . and has been repeatedly recognized for its skilled and effective representation"); *Hernandez v. C&S Wholesale Grocers, Inc.*, No. 06 CV 2675 (CLB) (MDF), 2008 U.S. Dist. LEXIS 118666 (S.D.N.Y July 30, 2008).

case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Id*. *See also Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 U.S. Dist. LEXIS 162101, at *18 (S.D.N.Y. Dec. 2, 2015) (same); *Moore v. PaineWebber, Inc.*, 306 F. 3d 1247, 1252 (2d Cir. 2002) (Rule 23(b)(3) predominance means that certain issues resolvable through generalized proof "are more substantial than the issues subject only to individualized proof"). A finding of Rule 23(a) typicality "goes a long way towards satisfying" the Rule 23(b)(3) predominance requirement. *Stinson v. City of New York*, 282 F.R.D. 360, 382 (S.D.N.Y. 2012).

Here, for purposes of this Settlement, "[r]esolution of Plaintiffs' challenge to [alleged discriminatory employment] practices will resolve significant issues with respect to the class as a whole, and this dwarfs individualized issues as to particular employment decisions." *Ellis*, 285 F.R.D. at 538. *See also, e.g.*, *Bellifemine*, 2010 U.S. Dist. LEXIS 79679, at *5 ("For purposes of this settlement, the Named Plaintiffs' claims meet [Rule 23(b)(3)] because they are unified by common factual allegations that sanofi-aventis allegedly disfavored female sales force employees compared to males in terms of compensation and promotion.").

2. A Class Settlement is Superior to Alternative Methods of Adjudication

Under the factors set forth in Fed. R. Civ. P. 23(b)(3), Plaintiffs contend that class treatment is superior to other methods of adjudication. *See Velez*, 2010 U.S. Dist. LEXIS 125945 at *29; *Ellis*, 285 F.R.D. at 539-40. Notably, the manageability factor strongly favors class treatment because there is hardly a form of adjudication more manageable than a voluntary settlement. *Cf. Amchem Prods. v. Windsor*, 521 U.S. 591, 610 (1997). Accordingly, the Court should grant final certification for settlement purposes.

II. TO EFFECTUATE THE SETTLEMENT, THE COURT SHOULD FINALIZE ITS CERTIFICATION OF THE EPA COLLECTIVES

Certification of an EPA collective action under 29 U.S.C. § 216(b) typically proceeds under a two-stage procedure.[12] *See, e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010). Here, the Plaintiffs seek stage-two certification of the EPA action for settlement purposes. As with Rule 23 certification, this will facilitate completion of the settlement and the final resolution of this matter. *See Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *7-8.

Under 29 U.S.C. § 216(b), a collective action is appropriate if the employees are "similarly-situated." In considering whether to grant final certification of an FLSA/EPA collective action, courts apply an *ad hoc* balancing test composed of several factors, including: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Torres v. Gristede's Oper. Corp.*, No. 04-cv-3316, 2006 U.S. Dist. LEXIS 74039, at *30 (S.D.N.Y. Sept. 28, 2006) (alterations omitted); *see also Jason v. Falcon Data Com, Inc.*, No. 09-cv-03990, 2011 U.S. Dist. LEXIS 77352, at *13 (E.D.N.Y. July 18, 2011); *Ayers v. SGS Control Servs.*, No. 03 Civ. 9078, 2007 U.S. Dist. LEXIS 19634, at *19 (S.D.N.Y. Feb. 26, 2007). The applicable balancing test is "considerably less stringent than the requirement of Rule 23(b)(3) that common questions 'predominate.'" *Ayers*, 2007 U.S. Dist. LEXIS 19634, at *16; *see also Iriarte v. Café 71, Inc.*, No. 15-cv-3217, 2015 U.S. Dist. LEXIS 166945, at *8 (S.D.N.Y. Dec. 11, 2015) (discussing lenient standard).

[12] "As part of the [Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*], the EPA utilizes the FLSA's enforcement mechanisms and employs its definitional provisions." *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 U.S. Dist. LEXIS 92675, at *24 (S.D.N.Y. June 19, 2012).

A. PLAINTIFFS' FACTUAL AND EMPLOYMENT SETTINGS

Here, for settlement purposes, Plaintiffs seek to certify four EPA Collectives, comprised of female: (i) Directors, (ii) Managers, (iii) Specialists/Analysts, and (iv) Sales professionals. The employees in each group are characterized by similar titles, similar levels of authority or responsibility, and/or similar job functions. *See* Dkt. No. 84 (detailing common elements within each group and supplying case law supporting certification). Further, the members of each of these groups allege that they were paid less than comparable men for performing equivalent work. They further contend that this discrimination was effectuated by common policies and practices, including centralized decision-making. *See, e.g.*, Amended Complaint at ¶¶ 170-171.

B. INDIVIDUALIZED DEFENSES

Plaintiffs assert a pattern or practice of discrimination and are not aware of any individualized defenses that could potentially prevent certification. As set forth above, common issues predominate over any minor individual differences between employees.

C. FAIRNESS AND PROCEDURAL CONSIDERATIONS

The final factor weighs heavily in favor of certification. Without the benefit of a collective action, the members of the EPA Collectives would be required to hire their own lawyers and expend resources bringing duplicative individual actions. Many employees would simply be unable to litigate their clams due to the costs and time necessary to litigate a lawsuit. *Cf. Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The Settlement fairly and efficiently resolves the claims of the members of the proposed EPA Collectives and avoids any potential manageability issues.

III. THE COURT SHOULD APPROVE THE SETTLEMENT UNDER RULE 23(e)

A. CLASS SETTLEMENTS ARE HIGHLY FAVORED AND SHOULD BE ACCORDED A PRESUMPTION OF FAIRNESS

There is a "strong judicial policy favoring settlements, particularly in the class action context." *McReynolds*, 588 F.3d at 803 (citation omitted). *See also, e.g., In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL No. 12-2389, 2015 U.S. Dist. LEXIS 152668, at *7 (S.D.N.Y. Nov. 9, 2015); *Peoples v. Annucci*, No. 11-cv-2694 (SAS), 2016 U.S. Dist. LEXIS 43556, at *30 (S.D.N.Y. Mar. 31, 2016). "[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116. *See also Annucci*, 2016 U.S. Dist. LEXIS 43556 at *29 ("[A] class action settlement enjoys a presumption of fairness where it is the product of arm's-length negotiations between experienced and capable counsel."); *Clark v. Ecolab Inc.*, 2010 U.S. Dist. LEXIS 47036, at *17-18 (S.D.N.Y. May 11, 2010) (absent any sign of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated settlement.").

B. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Court should approve the settlement if, taken as a whole, it is "fair, reasonable, and adequate." *In re Elec. Books Antitrust Litig.*, 639 Fed. Appx. 724, 726 (2d Cir. 2016) (citing Fed R. Civ. P. 23(e)(2)). *See also, e.g., McReynolds*, 588 F.3d at 800.

Courts within this Circuit make this determination by conducting a "review of both procedural and substantive fairness." *Blessing v. Sirius Xm Radio, Inc.*, 507 Fed. Appx. 1, 3 (2d Cir. 2012); *see also Wal-Mart*, 396 F.3d at 116 ("A court determines a settlement's fairness by looking at both the settlement terms and the negotiating process leading to settlement").

Procedural considerations include: whether the settlement is the product of arm's length negotiations between experienced counsel and whether it is tainted by collusion. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440 (DAB), 2010 U.S. Dist. LEXIS 87644, at *11 (S.D.N.Y Aug. 23, 2010). Substantive fairness compares the substantive terms of the settlement with the risks and likely rewards of litigation. *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 370 U.S. 414, 434-25 (1968); *see also Mba v. World Airways, Inc.*, 369 Fed. Appx. 194, 197 (2d Cir. 2010); *Clark*, 2010 U.S. Dist. LEXIS 47036 at *17; *deMunecas*, 2010 U.S. Dist. LEXIS 87644, at *10.

1. The Settlement is Procedurally Fair

a. The Agreement is the Product of Lengthy and Hard-Fought Negotiations

There can be no question that the Settlement was the result of hard-fought, arm's length negotiations. The final amended Settlement follows approximately a year and a half of litigation activity, including the analysis of extensive data and documents by both counsel and their respective experts. The parties fully aired their respective positions on class liability and damages on numerous occasions, including three days of mediation. Decl. at ¶¶ 20-28. All negotiations were conducted at arm's length and were well informed by the parties' extensive and diligent investigation. *See, e.g., Silverstein v. AllianceBernstein LP*, No. 09-CV-5904 (JPO), 2013 U.S. Dist. LEXIS 179734, at *11-13 (S.D.N.Y. Dec. 20, 2013); *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 U.S. Dist. LEXIS 144327, at *13-14 (S.D.N.Y. Oct. 2, 2013); *In re Sturm*, No. 3:09cv1293 (VLB), 2012 U.S. Dist. LEXIS 116930, at *12-13 (D. Conn. Aug. 20, 2012).[13]

[13] Additionally, the Agreement contains no reversionary clause. This further indicates a lack of collusion, supporting a finding of procedural fairness. *See, e.g., Betancourt v. Advantage Human Resourcing, Inc.*, No. 14-cv-01788-JST,

Moreover, where, as here, the Settlement is the product of mediation with an experienced mediator, there is a presumption of fairness and arm's length negotiations. *See, e.g., deMunecas*, 2010 U.S. Dist. LEXIS 38229, at *3 ("The assistance of an experienced mediator . . . reinforces that the Settlement Agreement is non-collusive."); *In re AOL Time Warner, Inc.*, No. 02cv8853 (SWK), 2006 U.S. Dist. LEXIS 70474, at *16 (S.D.N.Y. Sept. 27, 2006) ("In evaluating a settlement's procedural fairness, the Second Circuit has noted that 'a court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.'"); *Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271, 2011 U.S. Dist. LEXIS 11931, at *2-3 (S.D.N.Y. Jan. 20, 2011) ("The assistance of an experienced class action employment mediator . . . reinforces that the Settlement Agreements are non-collusive."). *See further Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *9 ("The Court further finds that the Settlement Agreement has been reached as the result of intensive, arms-length negotiations, including mediation with an experienced third-party neutral.").

b. Counsel for Both Parties Are Skilled and Seasoned Employment Lawyers

Class Counsel is a nationwide law firm with expertise in complex class litigation, particularly in gender discrimination cases. Courts across the country have repeatedly praised the firm for its zealous and effective advocacy in employment class actions. Decl. at ¶¶ 6-10. *See, e.g., Velez*, 2010 U.S. Dist. LEXIS 125945 at *28; *Bellifemine*, 2010 U.S. Dist. LEXIS 79679 at *4; *Zolkos v. Scriptfleet, Inc.*, 2014 U.S. Dist. LEXIS 172519, at *11 (N.D. Ill. Dec. 12, 2014).

2015 U.S. Dist. LEXIS 114814, at *19-20 (N.D. Cal. Aug. 28, 2015) ("[o]ther signs support the conclusion that the settlement was not the product of collusion [include the fact that] [t]he settlement does not contain a reversionary clause."); *see also Newberg on Class Actions* § 12:29 (5th ed.) (noting that "a defendant is more likely to settle if the unclaimed funds revert to it."). Simply put, here, "the risk of collusion among counsel is so small that it is effectively non-existent." *Wade v. Kroger Co.*, No. 3:01CV-699-R, 2008 U.S. Dist. LEXIS 97200, at *12 (W.D. Ky. Nov. 20, 2008).

Sanford Heisler has been recognized repeatedly as one of the nation's leading plaintiffs' firms, with attorneys of the highest caliber. The firm has been recognized as a "Best Law Firm National Tier 1 Employment Firm" by U.S. News (2015 and 2016) and "Elite Trial Lawyers" by the National Law Journal (2014 and 2015). Decl. at ¶ 11. Sanford Heisler's past employment actions have resulted in significant recoveries and injunctive relief for class members, including one of the largest jury verdicts ever awarded in an employment case. *Velez,* 2010 U.S. Dist. LEXIS 125945 at *11 ($250 million punitive damages verdict); Decl. at ¶ 9. The firm has been repeatedly recognized for its representation of its clients and high standing at the bar. *Id.* at ¶ 10. For example, at the final fairness hearing in *Velez*, the judge commented that the firm had achieved an "extraordinary" result: "This was a well prepared case. It was a brilliantly tried case by plaintiff's counsel. . . and it yielded a one-of-a-kind result, and that has led to a one-of-a-kind settlement." *Id.* At the final fairness hearing in *Hernandez v. C&S Wholesale Grocers, Inc.*, No. 06 CV 2675 (CLB) (MDF), 2008 U.S. Dist. LEXIS 118666 (S.D.N.Y. July 30, 2008), the judge described the firm as "exceptionally able and experienced" and praised "the work that counsel have put in, not just in terms of the quantity, but what it was that counsel did, with obviously the tremendous amount of work . . .," acknowledging a highly favorable result in "obviously a very complex dispute, both in terms of the law and in terms of the facts." *Id.*

McDermott Will & Emery LLP and Cravath, Swaine & Moore LLP are counsel for Alcon in this action, and White & Case LLP is counsel for Novartis Corporation. All are nationally-recognized law firms with offices worldwide and strong reputations in the fields of employment law and complex litigation.

2. The Settlement is Substantively Fair

"A proposed settlement is substantively fair if the nine factors outlined in *City of Detroit*

v. Grinnell Corp. [495 F.2d 448 (2d Cir. 1974)] weigh in favor of that conclusion." *Sirius*, 507 Fed. Appx. at 3 (citations omitted). These factors are:

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

Grinnell, 495 F.2d, at 462-63. These factors weigh heavily in favor of final approval.

a. The Complexity, Expense and Likely Duration of this Litigation

The first factor – the complexity, expense, and likely duration of this case – clearly favors final approval. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd,* 236 F.3d 78 (2d Cir. 2001). Discrimination class actions are particularly complex, "[a]nd the duration of litigation in such cases often rivals that of even the most notorious antitrust cases." *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1405 (D. Minn. 1987). As recognized by the Ninth Circuit, "[t]he track record for large class action employment discrimination cases demonstrates that many years may be consumed by trials and appeals before the dust finally settles." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 629 (9th Cir. 1982) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21129, at *5 (D. Colo. Mar. 9, 2000) ("discrimination class actions have a well- deserved reputation for being complex and difficult to win").

This observation is every bit as true in this case. This action involves more than 2,300 employees in four Classes who bring claims for discrimination in pay, promotions, and assignments. Here, the action would likely continue for years. The parties would face enormous expense and burden in conducting pre-certification discovery, litigating issues of venue, litigating class certification (and possible decertification) motions, conducting post-certification merits discovery, litigating dispositive motions, proceeding to trial, and pursuing appeals. There would be no guarantee of a more favorable result. These facts strongly support final approval of the Settlement.

b. The Reaction of the Class to the Settlement

"It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Facebook*, 2015 U.S. Dist. LEXIS 152668 at *9 (citation omitted). Lack of objection strongly favors settlement approval. *See, e.g., In re Elec. Books Antitrust Litig*., 639 Fed. Appx. at 727 ("factor . . . two [reaction of the class to the settlement] . . . weighed in favor of approving the settlement" where district court "concluded that the class implicitly approved the settlement" because there were "few exclusions and few objections.'"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) (absent a substantial number of objectors or "evidence of fraud or overreaching, courts have consistently refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.") (citations omitted).

Here, the Class Members have overwhelmingly affirmed the Court's judgment at preliminary approval that the amended settlement is fair, reasonable, and adequate. Out of the over 2,300 Notices sent, there have been **zero objections** and only 29 timely opt-outs.[14] Decl. at

[14] Moreover, 307 Class Members formally expressed their intent to submit Claim Forms in order to receive Supplemental Payments. This further affirms Class Members' support for the settlement. Decl. at ¶ 42.

¶ 42. In endorsing the Settlement, Class Members had easy access to information regarding the Settlement, including a website containing the full Settlement Agreement and Plaintiffs' expert's liability and damages analysis. Decl. at ¶ 30. Class Members' unqualified response to the Notice demonstrates their active support for the Settlement, including the benefits to the Classes, the service awards, and proposed attorney's fees and costs. "That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and supports a finding that 'the Settlement is 'fair, reasonable, and adequate.'"" *Charron v. Pinnacle Group NY LLC*, 874 F. Supp. 2d 179, 197 (S.D.N.Y. 2012) (citation omitted). The lack of objections "may itself be taken as evidencing the fairness of a settlement." *RMED Int'l Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL) (RLE), 2003 U.S. Dist. LEXIS 8239, at *4 (S.D.N.Y., May 15, 2003) (quoting *Ross v. A.H. Robins*, 700 F. Supp. 682, 684 (S.D.N.Y. 1988)).

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

The parties reached the Settlement only after extensive investigation and analysis. In particular, Class Counsel obtained voluminous human resources data from Defendants, including detailed information on Class Members' compensation, as well as their tenure at the company, ages, job functions, job families, and other characteristics; worked closely with an expert labor economist to examine the data to determine the extent of gender disparities in pay, promotion, and assignments; reviewed pertinent documents, including human resources policies, practices, and procedures; and engaged in numerous, lengthy discussions with the Class Representatives, potential Class Members, and witnesses. Decl. at ¶¶ 20-22.

It is well established that formal discovery "is not required for a settlement to be adequate, if the parties obtained sufficient information to understand the claims and negotiate settlement terms." *Castagna v. Madison Square Garden*, L.P., No. 09-cv-10211 (LTS) (HP),

2011 U.S. Dist. LEXIS 64218, at *16 (S.D.N.Y. June 7, 2011); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("the question is whether the parties had adequate information about their claims.") (citation omitted).[15] Where, as here, the parties have sufficiently exchanged relevant information, "the 'stage of proceedings' factor also weigh[s] in favor of settlement approval." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2001); *see also Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *9 ("The Court finds that sufficient investigation, research and litigation has been conducted such that counsel for the parties are able to evaluate their respective risks of further litigation, including the additional costs and delay associated with the further prosecution of this action.").

d. The Risks of Establishing Liability and Damages

As courts consistently recognize, the purpose of settlement is to avoid the uncertainty and risk inherent to litigation. *See, e.g.*, *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494 (RLE), 2015 U.S. Dist. LEXIS 65261, at *9 (S.D.N.Y. May 7, 2015) ("One purpose of a settlement is to avoid the uncertainty of a trial on the merits.") (citation omitted); *Clark*, 2010 U.S. Dist. LEXIS 47036 at *22.

If the case is litigated, Plaintiffs and the Classes would bear considerable risk at every stage: class certification, liability, damages, and potential appeals. The settlement resolves these risks in a favorable manner. Thus, this factor favors final approval. *See, e.g.*, *deMunecas*, 2010 U.S. Dist. LEXIS 87644, at *14-15. Moreover, the risk is all the greater on the class claims of systemic discrimination in promotions and assignments, because Plaintiffs' expert found no independent statistical significance on these claims. *See* Dkt. No. 54-1 and 74 at ¶¶ 14-15. This

[15] *Cf. Bravo v. Palm West Corp.*, No. 14 Civ. 9193 (SN), 2015 U.S. Dist. LEXIS 135123, at *4-5 (S.D.N.Y. Sept. 30, 2015) ("Courts encourage early settlement of class actions because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere") (citing cases); *In re Interpublic Sec. Litig.*, No. Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, at *35-36 (S.D.N.Y. Oct. 26, 2004) (praising plaintiffs and their counsel for the early settlement of class action).

is both the reason for requiring Class Members to submit Claim Forms to recover on these claims as well as the primary rationale for the Third-Party Neutral's decision to allocate only 15% of the Class Monetary Awards Settlement Fund to these claims. *See* Dkt. Nos. 54-3 and 74-2 at ¶ 7.

e. Maintaining the Class Through Trial Would Not Be Simple

"The risk of maintaining class status throughout trial also weighs in favor of final approval." *DeLeon*, 2015 U.S. Dist. LEXIS 65261 at *9. But for the Settlement, Defendants would strongly dispute the propriety of Rule 23 certification. Decl. at ¶ 17; *see*, *e.g.*, *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (this factor favors approval where "it is not certain that the case would be certified in the absence of a settlement."). Even if the Court were to grant certification, maintaining certification through trial could continue to present challenges. Defendants are likely to move for decertification, which would result in further expense and delay. Decl. at ¶ 17; *see*, *e.g.*, *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 U.S. Dist. LEXIS 37872, at *39 (S.D.N.Y. Mar. 21, 2014) ("This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial.") (citation omitted); *DeLeon*, 2015 U.S. Dist. LEXIS 65261 at *9 ("A motion to decertify . . . would require extensive briefing, possibly followed by an appeal. Settlement eliminates the risk, expense, and delay inherent in this process."). Further, Defendants might file a Rule 23(f) appeal, necessitating further briefing and attendant delays. *See*, *e.g.*, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 620 (S.D.N.Y. 2012). Finally, the manageability of a class trial would likely remain an issue. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (noting possibility of decertification if manageability issues become intractable).[16]

[16] Plaintiffs note that a defendant's ability to withstand a greater judgment is a factor that should be assigned "relatively little weight." *Morris*, 859 F. Supp. 2d at 621 (citation omitted). "A defendant is not required to 'empty

f. The Net Settlement Benefits are Reasonable in Light of the Best Possible Recovery, the Strengths and Weaknesses of Plaintiffs' Case, and All Attendant Risks of Litigation

"The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Morris*, 859 F. Supp. 2d at 621; *see also Henry v. Little Mint, Inc.*, No. 12 Civ. 3996 (CM) 2014 U.S. Dist. LEXIS 72574, at *25 (S.D.N.Y. May 23, 2014). The Court's inquiry should be limited to determining "whether the settlement 'falls below the lowest point in the range of reasonableness.'" *Long v. HSBC USA Inc.*, 2015 U.S. Dist. LEXIS 122655, at *12 (S.D.N.Y. Sept. 11, 2015) (quoting *In re Gache*, 164 F.3d 617 (2d Cir. 1998)). *See also Hart v. RCI Hospitality Holdings*, No. 09 Civ. 3043 (PAE), 2015 U.S. Dist. LEXIS 126934, at *31-32 (S.D.N.Y. Sept. 22, 2015).[17]

Weighing the benefits of the Settlement against the risks associated with proceeding in the litigation, the $8 million Settlement is more than reasonable. This constitutes approximately 22.2% of Plaintiffs' expert's calculation of the Classes' actual monetary losses due to alleged gender discrimination. Decl. at ¶ 44. Following all deductions, the Class Monetary Awards Settlement Fund of over $5 million constitutes approximately 14.0% of these

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its coffers' before a settlement can be found adequate." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (citation omitted); *see also Kochilas v. Nat'l Merch. Servs.*, No. 1:14-cv-00311, 2015 U.S. Dist. LEXIS 135553, at *15 (E.D.N.Y. Oct. 2, 2015).

[17] As the Second Circuit stated in *Grinnell*: "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455, n.2. *See, e.g., In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 483-84 (S.D.N.Y. 2009) (approving settlement which provided for 2% of the maximum possible liability, observing that "the Second Circuit has held that a settlement amount of even a fraction of the potential recovery does not render a proposed settlement inadequate"); *In re Sturm*, No. 3:09cv1293 (VLB), 2012 U.S. Dist. LEXIS 116930, at *20-21 (D. Conn. Aug. 20, 2012) (settlement providing for "approximately 3.5% of Lead Plaintiff's 'most aggressive estimate of maximum provable damages'" was reasonable "[i]n light of the legal and factual complexity" of the case and "the unpredictability of a lengthy trial and appellate process"); *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 103 (D. Conn. 2010) ("in light of the considerable risks," "costs" and "uncertainty" of success, a class settlement worth 8% of maximum recoverable damages was reasonable); *In re Prudential Inc. Secs. Ltd. Partnerships Litig.*, MDL No. 1005, 1995 U.S. Dist. LEXIS 22103 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 and 5% of claimed damages); *Dillworth v. Case Farms Processing, Inc.*, No. 5:08- cv-1694, 2010 U.S. Dist. LEXIS 20446, at *20 (N.D. Ohio Mar. 8, 2010) (noting that "average result achieved for class members" in class actions is between 7 and 11%) (citation omitted).

losses. *Id.; see* Dkt. 84-2 at ¶ 4.[18] In a highly complex and risky case, this is an excellent result.

Under the Settlement, each Class Member will receive a Base Payment without having to submit a claim form, testify, or take any other affirmative steps. Decl. at ¶ 35. The average pre-tax Base Payment for Class Members will be approximately $1,843.72, and Defendants' expert has estimated that Base Payment awards will range up to more than $13,500. *Id.* at ¶ 38. In addition, Class Members who submit timely and complete Claim Forms are expected to receive Supplemental Payments that average approximately $2,476.78. *Id.* at ¶ 39. These numbers demonstrate that participation in the Supplemental Payment Fund is operating as expected and that Class Members who submit Claim Forms will not receive an undue windfall.

The Settlement provides substantial relief to the class members and will be distributed to them in a matter of months, rather than after years of further litigation and appeals. *See, e.g.*, *Long*, 2015 U.S. Dist. LEXIS 122655 at *12-13 (where settlement "assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, [it] is reasonable under this factor.") (citation omitted); *see also Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452 (RLE), 2008 U.S. Dist. LEXIS 23016, at *13 (S.D.N.Y. Mar. 24, 2008).

Additionally, as noted above, Plaintiffs face "significant obstacles" in obtaining class certification, proving liability and damages, and withstanding further appeals. *Collins v. Olin Corp.*, No. 3:03-cv-945 (CFD), 2010 U.S. Dist. LEXIS 39862, at *22 (D. Conn. Apr. 21, 2010). Thus, "[t]here is simply no assurance that more years of litigation would result in any greater recovery." *Wright v. Stern*, 553 F. Supp. 2d 337, 339 (S.D.N.Y. 2008); *see also Henry*, 2014

[18] Plaintiffs' expert, Dr. Vekker, performed his analysis using four possible models. Dr. Vekker maintains that the analysis controlling for employees' job grade but not performance ratings presents a reasonable and justifiable model in this case. *See* Dkt. 84-2 at ¶ 4. The Court engaged with the parties on this matter at the preliminary approval stage, and "Defendants specifically dispute that any Court would accept the analysis in Plaintiffs' expert's statistical models that do not control for grade." Dkt. No. 94-2.

U.S. Dist. LEXIS 72574 at *25 ("range of reasonableness" of a settlement "recognize[s] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion") (citation omitted). For all of these reasons, the Settlement should be approved.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE EPA SETTLEMENT

"The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement." *DeLeon*, 2015 U.S. Dist. LEXIS 65261 at *10 (citation omitted). "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." *Id.* An FLSA/EPA settlement need only reflect a reasonable compromise of contested litigation involving a *bona fide* dispute between the parties. *Id*. at *10-11.

As set forth above, the Settlement meets the stricter Rule 23(e) standard. Thus, *a fortiori* it easily passes muster under the EPA. First, the parties have *bona fide* disputes over (i) Defendants' liability under the EPA, including whether collective action members were paid less than their male counterparts for performing equivalent work; (ii) the applicable statute of limitations under 29 U.S.C. § 255, as well as the availability of liquidated damages under 29 U.S.C. § 260; and (iii) absent settlement, whether collective action certification is appropriate. The parties would continue to contest these issues absent a settlement. *See* Decl. at ¶ 17. Second, the settlement is a fair and reasonable compromise of contested claims. *See, e.g., Aros v. United Rentals, Inc*, No. 3:10-CV-73 (JCH), 2012 U.S. Dist. LEXIS 104429, at *6-8 (D. Conn. July 26, 2012); *Campanelli v. Hershey Co.*, No. C 08-1862 BZ, 2011 U.S. Dist. LEXIS 93166, at *3 (N.D. Cal. May 4, 2011) ("substantial" payments achieved through arm's length negotiations). Moreover, unlike in many FLSA cases, the fairness and reasonableness of the

settlement has been tested through the Class' response to the Notice.

V. THE COURT SHOULD APPROVE PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

A. THE APPLICATION

The Settlement provides that, subject to Court approval, Class Counsel is eligible to receive up to $2,800,000 in attorneys' fees, or 35% of the $8 million settlement. Settlement Agreement at ¶ 7.4. Class Counsel, however, seeks only a standard one-third attorneys' fee, in the amount of $2,666,666. This fee is eminently reasonable in light of the complexity of the litigation, the high degree of risk assumed by Counsel, the amount of time and resources expended on the case, and the excellent result achieved for the Class. In addition, Counsel seeks an award of up to $75,000 for settlement administration expenses and of $79,190.60 in reasonable litigation expenses, including expert fees, mediation expenses, and various other out-of-pocket expenditures. Decl. at ¶ 53.

The Notice informed Class Members that Counsel would seek up to one-third of the total settlement amount in attorneys' fees, plus an estimated $175,000 for settlement administration and litigation costs. *See* Dkt. No. 109-1. The Class Members' nearly universal support of the Settlement – without objection to the attorneys' fees, costs, or any other aspect of the Settlement – confirms the reasonableness of the request.

B. AN AWARD OF ATTORNEYS' FEES IS STANDARD

Courts have long recognized that a lawyer whose efforts create a common fund may recover a reasonable attorney fee from the fund as a whole. *See Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care*, LLC, 504 F.3d 229, 249 (2d Cir. 2007) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)) ("under the 'equitable fund' doctrine, attorneys for the successful party may petition for a portion of the fund as

compensation for their efforts"). Moreover, it is well-established that "[a]n agreed upon award of attorneys' fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances." *Bellifemine*, 2010 U.S. Dist. LEXIS 79679 at *14-15.

Public policy favors an award of reasonable attorneys' fees. If plaintiffs' counsel, which litigates these cases on a contingency basis, were not sufficiently compensated, plaintiffs would not be able to fulfill their role as "private attorneys general" enforcing anti-discrimination statutes. *See, e.g., Kassim v. City of Schenectady*, 415 F.3d 246, 252 (2d Cir. 2005) (fee-shifting in civil rights cases is intended "to secure legal representation for plaintiffs whose constitutional injury [is] too small, in terms of expected monetary recovery, to create an incentive for attorneys to take the case under conventional fee arrangements."); *Goldberger v. Integrated Research, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) (commending the general "sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest").

C. THE ATTORNEYS' FEES REQUESTED ARE REASONABLE AND APPROPRIATE UNDER THE CIRCUMSTANCES

Counsel seeks attorneys' fees amounting to one-third of the total settlement amount. "The trend in this Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases such as this one . . . [and] 33.3% of the Fund . . . is reasonable 'and consistent with the norms of class litigation in this circuit.'" *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12cv4216, 2014 U.S. Dist. LEXIS 105596, at *26-28 (S.D.N.Y. July 31, 2014) (citation omitted).

Counsel's anticipated fee request is clearly in line with the majority of class settlements in the Second Circuit. *See, e.g., In re Facebook*, 2015 U.S. Dist. LEXIS 152668, at *30 ("A fee award of one-third of the Settlement Fund is well within the range accepted by courts in this circuit.") (internal quotations omitted); *Hart*, 2015 U.S. Dist. LEXIS 126934, at *44 ("In

numerous such common fund cases, fees have been awarded that represent one-third of the settlement fund."); *Flores v. One Hanover, LLC*, No. 13 Civ. 5184; 2014 U.S. Dist. LEXIS 78269, at *23-24 (S.D.N.Y. June 9, 2014) ("Class Counsel's request for one third of the fund is reasonable and consistent with the norms of class litigation in this circuit." (internal quotations omitted); *Willix v. Healthfirst, Inc*., No. 07-Civ-1132, 2011 U.S. Dist. LEXIS 21102, at *17 (E.D.N.Y. Feb. 18, 2011) (same) (collecting cases); *Campos v. Goode*, No. 10 Civ. 0224, 2011 U.S. Dist. LEXIS 22959, at *21 (S.D.N.Y. Mar. 4, 2011) (approving attorneys' fees of one-third of class fund in part because "reasonable, paying client[s] typically pay one-third of their recoveries under private retainer agreements") (citation omitted); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ 4270, 2009 U.S. Dist. LEXIS 27899, at *16 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 U.S. Dist. LEXIS 22663, at *76 (S.D.N.Y. Nov. 26, 2002) ("In this district alone, there are scores of . . . cases where fees alone (*i.e.*, where expenses are awarded in addition to the fee percentage) were awarded in the range of 33-1/3% of the settlement fund."). *See further Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *10 (awarding one-third of maximum gross settlement amount, plus costs).[19]

Indeed, in high-risk employment class action such as this one, courts frequently approve awards in excess of one-third. *See, e.g.*, *Wright*, 553 F. Supp. 2d at 347 (awarding an $8

[19] *See also, e.g.*, *Spann v. AOL Time Warner*, No.02-cv-8238, 2005 U.S. Dist. LEXIS 10848, at *24 (S.D.N.Y. June 7, 2005) (approving fees of one-third of settlement fund); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 263 (S.D.N.Y. 2003) (same); *In re Blech Sec. Litig.*, No. 94-cv-7696, 2002 U.S. Dist. LEXIS 23170, at *5 (S.D.N.Y. Dec. 4, 2002) (same); *Davis v. JP Morgan Chase & Co*., 827 F. Supp. 2d 172, 183, 185-86 (W.D.N.Y. 2011) (one-third of $42 million fund); *Warren v. Xerox Corp.*,, No. 01-CV-2909, 2008 U.S. Dist. LEXIS 73951, at *22 (E.D.N.Y. Sept. 19, 2008) (one-third of $12 million settlement).

million fee in employment case, representing over 38% of total relief, in addition to $999,999.79 in litigation expenses); *Frank*, 228 F.R.D. at 188-89 (awarding 38.26% of fund).[20]

Here, the requested award is reasonable and justified.

1. The Relevant Factors Support Counsel's Attorneys' Fee Application

In determining the reasonableness of class action attorneys' fees, courts apply the principles articulated in *Grinnell*, 495 F.2d at 471, and confirmed in *Goldberger*, 209 F.3d at 47. "The *Goldberger* factors include: (1) counsel's time and labor; (2) the litigation's magnitude and complexity; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Munter v. Hickey*, 634 Fed. Appx. 59, 60 (2d Cir. 2016) (citation omitted). "[T]he ultimate question is whether the fees awarded exceed what is 'reasonable' under the circumstances." *Id.*

These factors strongly weigh in favor of the requested fee award. Counsel has invested a vast amount of time and resources in a difficult litigation undertaken on a contingency basis. *See* Decl. at ¶¶ 47-48. Despite the high degree of risk involved, Counsel was able to achieve a highly favorable result for the Classes. The requested attorneys' fee is fully supported by the Class Members. The fee would result in only a modest lodestar multiplier (which would be substantially reduced or even eliminated by Counsel's future work in overseeing and implementing the Settlement), and is well within the range typically awarded in class cases.

[20] *See also, e.g.*, *Winingear v. City of Norfolk*, No. 2: 12 cv 560, 2014 U.S. Dist. LEXIS 97392, at *21-25 (E.D. Va. July 14, 2014) (approving fee award equivalent to 35% of $3.2 million total fund and 1.6 times lodestar; noting "that this Court has routinely approved percentage recoveries in FLSA cases approaching forty percent of the total recovery"); *Gomez v. H & R Gunlund Ranches*, No. CV F10-1163, 2011 U.S. Dist. LEXIS 135424, at *13-15 (E.D. Cal. Nov. 22, 2011) (45% fee award in FLSA collective action); *Payson v. Capital One Home Loans, LLC*, No. 07-cv-2282, 2009 U.S. Dist. LEXIS 25418, at *8-10 (D. Kan. Mar. 26, 2009) (40% fee in hard-fought FLSA collective action, resulting in 3-to-4 lodestar multiplier); *Worthington v. CDW Corp*., No. C-1-03-649, 2006 U.S. Dist. LEXIS 32100, at *21-22 (S.D. Ohio May 22, 2006) (38 1/3% of gross $1.45 million fund for WARN class, "solidly within the typical 20 to 50 percent range").

a. The "Risk of Litigation" Was Substantial

The most significant factor in determining the reasonableness of attorneys' fees is the risk of litigation. *Tiro v. Public House Invs., LLC*, Nos. 11 Civ. 7679; 11 Civ. 8249, 2013 U.S. Dist. LEXIS 129258, *40 (S.D.N.Y. Sept. 10, 2013). This factor weighs heavily in favor of the fee award requested in this case.

Here, the risks that Class Counsel assumed in taking on this litigation were high. Counsel has been pursuing this matter for over three years on a contingency basis, without any assurance of recovering their out-of-pocket expenses or being compensated for their legal services. Counsel originally commenced the action based on information from their clients without knowing whether the allegations would be borne out in the class data. Were the litigation to continue, Plaintiffs and Counsel would be faced with substantial challenges on class certification, liability, and damages. There was a very real possibility of an unsuccessful outcome. *See, e.g., McAnaney v. Astoria Fin. Corp.*, No 04-CV-1101, 2011 U.S. Dist. LEXIS 114768, at *27 (E.D.N.Y. Feb. 11, 2011) ("[C]lass counsel's requested attorneys' fees are within the range of reasonableness… particularly in light of the fact that 'the case was litigated on a purely contingency basis.'"); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 479 (S.D.N.Y. 2013) ("Contingency risk is the principal, though not exclusive, factor courts should consider in their determination of attorneys' fees.") (internal quotation and citation omitted). While representing Plaintiffs and the Classes in this matter during that time, Class Counsel was forced to forgo other, potentially lucrative cases.

b. Class Counsel Dedicated Significant Time and Labor to This Case

Since Class Counsel began investigating this matter approximately three years ago, Counsel has devoted over 3,100 hours to the successful pursuit of this matter. Decl. at ¶ 47.

Counsel's work in this matter included, *inter alia*: investigating legal and factual allegations of gender bias at Alcon; drafting multiple class charges of discrimination and class and collective action complaints; obtaining and interpreting statistical analyses of employment and compensation data; working with a statistical expert to prepare damages calculations; reviewing documents setting forth Defendants' human resources policies, practices, and procedures; participating in three days of mediation; negotiating and drafting the Class and Collective Settlement Agreement and Release and the First Amendment thereto; obtaining preliminary approval of the settlement; and seeking final approval. *Id.* at ¶ 46. Counsel's dedication to this matter and expenditure of substantial time, effort, and resources has undoubtedly brought this complex litigation to a successful resolution.

After final approval, Counsel expects to expend at least 700 hours to provide additional legal services in connection with the Settlement. This includes an anticipated 450 hours or more assisting Class Members in completing their Claim Forms and otherwise facilitating the Claims Form process, plus an additional 250 or more hours responding to Class Members' other questions about the Settlement and working with the Claims Administrator and Defendants' Counsel to facilitate the administration of the Settlement. *Id.* at ¶ 47.

c. The Litigation was Extremely Complex, Requiring Significant Efforts

The prosecution of this action has required a high level of experience and expertise in complex class action litigation, as well as the ability to provide such service under challenging circumstances. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, No 11-CV-8405, 2015 U.S. Dist. LEXIS 121574 at *22 (S.D.N.Y. Sep. 9, 2015) (approving fee where, *inter alia*, "These complex claims were bitterly fought, as Defendants developed defenses to liability, damages, and class certification, and offered their own expert opinions on actuaries issues for key questions…."). It

has also required an in-depth understanding of economic and statistical analysis, which figured prominently in the parties' mediation sessions and in conferences with the Court.

d. Counsel for Both Parties Are Highly Competent and Qualified

As set forth above, both Class Counsel and the counsel for Defendants have a high standing at the bar and a reputation for zealous and effective advocacy. Decl. at ¶ 10. Counsel applied their experience to the utmost in this case. This factor also weighs in favor of the fee request. *See, e.g.*, *Wright*, 553 F. Supp. 2d at 347 (approving $8 million fee given "the quality of the representation provided by class counsel and the depth of their commitment").

e. The Requested Attorneys' Fee is Reasonable Compared to the Substantial Benefits the Settlement Confers on the Class

As discussed above, the Settlement provides substantial benefits to the Classes. This relief, which Counsel was able to obtain only after years of investigation, litigation, and settlement negotiations, justifies the requested fee. It is well established that "counsel who creates a substantial benefit for a class is entitled to a commensurate award of fees." *In re EVCI Career Colls. Sec. Litig*., 2007 U.S. Dist. LEXIS 57918, at *44 (S.D.N.Y. July 27, 2007).

f. Public Policy Considerations Favor the Attorneys' Fee Request

Public policy considerations weigh in favor of granting Counsel's requested fees. In awarding attorneys' fees in common fund cases, "the Second Circuit and courts in this district. . . also have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). Attorneys' fees should "reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *In re Colgate-Palmolive Co. ERISA Litig*., 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014). "[S]etting fees too low or randomly will create poor incentives to bringing

large class action cases." *Id*. Fee awards "should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *Shapiro v. JPMorgan Chase & Co*., 2014 U.S. Dist. LEXIS 37872, at *65 (S.D.N.Y. Mar. 21, 2014).

2. One-Third of the Gross Settlement Benefit Is Well Within the Range of Reasonableness

As set forth above, fee awards of one-third of the total settlement are typical in class litigation in this jurisdiction. *See also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (finding fee of over $11 million, or one-third of the recovery, "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere."). In fact, fees often go substantially higher – up to 50% of the fund. *See, e.g.*, *Velez*, 2010 U.S. Dist. LEXIS 125945 at *58; *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 587-88 (S.D.N.Y. 2008) (collecting cases approving fee awards of 30% to 45%); *Newberg on Class Actions* (3rd Ed.) § 14.03, at 14-13 ("No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award . . . although somewhat larger percentages are not unprecedented.").

Accordingly, "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 U.S. Dist. LEXIS 125945 at *59. *See also, e.g.*, *Beckman*, 293 F.R.D. at 477 (a 33% fee "is reasonable and consistent with the norms of class litigation in this circuit") (internal quotation marks omitted); *Lovaglio v. W & E Hospitality, Inc.*, 2012 U.S. Dist. LEXIS 94077, at *7 (S.D.N.Y. July 6, 2012) (fee award of one-third of fund is "consistent with the trend in this Circuit"); *In re Lloyd's Am. Trust Fund Litig*., 2002 U.S. Dist. LEXIS 22663, at *76 ("In this district alone, there are scores of . . . cases where fees . . . were

awarded in the range of 33.3 percent of the settlement fund.").[21]

The requested one-third award is consistent with what clients typically pay under private retainer agreements. *See, e.g.*, *Morris*, 859 F. Supp. 2d at 623 (supporting class counsel's request for one third of the fund because "reasonable, paying client[s] typically pay one-third of their recoveries under private retainer agreements") (citation omitted); *Calle v. Elite Specialty Coatings Plus, Inc.*, 2014 U.S. Dist. LEXIS 164069, at *2-3 (E.D.N.Y. Nov. 21, 2014 (approving one-third award as "consistent with Plaintiffs' retainer agreement with counsel and with the consent to sue form signed by all Plaintiffs"); *Hanifin*, 2014 U.S. Dist. LEXIS 115710 at *17-19.

3. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

"Following *Goldberger*, the trend in the Second Circuit has been to apply the percentage method and loosely use the lodestar method as a 'baseline' or as a 'cross check.'" *Tiro*, 2013 U.S. Dist. LEXIS 129258 at *46 (citation omitted). The cross-check is a rough gauge meant only to ensure that the percentage method does not result in an excessive windfall.[22] Hence, when applying a lodestar cross-check, courts routinely approve fee awards from 2 to 6 times counsel's lodestar – or more. *See, e.g., Fleisher v. Phoenix Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at *61-62 (S.D.N.Y. Sept. 9, 2015) ("Courts regularly award lodestar multipliers from 2 to 6 times lodestar in this Circuit, and have been known to award lodestar multipliers significantly greater

[21] *See also, e.g., Behzadi v. Int'l Creative Mgmt. Partners, LLC*, 2015 U.S. Dist. LEXIS 90117, at *4 (S.D.N.Y. July 9, 2015) (one-third of fund in wage case); *Corte v. Fig & Olive Founders LLC*, No. 14 Civ. 7186 (KPF), ECF No. 46 at 4 (S.D.N.Y. Oct. 7, 2015) (same); *Ceka v. PBM/CMSI Inc.*, 2014 U.S. Dist. LEXIS 168169, at *18-22 (S.D.N.Y. Dec. 2, 2014) (same); *DeLeon*, 2015 U.S. Dist. LEXIS 65261, at *12-13 (same); *Monzon*, 2015 U.S. Dist. LEXIS 30047 at *5 (same); *Flores v. Anjost Corp.*, 2014 U.S. Dist. LEXIS 11026 (S.D.N.Y. Jan. 28, 2014) (same); *Tiro*, 2013 U.S. Dist. LEXIS 129258 (same); *Alli v. Boston Mkt. Corp.*, 2012 U.S. Dist. LEXIS 54695, *9-10 (D. Conn. Apr. 17, 2012) (same); *Capsolas v. Pasta Resources Inc.*, 2012 WL 4760910, at *8 (S.D.N.Y. Oct. 5, 2012) (same); *Davis*, 827 F. Supp. 2d at 185-86 (one-third of $42 million settlement).

[22] "[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Sewell v. Bovis Lend Lease LMB, Inc.*, 2012 U.S. Dist. LEXIS 53556, at *37 (S.D.N.Y. Apr. 20, 2012) (citations omitted). "[T]he Second Circuit has found 'no need to compel district courts to undertake the cumbersome, enervating, and often surrealistic process of lodestar computation.'" *In re Facebook*, 2015 U.S. Dist. LEXIS 152668, at *25 (citing *Goldberger*).

than the 4.87 multiplier sought here.") (citations omitted); *Sukhnandan*, 2014 U.S. Dist. LEXIS 105596, at *40-42 ("Courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers") (collecting cases); *Asare v. Change Group N.Y., Inc.*, 2013 U.S. Dist. LEXIS 165935, *51 (S.D.N.Y. Nov. 15, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *Sewell v. Bovis Lend Lease LMB, Inc.*, 2012 U.S. Dist. LEXIS 53556, at *38 (S.D.N.Y. Apr. 20, 2012) (noting that courts commonly award lodestar multipliers from two to six and approving a multiplier of 3); *Davis v. JP Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185-86 (W.D.N.Y. 2011) (one-third of $42 million settlement, resulting in 5.3 multiplier).

As set forth in the attached Declaration of David Sanford, Sanford Heisler has devoted more than 3,100 hours to prosecute this litigation. Decl. at ¶ 47. Calculated conservatively, the lodestar value of Counsel's time in this case to date is over $1,800,000. *Id.* at ¶ 48. The requested attorney's fee of $2,666,666 results in a lodestar multiplier of no more than 1.48 times Counsel's fees to date. This multiplier is considered very "modest" or even "low" under the circumstances. *See Maley v. Del Global Techs. Corp.*, 186 F. Supp.2d 358, 371 (S.D.N.Y. 2002) ("Finally, in 'cross-checking' the percentage fee against the lodestar-multiple, it clearly appears that the modest multiplier of 4.65 is fair and reasonable."); *In re Lloyd's Am. Trust Fund Litig.*, 2002 U.S. Dist. LEXIS 22663, at *80-81 (finding multipliers between 3 and 4.5 common, and noting that "[m]uch higher multipliers have been awarded as well."; "[h]ere, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit.").

Moreover, courts in this Circuit have recognized that where "class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower." *Bellifemine*,

2010 U.S. Dist. LEXIS 79679, at *19; *see also, e.g, Beckman*, 293 F.R.D. at *482 ("Because 'class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower' because the award includes not only time spent prior to the award, but after in enforcing the settlement."); *Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, 2010 U.S. Dist. LEXIS 12762, at *7-8 (S.D.N.Y. Feb. 9, 2010) (noting that, "as class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time"). As noted herein, Counsel anticipates spending significant additional time on this matter with no additional compensation for its services. In particular, Counsel expects to devote at least 700 hours to this matter following final approval, which could result in several hundreds of thousands of dollars in additional lodestar. Decl. at ¶¶ 47-48. Thus, Counsel's multiplier would be significantly reduced.

In sum, Counsel's request is consistent with the norms of fee awards in this Circuit. It is also commensurate to the risk taken by Counsel and the outcome reached in this case. A smaller award would fail to adequately compensate Counsel for its extensive efforts or to provide sufficient incentive for employment attorneys to litigate similar risky and labor-intensive cases. The requested fee amount "is justified by the work performed, risks taken, and results achieved by Class Counsel." *Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *11.

D. PLAINTIFFS' APPLICATION FOR AN AWARD OF CLAIMS ADMINISTRATION COSTS AND LITIGATION EXPENSES SHOULD BE GRANTED

The Claims Administrator's costs are estimated to total no more than $75,000 through the conclusion of the Claims Administration process. Decl. at ¶ 53. In addition, Class Counsel has

reasonably incurred $79,190.60 in additional expenses in investigating and prosecuting this class case for approximately three years. *Id*. The largest categories of expenses are: expenses for the services of labor economist Dr. Alexander Vekker (totaling $38,111.66); costs incurred in connection with the parties' three mediations (totaling $16,375.48); and costs for the services of the Third-Party Neutral, Carol Wittenberg (totaling $6,576.00). Other expenses include filing fees, legal printing, and miscellaneous costs. *Id.* at ¶¶ 54-55.

"It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *In re Giant Interactive Group, Inc*., 279 F.R.D. 151, 165 (S.D.N.Y. 2011). *See also In re Colgate-Palmolive Co. ERISA Litig*., 2014 U.S. Dist. LEXIS 93379, at *24 (S.D.N.Y. July 8, 2014) (granting request for reimbursement of $591,011.17 in expenses); *In re Marsh & McLennan Cos., Inc. Secs. Litig.*, 2009 U.S. Dist. LEXIS 120953, at *59 (S.D.N.Y. Dec. 23, 2009) ($7,848,411.84).

The costs accumulated by Counsel in litigating this case are typical for a class action, were incidental and necessary to the litigation, and were reasonably related to the interests of the class. *See In re Marsh*, 265 F.R.D. at 150 ("Litigating complex contingent cases such as this one requires counsel to incur significant expenses."). Moreover, because Counsel "was proceeding on a contingent-fee basis, they had a strong incentive to keep expenses at a reasonable level." *Id.* Indeed, the total expenses here are over $20,000 less than estimated in the Notice. The Court should therefore permit reimbursement of litigation expenses under the Settlement.

VI. THE PLAINTIFFS ARE ENTITLED TO SERVICE PAYMENTS IN THE AMOUNTS REQUESTED

Pursuant to the Settlement, Plaintiffs seek service awards totaling $110,000 on a combined basis and distributed as follows: $20,000 for Plaintiff Susan Orr, $15,000 each for Plaintiffs Katerina Dodbiba and Jessica McGaffie, $10,000 each for Plaintiffs Melinda Konczal

and Caroline Bucci, and $5,000 for each of the other Representative Plaintiffs. Decl. at ¶¶ 56-63; Settlement Agreement at ¶ 7.3. The Court-approved Notice advised Class Members of the proposed service awards, and there were no objections. *See* Dkt. 109-1; Decl. at ¶ 42.

Service payments of this type are commonly awarded to named plaintiffs and class members who actively assisted in prosecuting a class case. Here, the Plaintiffs joined this case early on and expended considerable time, effort, and resources on behalf of the Classes. They also incurred significant risk in lending their names to the action, helping to plan and organize the litigation, and consulting with Class Counsel to the benefit of their fellow Class Members. Decl. at ¶¶ 56-63. Without the efforts and sacrifices of these individuals, the Settlement could not have been achieved. Moreover, no Class Members have objected to the proposed payments. Accordingly, the Court should approve the service awards provided for in the Settlement.

A. COURTS ROUTINELY AWARD SERVICE PAYMENTS TO REPRESENTATIVE PLAINTIFFS WHO PROVIDE SUBSTANTIAL ASSISTANCE, ESPECIALLY IN EMPLOYMENT CASES

"Service awards, also called enhancement or incentive awards, are common in class actions." *Mills v. Capital One*, 2015 U.S. Dist. LEXIS 133530, at *47 (S.D.N.Y. Sept. 30, 2015). *See also McAnaney*, 2011 U.S. Dist. LEXIS 114768 at *32 ("Courts have, with some frequency, held that a successful Class action plaintiff, may . . . receive an . . . incentive award.'"). Such payments "serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts." *Mills*, 2015 U.S. Dist. LEXIS 133530 at *47. *See also, e.g., Silverstein*, 2013 U.S. Dist. LEXIS 179734 at *28; *Toure v. Amerigroup Corp.*, 2012 U.S. Dist. LEXIS 110300, at *16-17 (E.D.N.Y. Aug. 6, 2012); *Parker*, 2010 U.S. Dist. LEXIS 12762, at *4-6.

As courts within this Circuit have noted, plaintiffs in employment class actions, including

discrimination cases, are particularly deserving of incentive awards:

> [T]here is a fundamental distinction between litigation based on claims of racial, gender or other discrimination, and securities-based litigation . . . or antitrust suit . . . [T]he plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.

Roberts v Texaco, Inc., 979 F. Supp. 185, 201 (S.D.N.Y. 1997). *See also, e.g.*, *Bozak v. FedEx Ground Package Sys.*, 2014 U.S. Dist. LEXIS 106042, at *13 (D. Conn. July 31, 2014) ("Incentive awards are 'particularly appropriate in the employment context . . . [where] the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers'"); *Aros*, 2012 U.S. Dist. 104429, at *10 (same); *Velez v. MaJik Cleaning Serv., Inc.*, 2007 U.S. Dist. LEXIS 46223, at *22-24 (S.D.N.Y. June 22, 2007) (approving incentive award in wage case equal to twice what class members received under settlement given "[t]he risks to which [class representatives] allowed themselves to be exposed . . . and the effort they expended on behalf of all class members").[23]

B. COURTS HAVE OFTEN GRANTED SERVICE AWARDS IN AMOUNTS SIMILAR TO OR LARGER THAN THOSE APPLIED FOR HERE

The amounts sought here are well within or below the range of awards approved as reasonable. *See, e.g., Calibuso v. Bank of Am. Corp.*, 2013 U.S. Dist. LEXIS 180848, at *17 (E.D.N.Y. Dec. 27, 2013) (discrimination case with five awards of $35,000 each and one award of $7,500); *Flores v. Anjost Corp.*, No. 11 Civ. 1531, 2014 U.S. Dist. LEXIS 11026, at *27 (S.D.N.Y. Jan. 28, 2014) ($25,000 each to five named plaintiffs in wage and hour case); *Bellifemine*, 2010 U.S. Dist. LEXIS 79679 at *21 (awarding $75,000 to named plaintiffs and

[23] *See further* Nantiya Ruan, *Bringing Sense to Incentive Payments: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. & Emp, Pol'y J. 395 (2006) (discussing the importance of incentive awards to civil rights and wage and hour rights).

$25,000 to $60,000 to non-named plaintiff class members); *Wright*, 553 F. Supp. 2d at 345 (awarding $50,000 to each of eleven named plaintiffs in employment discrimination class action); *Silverstein*, 2013 U.S. Dist. LEXIS 179734 at *27 (two $25,000 awards in wage and hour case); *Matheson v. T-Bone Rest., LLC*, 2011 U.S. Dist. LEXIS 143773, at *25 (S.D.N.Y. Dec. 13, 2011) ($45,000 award from $495,000 fund); *Willix v. Healthfirst, Inc*., 2011 U.S. Dist. LEXIS 21102, at *19-20 (E.D.N.Y. Feb. 18, 2011) (awards of $30,000, $15,000, and $7,500 in wage and hour case); *Mentor v. Imperial Parking Sys., Inc.*, 2010 U.S. Dist. LEXIS 132821 (S.D.N.Y. Dec. 15, 2010) ($40,000 and $15,000 service awards in wage and hour action); *Roberts*, 979 F. Supp. at 205 ($50,000.00 and $85,000.00 to two of the named plaintiffs in an employment discrimination class action).[24]

In *Gonqueh*, this Court approved service awards of $5,000, $12,000 and $13,000 out of a $725,000 settlement. The Court found these awards justified by the plaintiffs' "performance of substantial services for the benefit of the Settlement Classes." 2016 U.S. Dist. LEXIS 24231, at *10. Here, the total settlement is more than ten times as large.

C. THE REQUESTED SERVICE PAYMENTS ARE AMPLY JUSTIFIED

Under this body of law, the requested awards are more than justified. Plaintiffs all devoted substantial time and effort to the prosecution of this case. They stepped forward on behalf of their fellow employees, lent their names to the prosecution of this suit, participated in informal discovery, consulted with and advised counsel, and participated in settlement

[24] In the employment context: *See also, e.g.*, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., No 1:05-cv6583, at *5 (N.D. Ill. Dec. 6, 2013) (service awards of $250,000 to each of 17 class representatives and $75,000 each to six additional Steering Committee Members in race discrimination case); *Ingram v. Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) ($300,000 each to four class reps in discrimination case); *Worthington v. CDW Corp*., 2006 U.S. Dist. LEXIS 32100, at *24-26 (S.D. Ohio May 22, 2006) (awards between $10,000 and $50,000 from $1.45 million settlement); *Lazarin v. Pro Unlimited, Inc*., 2013 U.S. Dist. LEXIS 97213, at *10-11 (N.D. Cal. July 11, 2013) (FLSA case with three $25,000 awards out of total settlement of $1.25 million); *Beck v. Boeing Co*., No. C00-301P (W.D. Wash. Apr. 9, 2004) ($100,000.00 awards to each of 12 plaintiffs); *Hughes v. Microsoft Corp*., 2001 U.S. Dist. LEXIS 5976, at *34-39 (W.D. Wash. Mar. 21, 2001) (awards of up to $40,000 to numerous plaintiffs).

negotiations. The proposed awards are tailored to their individual efforts and contributions on behalf of the Classes. *See* Decl. at ¶¶ 56-63 (setting forth the respective contributions of the Plaintiffs.) The service payments sought are necessary, not only to recognize the significant role each of the individuals played in the prosecution of this matter, but also to generally encourage similar individuals to play an active role in the private enforcement of public rights.

D. THE PROPOSED AWARDS ARE REASONABLE AND APPROPRIATE IN PROPORTION TO THE CLASS FUND AS WELL AS TO THE INDIVIDUAL SETTLEMENT BENEFITS TO THE CLASS MEMBERS

The requested awards are modest, both individually and in the aggregate, particularly given the Representative Plaintiffs' individual contributions and circumstances. The total amount sought on behalf of the Representative Plaintiffs is $110,000. This represents a mere 1.375% of the Settlement. The highest individual award sought is $20,000 (0.25% of the Settlement) for Lead Plaintiff Susan Orr, who has pursued this case on behalf of other employees since the inception of the case. These awards have been carefully tailored to the contributions and risks of individual Class Representatives – factoring in their relatively visibility in this action, their participation in one or multiple mediations, and their overall time spent assisting with the litigation. Decl. at ¶¶ 56-63. By tying their names to this action publicly, Plaintiffs, many of whom continue to work in Defendants' industry, assumed a substantial risk to their careers.

Such awards are not only appropriate in this case, but also modest and reasonable in proportion to the Settlement. *See, e.g., Reyes v. Altamarea Grp., LLC*, 2011 U.S. Dist. LEXIS 115984 (S.D.N.Y. Aug. 16, 2011) (three service awards totaling $50,000 of $300,000 settlement, or 16.67%); *Flores*, 2014 U.S. Dist. LEXIS 11026 ($125,000 total to five named plaintiffs, or 11.9% of $1,050,000 fund); *Parker*, 2010 U.S. Dist. LEXIS 12762, at *5-6 (awarding payments of $5,000 to $15,000, totaling $85,000, or about 11% of fund, with individual amounts ranging

up to 2% of fund); *Matheson*, 2011 U.S. Dist. LEXIS 143773 ($45,000 award from $495,000 fund, or 9.1%, with total awards equaling 10.1%); *Johnson v. Brennan*, 2011 U.S. Dist. LEXIS 105775 (S.D.N.Y. Sept. 16, 2011) (four $10,000 awards from a $440,000 settlement fund, or 9.1%); *Frank*, 228 F.R.D. at 187 (single award representing 8.4% of settlement fund).[25] *See further Gonqueh*, 2016 U.S. Dist. LEXIS 24231, at *10 (approving awards totaling over 4% of the overall settlement, with individual awards ranging up to 1.8%).

E. THE CLASS MEMBERS HAVE APPROVED THE SERVICE AWARDS

Significantly, *none* of the Class Members has voiced any objection to the proposed service awards. *See, e.g., Sewell*, 2012 U.S. Dist. LEXIS 53556, *43. This is a strong indication that Class Members value the efforts and sacrifices of the Representatives Plaintiffs on their behalf. This factor weighs strongly in favor of approving the requested payments.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' unopposed application for final approval of (1) the Settlement Classes and Collectives; (2) the Settlement; (3) attorneys' fees and costs; and (4) service payments to the Representative Plaintiffs. Accordingly, the Court should enter the proposed Order granting final approval of the Settlement in all respects and entering final judgment in this matter.

[25] *See also, e.g., Alvarado v. Nederend*, 2011 U.S. Dist. LEXIS 52793 (E.D. Cal. May 11, 2011) (five $7,500 awards, totaling approximately 7.5% of fund, where average settlement share per class member was approximately $2,000); *Bert v. AK Steel Corp*., 2008 U.S. Dist. LEXIS 111711 (S.D. Ohio Oct. 23, 2008) (five awards of $10,000 each, 10.7% of maximum possible settlement benefit; maximum class fund would be $469,200, or $3,400 per participating member); *Kritzer v. Safelite Solutions, LLC*, 2012 U.S. Dist. LEXIS 74994 (S.D. Ohio May 30, 2012) (six $2,500 awards out of maximum $455,000 wage and hour settlement; only $50,129 of the settlement fund was actually claimed by and paid out to the class members); *Bolton v. United States Nursing Corp*., 2013 U.S. Dist. LEXIS 150299, at *18-19 (N.D. Cal. Oct. 18, 2013) (approving $10,000 service award where average settlement recovery was $595.91, maximum was $3,602.67, and 204 of 2,765 class members would receive at least $1,500).

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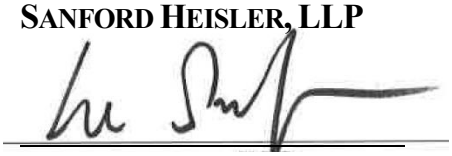
SANFORD HEISLER, LLP



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