Myron D. Rumeld*
mrumeld@proskauer.com
Neil V. Shah*
nshah@proskauer.com
Anastasia S. Gellman*
agellman@proskauer.com
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Tel.: 212.969.3000
Fax: 212.969.2900

Scott P. Cooper (SBN 96905)
scooper@proskauer.com
Jennifer L. Roche (SBN 254538)
jroche@proskauer.com
PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Tel.: 310.557.2900
Fax: 310.557.2193

Jani K. Rachelson*
jrachelson@cwsny.com
Evan R. Hudson-Plush*
ehudson-plush@cwsny.com
COHEN, WEISS AND SIMON LLP
900 Third Avenue, Suite 2100
New York, NY 10022-4869
Tel.: 212.563.4100
Fax: 646.473.8254

* *admitted pro hac vice*

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

EDWARD ASNER, *et al.*,

Plaintiffs,

vs.

THE SAG-AFTRA HEALTH FUND, *et al.*,

Defendants.

Case No. 2:20-cv-10914-CAS-JEM

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES

Date: September 11, 2023
Time: 10:00 a.m.
Courtroom: 8D
Judge: Hon. Christina A. Snyder
Action Filed: December 1, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Defendants submit this memorandum of points and authorities in opposition to Class Counsel's request for $6,866,667 in attorneys' fees. (ECF No. 141.)[1]

PRELIMINARY STATEMENT

Plaintiffs brought this lawsuit in the aftermath of a financial crisis that necessitated cost-saving changes to the benefits offered by the Plan, which became effective January 1, 2021. The Plan's financial crisis resulted from skyrocketing medical costs exacerbated by a significant decline in revenue following the shutdown of acting and other work due to the COVID-19 pandemic. (ECF No. 47 at 428.) The Plan's Trustees determined that the changes were necessary to ensure the Plan's survival and its continued provision of high-quality health care benefits to the greatest number of covered participants. The needed changes included one that "leverage[d] Medicare" (ECF No. 141 at 31 n.8) by eliminating coverage for age 65+ Senior Performers who could not qualify based on their sessional earnings, while at the same time providing them with up to $1,140 per year to use toward enhancing their Medicare coverage through a new HRA Plan (ECF No. 47 at 437-40).

Although the Amended Complaint contended that these changes were attributable to breaches of fiduciary duty by the Trustee Defendants, Plaintiffs' motion for final approval of the Settlement concedes that their claims faced enormous legal and factual hurdles that left Plaintiffs with little chance of success. (*See, e.g.*, ECF No. 141 at 8-10, 25, 34.) Among them was the fact that, before making the changes, the Trustee Defendants engaged in extensive deliberations and consulted with "a long list of prominent financial, legal and other advisors." (*Id.* at 34.) Despite the strength of their defenses, Defendants agreed to an early resolution of the lawsuit to avoid costly discovery. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting "the threat of discovery expense will push cost-conscious defendants to settle even anemic

[1] Any capitalized terms not defined herein are as defined in the Class Action Settlement Agreement. (ECF No. 128-1 § 2.)

cases before reaching" discovery).

When the parties reached an informal agreement to stay discovery in the Fall of 2022, fact discovery was in its early stages—the bulk of requested documents had not yet been exchanged and depositions had not yet been noticed. (Declaration of Myron D. Rumeld ("Rumeld Decl.") at 2 ¶¶ 2-3.) Nevertheless, Class Counsel now argue for an outsized fee for achieving what they characterize as a "timely" and "excellent" result for the Settlement Class. (ECF No. 141 at 2.) An evaluation of the Settlement in the context of the claims for relief originally demanded, however, shows that its terms are far from "excellent."

To begin with, the monetary relief pales in comparison to Plaintiffs' original demand for more than $200 million in damages. And even though the Amended Complaint's objective was to seek monetary relief *for* the Plan, the bulk of this monetary relief is coming *from* the Plan itself. Only a small portion of the recovery ($7.5 million) is coming from an external source—Defendants' insurance—and almost all of that recovery will be consumed by attorneys' fees if Class Counsel prevail on their motion. The non-monetary relief is similarly unimpressive, as it consists primarily of modest, non-controversial, tinkering in Plan communications and the methodology for calculating covered earnings, and an agreement to retain a Cost Consultant whose authority is limited to making recommendations.

In short, the Settlement achieves a very modest result that should not entitle Class Counsel to anywhere close to $6,866,667 in fees. The award should be substantially downsized to an amount more befitting the outcome, thereby enabling more of the Settlement proceeds to inure to the benefit of Class Members.

EVALUATION OF THE SETTLEMENT'S TERMS

The Court should approve the Settlement because it achieves a better result for Class Members than a continuation of this ill-fated lawsuit. Nonetheless, there should be no illusion about the limited nature of the relief obtained.

A. Monetary Relief

The Settlement's monetary relief consists of two components. The first component consists of $15 million, half of which is funded by the Plan and the other half by Defendants' insurers. (ECF No. 128-1 § 7.) The $15 million is to be distributed first for Attorneys' Fees and Costs and Administrative Expenses, with the remainder to be paid by check to, or allocated into the HRA Accounts of, certain Senior Performers and spouses who lost either active or secondary coverage due to various aspects of the Amendments. (*Id.* § 8.2 & Ex. 6.) The Plan of Allocation contemplates that these payments or allocations will range from $400 to $4,400, with the vast majority of recipients receiving $400. (*Id.* at Ex. 6; Rumeld Decl. at 3 ¶ 5.) These amounts will increase, on a proportionate basis, to the extent there is more money to distribute because Class Counsel is awarded less than the $6,866,667 in fees they are requesting. (ECF No. 128-1 at Ex. 6.) If any Senior Performers cannot be located, do not cash their Settlement payment, or otherwise cannot receive their Settlement payment, the amount of their payments will be returned to the Plan. (*Id.* § 8.5.)

The second component of the monetary relief consists of additional allocations to be made by the Plan into the HRA Accounts of certain Senior Performers who, on a going-forward basis, lose active coverage as a result of no longer being able to count their residual earnings ("Qualifying Senior Performers"). (*Id.* §§ 2.52 & 10.) To make these additional allocations, the Plan will need to: identify each year's Qualifying Senior Performers, and then compute and allocate to their HRA Accounts an amount approximating one-half of the contributions to the Plan generated by their residual earnings in the previous year up to a capped amount of $125,000. (*Id.* § 10.2.) But these allocations: (i) will be made only to Qualifying Senior Performers who have established an HRA Account (*id.* § 10.1), (ii) are subject to an aggregate annual cap of $700,000 (*id.* § 10.2.1), (iii) will be made only for up to eight years (*id.* § 10.2), and (iv) will be discontinued sooner than eight years if the Plan's financial condition

worsens to a defined trigger point (*id.* §10.3).

Given the various caps and contingencies, the amount of the additional allocations over the next eight years is entirely speculative. All indications are that it will be substantially less than the maximum $5.6 million figure that Class Counsel has factored into their fee application. By way of example, Class Counsel notes that the additional allocations for 2023 would exceed $625,000 *if* all Qualifying Senior Performers were enrolled in the HRA Plan. (ECF No. 141 at 3 n.2.) But, based on the number of Senior Performers who have thus far enrolled in the HRA Plan or communicated an intent to enroll, the Plan anticipates that the allocations for 2023 will be less than $450,000. (Rumeld Decl. at 4 ¶ 7.) And, as noted, the continuation of the allocations even at this level is contingent on several other factors, including the Plan not reaching its financial trigger point well before the eight-year period expires—which could very well be the case if medical costs continue to skyrocket.

The combined monetary relief pales in comparison to Plaintiffs' original demands—in their initial disclosures, Plaintiffs contended that the Trustee Defendants' fiduciary breaches with respect to the Merger and Amendments each "resulted in plan losses likely to exceed $100 million," for a total of over $200 million. (Rumeld Decl., Ex. 1 at 20.) And it is particularly modest when considering that only $7.5 million of the relief is being paid by an external source—Defendants' insurers, who clearly were not persuaded that they faced any material exposure in this litigation other than accumulating defense costs. Indeed, approximately $27.5 million in available insurance proceeds (after deducting the amounts already spent on defense costs) were left on the table despite the Settlement. (Rumeld Decl. at 3 ¶ 6.) The Plan was left responsible to fund the bulk of the Settlement in order to prevent this ill-fated lawsuit from continuing. But given that Plaintiffs' claims sought to bring money *into* the Plan, payments *from* the Plan really do not constitute relief at all. (*See* ECF No. 43 ¶ 34 (Plaintiffs "bring this lawsuit on behalf of the" Plan, which was the "victim[]" of the

Trustee Defendants' fiduciary breaches and will be the "recipient of any recovery").) Since the Plan's assets are dedicated to paying benefits to Plan participants anyway, this recovery merely amounts to a shifting of resources to pay one group of participants at the expense of other participants.

B. Non-Monetary Relief

The Settlement's non-monetary relief, which is effective for only four years (ECF No. 128-1 § 11.1), consists of: (i) a requirement that the Plan disclose information on its financial condition to the Union before certain collective bargaining agreements are negotiated (*id.* § 11.2); (ii) a requirement that the Plan retain a Cost Consultant to advise on potential cost-saving measures (*id.* § 11.3); and (iii) a Plan amendment that is expected to impact only a handful of Senior Performers by allowing them to retroactively apply late-reported sessional earnings toward qualification for active coverage up to two times in the next few years (*id.* §§ 11.4-11.5).

Of these provisions, the one Class Counsel have touted the most (ECF No. 141 at 31-32) is the one that supposedly brings greater transparency with respect to the financial condition of the Plan in order to assist those engaged in collective bargaining negotiations. But, contrary to the assertions in the Amended Complaint, there has never been a reluctance to share information on the Plan's financial condition. In fact, the Settlement Agreement acknowledges that these disclosures were already made in previous negotiations. (ECF No. 128-1 § 11.2.4.) Moreover, as a practical matter and as Plaintiffs acknowledge (ECF No. 43 ¶ 102), the Union's chief negotiators have always had direct access to this financial information since they are also Plan Trustees.

The various other non-monetary provisions are similarly of little consequence. The Cost Consultant has no authority to implement cost-saving changes and is not expected to discover many to recommend because the Settlement Agreement requires him to steer clear of the many areas in which the Plan has already achieved savings over the last few years through its own diligent efforts. (ECF No. 128-1 § 11.3;

Rumeld Decl., Ex. 2.) And the Plan amendment is a non-controversial allowance made to accommodate concerns expressed over the timing of the Plan's evaluation of certain participants' sessional earnings for purposes of determining their eligibility for the active Plan and how they were advised on the status of their sessional earnings. In short, like the monetary terms, the non-monetary terms do not amount to some sort of "course correction" that betray imprudent past practices.

LEGAL STANDARD

"District courts must ensure that attorneys' fees awards in class action cases are reasonable," mainly by considering the amount in relation to "the benefit that class counsel obtained for the class." *Lowery v. Rhapsody Int'l, Inc.*, -- F.4th --, No. 22-cv-15162, 2023 WL 4933917, at *5 (9th Cir. Aug. 2, 2023) (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011)). In the Ninth Circuit, there are two ways to determine fee awards for class counsel: (1) the lodestar method; and (2) the percentage-of-recovery method. *Lowery*, 2023 WL 4933917, at *7. The percentage-of-recovery method is permitted, in lieu of the lodestar method, when the settlement creates a common fund to be distributed to the class that is "easily quantified." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942. Even then, however, district courts are "encouraged" to "perform a cross-check by applying the lodestar method to confirm that the percentage-of-recovery amount is reasonable." *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020).

In applying the percentage-of-recovery method, "courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); *see also Lowery*, 2023 WL 4933917, at *3 ("The typical benchmark for the percentage-of-recovery approach is 25%, but a court can—as in the lodestar method—adjust that benchmark up or

down."). Among the relevant circumstances that may be considered in determining the appropriate percentage are the "*Vizcaino* factors":

> (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis.

In re Optical Disk Drive Prods. Antitrust Litig., 959 F.3d at 930 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)). The *Vizcaino* factors are not intended to be an "exhaustive list." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015). Rather, courts should "consider[] all the circumstances of the case" in arriving at a reasonable percentage. *Vizcaino*, 290 F.3d at 1048.

ARGUMENT

In seeking a fee award amounting to 33.33% of $20.6 million, Class Counsel assert that the benefits obtained for Class Members with this Settlement are "substantial" and the "monetary benefit to the class is easily quantifiable at up to $20.6 million." (ECF No. 141 at 29, 31.) Nothing could be farther from the truth. The bulk of the monetary relief is not a benefit to the class of Plan participants because it consists of Plan assets that would have been paid for the benefit of Plan participants with or without the Settlement. Furthermore, a substantial portion of the Plan's contribution is uncertain: the $5.6 million that Class Counsel ascribe to the additional allocations is just a maximum figure that will not realistically be achieved; and even the underlying $7.5 million is not easily quantifiable because any money left over as a result of Class Members who cannot be located reverts back to the Plan.

Separate and apart from their failure to establish a common fund of $20.6 million, Class Counsel have also failed to establish a basis for departing from this

Circuit's presumption of awarding 25% of a common fund. For the reasons stated, this Settlement has achieved little, relative to the claims asserted in the Amended Complaint, and Class Counsel's efforts in achieving this modest Settlement were anything but extraordinary given this case was settled in the early stages of fact discovery before Plaintiffs even took or defended a single deposition. Furthermore, Class Counsel's claimed lodestar is of little help in confirming the reasonableness of any percentage-fee awarded because they have not adequately shown that it reflects hours reasonably spent on necessary tasks at reasonable hourly rates.

I. ANY PERCENTAGE-OF-RECOVERY AWARD SHOULD BE BASED SOLELY ON THE $7.5 MILLION BEING PAID BY INSURERS

Under the percentage-of-recovery method, fees are awarded based on a percentage of, and recovered out of, the common fund that will ultimately be distributed to the class. The value assigned to the common fund must be a sum-certain—it should not include "inexact" values that cannot be "accurately ascertained." *Staton v. Boeing Co.*, 327 F.3d 938, 945-46, 973-74 (9th Cir. 2003); *see also In re Apple Inc. Device Performance Litig.*, No. 5:18-MD-02827-EJD, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021) (describing a common fund's characteristics as "fixed, certain, and non-reversionary"), *vacated and remanded on other grounds*, 50 F.4th 769 (9th Cir. 2022); *In re Apple Inc. Device Performance Litig.*, No. 5:18-MD-02827-EJD, 2023 WL 2090981, at *12 (N.D. Cal. Feb. 17, 2023) (same on remand).

For example, in *In re Apple Inc. Device Performance Litigation*, for purposes of calculating a percentage-fee award, the district court noted it was appropriate to value the common fund at only the "fixed" $310 million minimum amount that Apple was required to pay as part of the settlement, and *not* the $500 million maximum amount that Apple *might* be required to pay, depending on the number of claims submitted. 2021 WL 1022866, at *2. The court remarked that the minimum amount was certain to be paid and would "under no circumstances . . . revert to Apple," whereas the

maximum amount was only "potential" and it was "uncertain" whether Apple would ever pay that much. *Id.* Relatedly, in *Lowery*, the Court of Appeals recently made clear that "courts must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount—in assessing the value of a class action settlement" for purposes of ensuring a fee award is reasonable. 2023 WL 4933917, at *5. In that case, the defendant did not "surrender a sum certain"—it agreed to pay up to a maximum of $20 million to satisfy any claims submitted by class members, but only about $50,000 in claims were actually paid to class members. *Id.* at *4-6. While the district court had elected the lodestar method in that case, the Court noted that a cross-check using the percentage-of-recovery method would be calculated as 25% of the settlement's actual value of $50,000, and not as 25% of the $20 million that *could* have hypothetically been paid. *See id.* at *7.

Here, for purposes of calculating Class Counsel's percentage-fee award, the common fund should be valued at the $7.5 million that will be paid into the Qualified Settlement Fund by Defendants' insurers. This is the only amount that can reasonably be described as a recovery *on behalf of the Plan*, consistent with the relief sought by the Amended Complaint. *See supra* at 4-5. It is also the only amount that is "fixed, certain, and non-reversionary." *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2. For the reasons previously stated, the additional allocations for Qualifying Senior Performers can hardly be valued at the $5.6 million maximum claimed by Plaintiffs; and even the Plan's $7.5 million share of the $15 million base amount is overstated and uncertain in light of the Plan's reversionary interest in any sums not distributed to Class Members. *See supra* at 3-4. Accordingly, for purposes of calculating Class Counsel's percentage-fee award, the common fund should be valued at the only sum certain involved in this Settlement, and the only sum that constitutes a meaningful recovery on the claims alleged in the Amended Complaint—the $7.5 million from insurers.

II. CLASS COUNSEL HAS NOT JUSTIFIED AN AWARD HIGHER THAN 25% OF THE PLAN'S RECOVERY

Applying the *Vizcaino* factors, Class Counsel has provided no justification for their requested upward departure from this Circuit's 25% benchmark. In fact, all of the factors, including the most important one—the results achieved—militate in favor of a lower percentage.

A. Class Counsel Did Not Achieve Exceptional Results for Class Members

As noted above, the first and foremost consideration in determining the amount of Class Counsel's fee award is an assessment of the results they achieved for Class Members with the Settlement. *See, e.g.*, *Lowery*, 2023 WL 4933917, at *2 ("The touchstone for determining the reasonableness of attorneys' fees in a class action is the benefit to the class."). Only "exceptional results" weigh in favor of upward departure from the 25% benchmark. *Vizcaino*, 290 F.3d at 1048; *cf. Six (6) Mexican Workers*, 904 F.2d at 1311 (finding no reason to depart from the 25% "standard award" even though class counsel "obtained substantial success"). Here, there are many reasons why the Court should find that the monetary and non-monetary relief negotiated by Class Counsel in this Settlement are unexceptional.

First, the only monetary recovery for the Plan achieved by this Settlement (*i.e.*, the $7.5 million from insurers) is a small fraction (less than 4%) of the more than $200 million in damages Class Counsel set out to recover for the Plan. *See supra* at 4. This result contrasts with the cases cited by Class Counsel (ECF No. 141 at 31, 37-38) in which the court found "exceptional" recoveries that were much more substantial. *See, e.g.*, *Marshall v. Northrop Grumman Corp.*, No. 16-CV-6794 AB (JCx), 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020) (common fund recovered "approximately 29% of Plaintiffs' claimed damages"); *Waldbuesser v. Northrop Grumman Corp.*, No. CV 06-6213-AB (JCx), 2017 WL 9614818, at *2 (C.D. Cal. Oct. 24, 2017) (common fund recovered 70% of the class' "total net loss"); *Carlin v. DairyAmerica, Inc.*, 380 F.

Supp. 3d 998, 1019 (E.D. Cal. 2019) (common fund recovered "48% of what Plaintiffs' reputable experts believe the damages could have been"). Class Counsel's argument that the monetary relief is "substantial" (ECF No. 141 at 31) considers only how it may seem from the point of view of a small group of Senior Performers who are receiving relatively large Settlement payments (*e.g.*, $4,400, plus additional allocations) (Rumeld Decl. at 3 ¶ 5). The vast majority of Senior Performers impacted by the Amendments are receiving only token amounts (*e.g.*, $400); and many other participants who were impacted are receiving no monetary relief at all. (Rumeld Decl. at 3 ¶ 5.)

Second, the non-monetary relief provided for in the Settlement is, for the most part, immaterial and will have almost no effect on the Plan's financial condition or on Class Members' eligibility for coverage. *See supra* at 5-6. This is in stark contrast to the significant non-monetary benefits negotiated in *Vizcaino*, which resulted in 3,000 class members being hired as Microsoft employees and becoming entitled to participate in various employee benefit plans that were not previously available to them as freelancers. 290 F.3d at 1045, 1049 (affirming 28% award).

B. Class Counsel Should Not be Rewarded for the Risk of Pursuing Meritless Claims

With respect to the second *Vizcaino* factor, Defendants agree that this case was "risky" for Class Counsel (ECF No. 141 at 33-34), but not in a way that should be rewarded. The Ninth Circuit has noted that "risk" is relevant in awarding fees because class counsel should be encouraged to take cases for the public good on a contingent-fee basis that are not guaranteed wins because, for instance, there is an "absence of supporting precedents." *Vizcaino*, 290 F.3d at 1048. But, class counsel should not be similarly encouraged to take "meritless" cases that "should not be brought at all." *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 634-35 (9th Cir. 2020) (Kleinfeld, J., dissenting); *see also In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1452 (N.D. Cal. 1994) (recognizing need to limit risk enhancements to class counsel's

percentage fees because of "social cost of indiscriminately encouraging nonmeritorious claims to be brought") (quoting *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992)).[2] This case is of the type that should not be encouraged because, as Class Counsel virtually concede in their motion papers, there were numerous factual and legal obstacles to Plaintiffs' claims that were known from the start. (*See, e.g.*, ECF No. 141 at 8-10, 25, 34.) Class Counsel should not be rewarded for bringing exceedingly weak claims against well-meaning Trustees that only serve to discourage other industry and union leaders from volunteering to undertake these critically important but unpaid positions.

C. Class Counsel Generated Only Modest Benefits Beyond the Common Fund for Class Members

With respect to the third *Vizcaino* factor, as discussed above, Class Counsel did generate some "benefits beyond the cash settlement fund," *Vizcaino*, 290 F.3d at 1049, but they consist only of: (i) benefits paid for with Plan assets that eventually would have been used to pay benefits anyway; and (ii) four years of token administrative changes that will be largely inconsequential. *See supra* at 3-6.

D. Class Counsel's Request Is Outside the Range of Fee Awards in Settlements of Comparable Size

With respect to the fourth *Vizcaino* factor, the usual "range of fee awards out of common funds of comparable size" is currently 20%-30% for common funds of less than $50 million—*i.e.*, less than the one-third recovery sought by Class Counsel here. *Vizcaino*, 290 F.3d at 1050 & n.4 (looking to the Attorney Fee Awards treatise to determine class counsel's "reasonable expectations" for a fee award); Attorney Fee Awards § 2:8 (3d ed.) (noting that "common-fund fees in complex class action . . . suits

[2] For the same reason, contrary to Class Counsel's suggestions (ECF No. 141 at 34 n.11 & 38), their failure to recover anything in the related—and meritless—*Fisher v. Screen Actors Guild-American Federation of Television & Radio Artists*, No. 21-cv-05215-CAS (JEM) (C.D. Cal.) lawsuit should not serve as a basis for augmenting their fee recovery in this case.

normally constitute 20 to 30% of the class recovery, up to common funds of approximately $50 million"). Class Counsel assert that courts have been awarding a one-third fee in an "overwhelming majority of recent ERISA class actions." (ECF No. 141 at 37-38.) But, most of the cases cited are from outside the Ninth Circuit; and the ones from within the Ninth Circuit are readily distinguishable in light of the excellent results achieved and/or other unique circumstances warranting an upward departure from the 25% benchmark.[3]

E. Class Counsel Was Only Minimally Burdened by Litigating this Case on a Contingency Fee Basis

With respect to the remaining *Vizcaino* factors, Class Counsel has not suffered from bringing this lawsuit on a contingency fee basis in a manner that would warrant an upward adjustment of their fee award. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 955 (noting relevant burdens to consider include "cost, duration, [and] foregoing other work"); *Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, 2021 WL 11607173, at *3 (N.D. Cal. July 19, 2021) (noting that contingency litigation is "the nature of the beast" and "not a special consideration" unless the litigation has lasted many years). As noted, this case proceeded only through the early stages of fact discovery and did not require any large-scale document review by Class Counsel, depositions, expert discovery, summary judgment briefing, or trial preparation. (Rumeld Decl. at 2 ¶ 3.) During the relatively brief duration of this lawsuit, Class Counsel were not prevented from pursuing other litigation recoveries.[4] Nor did Class

[3] *See Marshall*, 2020 WL 5668935 (distinguished on pp. 10 & 14); *Waldbuesser*, 2017 WL 9614818 (distinguished on pp. 10 & 14 n.5); *Schwartz v. Cook*, No. 15-cv-03347-BLF, 2017 WL 2834115, at *5 (N.D. Cal. June 30, 2017) (33% award only compensated class counsel for 22% of its lodestar); *Harris v. Amgen Inc.*, No. 07-CV-5442-PSG-(PLAx), 2017 WL 6048215, at *8 (C.D. Cal. Apr. 4, 2017) (distinguished on p. 14 n.5); *Del Castillo v. Cmty. Child Care Council of Santa Clara Cnty., Inc.*, No. 17-cv-07243-BLF, 2021 WL 4895084, at *6 (N.D. Cal. Oct. 20, 2021) (34.7% award only compensated class counsel for one-third of its lodestar); *Foster v. Adams & Assocs., Inc.*, No. 18-cv-02723-JSC, 2022 WL 425559 (N.D. Cal. Feb. 11, 2022) (distinguished on p. 14 n.5).

[4] For example, Lead Class Counsel has been litigating another case at the same

Counsel have to bear significant costs, fronting under $51,000 (ECF No. 141 at 41). *See, e.g.*, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (considering class counsel's "carrying the financial burden of the case" before affirming 25% award).

By contrast, in *Vizcaino*, which affirmed a 28% award, the litigation "extended over eleven years, entailed hundreds of thousands of dollars of expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income." 290 F.3d at 1050. Similarly, in the *Marshall* case repeatedly cited by Class Counsel (*e.g.*, ECF No. 141 at 28, 31, 37), the district court awarded 33.33% not only because of the "exceptional result" but also because class counsel "expended tremendous effort" litigating the case until "fourteen minutes before trial was scheduled to begin" and fronted over $390,000 in costs in a case that involved summary judgment briefing, 353,000 pages of documents, 20 depositions, and full trial preparation. 2020 WL 566893, at *3, *9. Other one-third fee cases cited by Class Counsel (ECF No. 141 at 33, 37-38) have also settled at a much later stage of litigation.[5] And, there are numerous other litigations that have lasted far longer than this one and were more burdensome for class counsel in which the Court of Appeals found no reason to depart from the 25% benchmark. *See, e.g.*, *Six (6) Mexican Workers*, 904 F.2d at 1311

---

time that recently settled and resulted in a $15 million attorneys' fees award (split with another firm). *See In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2023 WL 3688452 (N.D. Cal. May 25, 2023). In that case, a 30% award was found warranted where there were "excellent results" (recovery of 9% to 28% of total estimated damages) and it was a "protracted" litigation undertaken on a contingency basis, requiring almost 28,000 hours of work over six years and over $1.5 million in costs. *See id.* at *13-15.

[5] *See AdTrader, Inc. v. Google LLC*, No. 17-cv-07082-BLF, 2022 WL 16579324, at *5 (N.D. Cal. Nov. 1, 2022) (settlement "after years of litigation and substantial discovery, including over a dozen depositions of parties and their experts, document production and review, interrogatories, and use of experts"); *Foster*, 2022 WL 425559, at *1, *10 (settlement "[s]hortly before trial was scheduled to commence"); *Waldbuesser*, 2017 WL 9614818, at *3 (settlement after trial had begun); *Harris*, 2017 WL 6048215, at *8 (settlement after "more than nine years" of litigation); *Carlin*, 380 F. Supp. 3d at 1019-20 (settlement after a "decade of litigation" and "considerable efforts sifting through hundreds-of-thousands of documents, conducting multiple depositions").

(finding no reason to depart from 25% "standard award" even though "litigation lasted more than 13 years"); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 941, 955 (affirming 25% award even though "class counsel risked great time and effort and advanced significant costs" totaling over $1.7 million).

III. CLASS COUNSEL CANNOT, IN THE ALTERNATIVE, JUSTIFY THEIR REQUESTED FEE BY MEANS OF A LODESTAR MULTIPLIER

Having failed to demonstrate entitlement to an upward departure from the 25% benchmark applicable to common fund awards, Class Counsel should not be heard to justify a higher award by referring to their alleged $3.8 million lodestar and claiming entitlement to a 1.8 multiplier. (ECF No. 141 at 38.)[6] To begin with, the modest benefits obtained for Class Members with this Settlement should not warrant any recovery above their lodestar. Secondly, the summary charts they submitted are inadequate to perform a lodestar cross-check, and if anything, suggest that their true lodestar should be much lower than the $3.8 million claimed.

A. Class Counsel Is Not Entitled to a Positive Multiplier

The Court of Appeals has counseled that the "[f]oremost" consideration in assessing whether a lodestar multiplier is appropriate is "the benefit obtained for the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983)). For the reasons stated (*see supra* at 3-6), the benefits obtained for Class Members here were so modest that, if anything, a negative multiplier may be justified. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (noting that "where the plaintiff has achieved only limited success, counting *all* hours expended on the litigation—even those reasonably spent—may produce an

[6] Class Counsel also try to justify a higher award by referencing the fees charged by defense counsel. (ECF No. 141 at 41.) Defendants do not feel that any such comparison is appropriate for a variety of reasons—not the least of which is that defense counsel were responsible for the bulk of the early discovery work, which consisted of gathering and searching through documents in the possession of the Plan and the Trustee Defendants. (Rumeld Decl. at 2 ¶ 3.) In any event, defense counsel's fees are substantially less than the fees being requested by Class Counsel. (*Id.* at 4 ¶ 9.)

excessive amount") (quotation omitted).

B. Class Counsel's Submission Is Insufficient to Demonstrate the Reasonableness of Their Claimed Lodestar

Because the court performing a lodestar cross-check must exclude any hours that are "excessive, redundant, or otherwise unnecessary," class counsel must submit "sufficiently detailed" documentation of the hours they spent on specific litigation tasks. *Anderson v. Nextel Retail Stores, LLC*, No. 07-CV-4480-SVW-(FFMx), 2010 WL 11506729, at *3 (C.D. Cal. June 30, 2010) (quoting *Hensley*, 461 U.S. at 434). They may not merely submit summary charts that list the total number of hours worked by each individual without, at the very least, breaking down those hours into categories of tasks. *See, e.g.*, *Weeks v. Kellogg Co.*, No. 09-CV-08102 (MMM)(RZx), 2013 WL 6531177, at *33-34 (C.D. Cal. Nov. 23, 2013) (court was "unable to conduct a true lodestar cross-check" where the summary chart submitted "provide[d] no detail as to how many hours were spent on particular tasks"). In addition, Class Counsel must demonstrate that their proffered hourly rates are "reasonable . . . considering the experience, skill, and reputation of the attorney[s] requesting fees." *Sarabia v. Ricoh USA, Inc.*, No. 8:20-cv-00218-JLS-KES, 2023 WL 3432160, at *7 (C.D. Cal. May 1, 2023) (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986)). Where the submission is inadequate with respect to time spent or the rates charged, it is appropriate for the court to reduce the claimed lodestar amount. *See, e.g.*, *Weeks*, 2013 WL 6531177, at *33 (noting "some reduction of the lodestar amount is appropriate" where class counsel submits only inadequate summary chart); *Anderson*, 2010 WL 11506729, at *3 (noting reduction is appropriate where "documentation is inadequate"); *Sarabia*, 2023 WL 3432160, at *8 (noting it may be "necessary" to reduce hourly rates in order to "calculate the true lodestar" for cross-check purposes if they are not justified by the evidence submitted).

Here, Class Counsel claim to have spent 5,093.7 hours on this case, at rates

ranging from $225 to $1,200 per hour, resulting in a claimed lodestar of $3,800,961. (ECF Nos. 142-2, 142-3, 143 ¶ 6 & 144 ¶ 12.) But in support of that claim, they rely on summary charts stating only the total number of hours worked by each individual (*see id.*), which make it impossible to evaluate whether those 5,093.7 hours were reasonably spent on necessary tasks.[7] On the basis of this submission, the Court cannot rule out the possibility that Class Counsel "frittered away hours on pointless" tasks that achieved "very little for the class." *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021).[8]

The summary charts submitted by Class Counsel also provoke concerns as to whether a disproportionate amount of the work on this case was unnecessarily handled by partners, most of whom claim billing rates of $1000 or more per hour. Specifically, about 55% of the 5,093.7 hours claimed (or 2,779.5 hours) were worked by partners. (*See* ECF Nos. 142-2, 142-3, 143 ¶ 6 & 144 ¶ 12.) This suggests that Class Counsel may have inflated their lodestar by failing to delegate appropriate work to more junior attorneys or paralegals with lower hourly rates. *Cf., e.g.*, *In re Am. Apparel, Inc. S'holder Litig.*, No. 10-CV-06352-MMM-JCGx, 2014 WL 10212865, at *26 (C.D. Cal. July 28, 2014) (noting during lodestar cross-check that class counsel reasonably assigned "lower-billing associates, staff attorneys, and of counsel to perform the majority [66%] of the work"); *Reed v. Balfour Beatty Rail, Inc.*, No. 8:21-CV-01846-JLS-ADSx, 2023 WL 4680922, at *7 (C.D. Cal. June 22, 2023) (noting during lodestar cross-check that the presence of a "junior associate who performed most of the work in

[7] In the case relied upon by Class Counsel in support of submitting summaries (ECF No. 141 at 39), the court stated that "actual billing records" are not required if class counsel submits sworn declarations "detailing the projects and tasks each lawyer completed" in the hours worked. *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015). Here, Class Counsel's submissions do not describe the tasks performed by each individual. (ECF Nos. 142-2, 142-3, 143 ¶ 6 & 144 ¶ 12.)

[8] For example, Edward Siedle claims to have spent 196.7 hours, at an hourly rate of $1,200, on economic (not legal) work that served merely to confirm—contrary to the Amended Complaint's allegations—that the SAG Health Plan was declining before the Merger. (ECF No. 144 ¶¶ 9-12.)

the matter is of special importance to the Court, as it demonstrates a tendency toward efficient billing"). If Class Counsel had partners performing tasks that should have been delegated to lower-rate timekeepers, this would constitute an independent reason for reducing their lodestar. *See, e.g.*, *Scott v. HSS Inc.*, No. 8:14-CV-01911-JLS-RNB, 2017 WL 7049524, at *8 (C.D. Cal. Dec. 18, 2017) (reducing lodestar by 20%).

Finally, Class Counsel has failed to justify the hourly rates for most of the 28 timekeepers listed on their summary charts by failing to provide their years of experience. (*See* ECF No. 142-2 & 142 ¶ 11 (Lead Class Counsel referring to firm website bios for only two partners and many of the remaining 19 timekeepers cannot be found on website); ECF No. 143 ¶¶ 3, 6 (Johnson & Johnson LLP referring to firm website where only three of six timekeepers can be found); ECF No. 144 ¶¶ 2-5 (Edward Siedle failing to provide years of experience as an attorney).) And, while Class Counsel also reference four previous cases that address the hourly rates of *some* timekeepers involved here (ECF No. 141 at 40; ECF No. 143 ¶ 9), the rates awarded in those cases were mostly *lower* than those proposed here—only one case, on an unopposed motion, awarded the currently-requested rates for eight of Lead Class Counsel's specific timekeepers. *See In re MacBook Keyboard Litig.*, 2023 WL 3688452, at *12, *15 & ECF No. 432, Joint Declaration (Jan. 6, 2023), at 18-19 ($1,000 for Steven A. Schwartz, $800 for Benjamin F. Johns, $750 for Andrew W. Ferich, $750 for Beena M. McDonald, $550 for Alex M. Kashurba, $400 for David W. Birch, $260 for Carlynne A. Wagner, and $250 for Corneliu P. Mastraghin).

In short, independent of their failure to deliver results that would warrant a fee award higher than their lodestar, Class Counsel have failed to submit documentation that would support a finding that their claimed lodestar is reasonable.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court reject Class Counsel's request for $6,866,667 in attorneys' fees as unreasonable, and

instead award lower, more reasonable fees.

Dated: August 21, 2023 By: /s/ Myron D. Rumeld

Myron D. Rumeld*
mrumeld@proskauer.com
Neil V. Shah*
nshah@proskauer.com
Anastasia S. Gellman*
agellman@proskauer.com
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Tel.: 212.969.3000
Fax: 212.969.2900

Scott P. Cooper (SBN 96905)
scooper@proskauer.com
Jennifer L. Roche (SBN 254538)
jroche@proskauer.com
PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Tel.: 310.557.2900
Fax: 310.557.2193

Jani K. Rachelson*
jrachelson@cwsny.com
Evan R. Hudson-Plush*
ehudson-plush@cwsny.com
COHEN, WEISS AND SIMON LLP
900 Third Avenue, Suite 2100
New York, NY 10022-4869
Tel.: 212.563.4100
Fax: 646.473.8254

* *admitted pro hac vice*

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this brief contains 6,415 words, which complies with the word limit of L.R. 11-6.1.

Dated: August 21, 2023 By: /s/ Myron D. Rumeld

Myron D. Rumeld*
mrumeld@proskauer.com
Neil V. Shah*
nshah@proskauer.com
Anastasia S. Gellman*
agellman@proskauer.com
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
Tel.: 212.969.3000
Fax: 212.969.2900

Scott P. Cooper (SBN 96905)
scooper@proskauer.com
Jennifer L. Roche (SBN 254538)
jroche@proskauer.com
PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Tel.: 310.557.2900
Fax: 310.557.2193

Jani K. Rachelson*
jrachelson@cwsny.com
Evan R. Hudson-Plush*
ehudson-plush@cwsny.com
COHEN, WEISS AND SIMON LLP
900 Third Avenue, Suite 2100
New York, NY 10022-4869
Tel.: 212.563.4100
Fax: 646.473.8254

* *admitted pro hac vice*

Attorneys for Defendants