IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DARRYL CHALMERS, DARREN CONNORS, GLENN MENDEZ, JAMES NOVA, FATIMA Q. ROSEMOND, and AFSCME DISTRICT COUNCIL 37 LOCAL 2507,

Plaintiffs,

And

BRANDEN BOWMAN and SEBASTIAN STACK,

Intervenors-Plaintiffs,

v.

THE CITY OF NEW YORK,

Defendant.

Case No. 20 Civ. 3389 (AT)

MEMORANDUM OF LAW IN SUPPORT OF DAMAGES PLAINTIFFS' REVISED MOTION FOR PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT OF ATTORNEY EXPENSES

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I. INTRODUCTION

The law firms of Mehri & Skalet, PLLC ("M&S") and Valli Kane & Vagnini LLP ("VKV"; collectively "Damages Class Counsel") have achieved remarkable results for their clients and proposed class members in this case. They brought unusual, and in at least one respect unique, claims. Despite the novelty of the claims, the plaintiffs mostly or totally prevailed on every motion. Ultimately, they negotiated a proposed settlement with total benefits that exceed $30 million. The members of one class, the "Damages Class," will receive average awards of about $50,000, much larger than the awards in most employment discrimination class action cases. The members of the other class, the "Pay Adjustment Class," have smaller claims but under the proposed settlement will receive 100 cents on the dollar for those claims. Most class members are members of both classes.

The Court denied preliminary approval of that settlement without prejudice because the Court determined that plaintiffs and Damages Class Counsel had a conflict in representing members of both classes. ECF No. 137. Thus, new plaintiffs and new counsel now represent the Pay Adjustment Class. The parties have negotiated a new settlement that is similar but not identical to the original settlement.

One difference is that the original five Plaintiffs, who are now the representatives of only the Damages Class (the "Damages Plaintiffs"), seek attorneys' fees for Damages Class Counsel of $8,150,000 instead of the $8,760,000 request that was part of the original proposed settlement. This is a reduction of $510,000.

The request is reduced because the original fee motion sought a fee of 30% of what was then a $29,200,000 settlement fund. While the settlement fund has been increased to $29,907,150,[1]

[1] Looking at just the amount of the settlement fund understates the monetary value of the settlement. The City will pay $1 million or more in employment taxes on the backpay portions of the awards to

the parties estimate that about $2,407,150 of that increased settlement fund will be paid to Pay Adjustment Class members. Declaration of Michael Lieder in Support of Revised Fee and Expense Motion ("Supp. Lieder Decl."), ¶ 5. Damages Class Counsel do not seek fees from that portion, even though until January 2024 they did the work that resulted in the payments to Pay Adjustment Class members under the settlement. Instead, Damages Plaintiffs request fees for Damages Class Counsel of 30% of the remaining $27,500,000. Thirty percent of $27,500,000 comes to $8,150,000.

Damages Class Counsel's lodestar is $3,599,682.40 through July 19, 2023. Supp. Lieder Decl., ¶ 7. The requested fee of $8,150,000 yields a multiplier of 2.26 on that lodestar. Both the percentage and the multiplier are squarely in line with other awards in this Circuit and by this Court for cases with similarly sized common funds. *See Chen-Oster v. Goldman Sachs & Co.,* 2023 U.S. Dist. LEXIS 200333, at *20 (S.D.N.Y. Nov. 7, 2023) (Torres, J.) (fees of $71,665,000, which was 1/3 of a common fund of $215,000,000; multiplier of 1.52); *In re Nichols v. Noom, Inc.*, 2022 U.S. Dist. LEXIS 123146, at *31-32 (S.D.N.Y. July 12, 2022) (fees of $18,666,666, which was one-third of the $56,000,000 common fund; multiplier of 2.88); *Bekker v. Neuberger Berman Group 401k Plan Inv. Comm.*, 504 F. Supp.3d 265, 268, 271 (S.D.N.Y. 2020) (fees of $4,760,000, which was 28% of $17 million settlement; lodestar multiplier of 5.85); *Westchester Putnam Ctys. Heavy & Highway Laborers Local 60 Benefit Funds v Brixmor Prop. Group Inc*., 2017 U.S. Dist. LEXIS 225656, at *4-5 (S.D.N.Y. Dec. 13, 2017) (Torres, J.) (fees of $8,400,000, which was 30% of a $28,000,000 common fund; lodestar multiplier of 3.25); *Colgate-Palmolive ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (fees of $11,475,000, which was 25%

settlement class members. If that payment is included, the requested fee award is only about 26.3% of the total monetary value of the settlement.

of the common fund; multiplier of 5.2)[2] Damages Class Counsel's risk-taking and efforts over the past four plus years in litigating the atypical employment discrimination claims here and in negotiating such a stellar settlement justify an award in line with those in the cases cited above.

Damages Plaintiffs ask that Damages Class Counsel also be reimbursed for $246,739.77 in expenses. The request exceeds the request in the prior motion by over $9,000. About half the new expenses had been incurred but not yet hit the firms' books when they submitted the prior motion. Ample documentation backs the request, which is less than 1% of the common fund.

These requests are fair and reasonable to the Damages Class. At the final approval hearing, the Court should grant the requested motion in full.

II. BACKGROUND

A. Case Investigation and Initiation (through May 1, 2020)

Darryl Chalmers, an associate fire protection inspector who became the lead plaintiff in the case, contacted Michael Lieder of M&S in October 2019 about representing fire protection inspectors in a racial discrimination case against the City. ECF No. 124, ¶ 4. After several conversations, M&S decided to investigate a possible racial discrimination claim based on the differences in pay between fire protection inspectors and associate fire protection inspectors

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[2] In *Pearlstein v. Blackberry Ltd.,* 2022 U.S. Dist. LEXIS 177786, at *29 (S.D.N.Y. Sep. 29, 2022), Judge McMahon recently surveyed multipliers "that have been applied by courts in this Circuit," and offered this string citation of additional cases involving eight and nine figure common funds, all but one with multipliers higher than the 2.57 multiplier here: "*JP Morgan Precious Metals*, No. 18-cv-10356, ECF Nos. 99, 114 (multiplier of 3.24; fees of 33.33% of $60 million settlement); *Osberg v. Foot Locker, Inc*., No. 07- cv-1358, ECF No. 423 (S.D.N.Y. June 8, 2018) (4.8 multiplier; fees of 33% of $288.4 million settlement); *Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-1552, ECF Nos. 598-1, 601 (D. Conn. Apr. 9, 2015) (3.0 multiplier; fees of 35% of $140 million settlement*); In re U.S. Foodservice, Inc. Pricing Litig.,* No. 07-md-1894, ECF No. 521 (D. Conn. Dec. 9, 2014) (2.23 multiplier; fees of 33.33% of $297 million settlement); *Del Glob. Techs.,* 186 F. Supp.2d at 369 (4.65 multiplier; fees of 33.33% of $11.5 million settlement))."

(together "FPIs"), who were mostly people of color, and building inspectors and associate building inspectors (together "BIs"), who were mostly white. *Id.*

Over the next few months, M&S lawyers interviewed several FPIs to confirm that the issues identified by Mr. Chalmers were widespread. *Id.*, ¶¶ 4, 5. They also reviewed documents, some provided by the FPIs and others available on the internet, including collective bargaining agreements ("CBAs") , annual reports issued by the City's Department of Citywide Administrative Services, which contained racial demographic information for FPIs and BIs, and data showing the salaries of every FPI and BI each year back to FY 2008. *Id.*, ¶¶ 6-7. In addition, the lawyers contacted two prominent industrial psychologists, Drs. Harold Goldstein and Charles Scherbaum, who researched the similarity of the job duties of FPIs and BIs. *Id.*, ¶ 8. Finally, the M&S lawyers conducted legal research to assess (a) the viability of the unusual discrimination claims that were contemplated, for which the comparators would not be individuals with the same job title but workers with a different job title employed at a different agency of the same employer, (b) the possibility of including white FPIs in the proposed class under an associational discrimination theory, and (c) the applicability of the continuing violation doctrine under the NYCHRL. *Id.*, ¶ 9. After completing this assessment, in early 2020, M&S tentatively decided to proceed with the case and draft a complaint. *Id.*, ¶ 10. At the lawyers' request, Mr. Chalmers identified several more potential plaintiffs in different functional areas of the Bureau of Fire Prevention and with different FPI titles. *Id.*, ¶ 11. The lawyers interviewed Darren Connors, Glenn Mendez, James Nova, and Fatima Rosemond, who all agreed to serve as plaintiffs. *Id.*, ¶¶ 11-12.

In February 2020, M&S asked VKV to co-counsel in the case. The firms had previously worked together on several class and collective cases and they have worked closely together on this case since February 2020. *Id.*, ¶ 14; ECF No. 125, ¶ 5.

Together, M&S and VKV ("Damages Class Counsel') prepared and filed the Complaint on May 1, 2020. ECF No. 1. That complaint was based on the novel and virtually untested theory that an employer engages in racial discrimination by paying workers in a largely minority job title less than mostly white workers with a different title in a different department, when the jobs have substantially similar duties, requiring similar skills, knowledge and abilities. ECF No. 1; ECF No. 124, ¶ 16.

B. Oppositions to the City's Motions to Dismiss.

Not surprisingly, the City moved to dismiss the Complaint to test Plaintiffs' ground-breaking legal theory. ECF Nos. 25, 26. Damages Class Counsel prepared and filed an opposition. ECF No. 34. The Court granted the City's motion to dismiss the claims of white FPIs but otherwise denied the motion, including the portion of the motion attacking the theory that the City was engaged in racial discrimination by paying FPIs less than BIs. ECF No. 63.

Damages Class Counsel asked for leave to file an Amended Complaint to set out additional facts supporting the claim that white employees could state viable associational discrimination claims under the NYCHRL. To develop those facts, they re-interviewed the white Plaintiff, Darren Connors, and interviewed three more white FPIs identified by Mr. Chalmers. ECF No. 124, ¶ 26. Based on those interviews, the Amended Complaint contained new allegations about the working relationships of white FPIs and FPIs who are people of color. ECF No. 64-1, ¶¶ 44, 47, 55-60, 66. Damages Class Counsel also added new calculations by Dr. Scherbaum, showing that white FPIs are paid the same as other FPIs. ECF No. 124, ¶ 26; ECF No. 64-1, ¶¶ 15, 128-31, 155. The Court granted Plaintiffs' letter motion for leave to file the Amended Complaint. ECF No. 68. The City filed a new motion to dismiss, ECF No. 73. Damages Class Counsel prepared and filed an opposition. ECF No. 77. On June 9, 2022, the Court denied the City's second motion to dismiss.

ECF No. 93. This was the first time that NYCHRL's associational discrimination provision, NYC Admin. Code § 8-107(20), had been used to include white employees with people of color in a racial discrimination class action claim. As far as we know, ours was the first such claim and the Court's ruling was the first ruling on this issue anywhere in the nation.

C. Discovery and Resolution of Discovery-Related Disputes

While briefing on the initial motion to dismiss was still ongoing, the parties negotiated a case management plan for the class certification stage of the case, which the Court approved. ECF No. 32. Class discovery began in October 2020 and continued through class certification expert depositions in July 2021.

The class discovery prepared the case for class certification and, later, became the basis for negotiating a settlement. During class discovery, the City produced 58,691 pages of documents, and Plaintiffs produced 13,529 pages. ECF No. 124, ¶ 17. Lawyers and paralegals from M&S and VKV reviewed and coded all 72,220 pages of documents. ECF No. 124, ¶ 17; ECF No. 125, ¶ 9. Each Plaintiff also answered interrogatories propounded by the City while the City responded to Plaintiffs' interrogatories and requests to admit. ECF No. 124, ¶ 17. The City deposed all five individual Plaintiffs, while Damages Class Counsel deposed seven non-expert defense witnesses from the Fire Department of the City of New York, the Department of Buildings, the Department of Citywide Administrative Services, and the Office of Labor Relations. *Id.*, ¶ 19.

Damages Class Counsel also devoted many hours to expert discovery. They asked Drs. Goldstein and Scherbaum to render opinions about relevant topics, sent them copies of documents and deposition transcripts, reviewed and discussed drafts of Drs. Goldstein and Scherbaum's expert report, prepared Dr. Scherbaum for his deposition, and then defended that deposition. *Id.*,

¶¶ 20-22. Damages Class Counsel also reviewed the report of Dr. Christopher Erath, the City's expert, conferred with Dr. Scherbaum about it, and deposed Dr. Erath. *Id.*, ¶ 22.

Notably, to the credit of counsel on both sides, neither side had to resort to a motion to compel at any point during the nine months of class discovery. Although the parties had multiple disputes, they resolved every one of them by compromise, after conferences and exchanges of emails. *Id.*, ¶ 23. These conferences consumed many hours but not as many as would have been required if the parties briefed discovery motions.

D. Class Certification and Motions to Exclude Expert Testimony

During 2021, Damages Class Counsel prepared both a motion for class certification and a motion to exclude Dr. Erath's testimony, including supporting memoranda and exhibits. ECF Nos. 61, 62. The City not only opposed those motions but moved to exclude Drs. Goldstein and Scherbaum's expert opinions. ECF Nos. 80, 81. On September 19, 2022, the Court granted Plaintiffs' motion for class certification and most of Plaintiffs' motion to exclude Dr. Erath's testimony, while denying the City's motion to exclude Drs. Goldstein and Scherbaum's opinions. ECF No. 98. These rulings led immediately to settlement discussions. ECF No. 124, ¶ 28.

E. Settlement Negotiations

Starting in late September 2022, the parties focused on negotiating a settlement, ironing out details, and reducing the settlement to writing. This was a grueling process, facilitated by Robin Gise, a JAMS mediator. Ms. Gise conducted six lengthy in-person mediation sessions, plus scores of video conferences and numerous email exchanges with the parties and their counsel. *Id.*, ¶ 30. The City's lead lawyer during the negotiations, Kami Barker, had to satisfy several different departmental stakeholders during the process, each seemingly with its own agenda. *Id.*

Damages Class Counsel worked very hard to overcome all obstacles. And although now they are serving only as Damages Class Counsel, at that time they were the sole counsel for both proposed classes. During settlement negotiations, Damages Class Counsel: worked with Dr. Scherbaum to calculate the City's exposure, analyses that were provided to Ms. Gise and Ms. Barker; researched, wrote, and shared legal and factual analyses of disputed issues with Ms. Gise and Ms. Barker, included analyses of the continuing violation doctrine, the application of prejudgment interest to awards against the City, the use of averages in calculating damages, and the size of typical service awards. Damages Counsel attended the six in-person mediation sessions and participated in scores of video conferences and email exchanges with Ms. Gise and Ms. Barker. They participated with Ms. Barker in many calls with the administrator, SSI. They drafted and edited the Settlement Stipulation and its exhibits. And they prepared the motion for preliminary approval along with the supporting memorandum and declarations. *Id.*., ¶¶ 28-34; ECF No. 125, ¶¶ 7-11.

The City, the five original Plaintiffs, and Local 2507 signed the original Stipulation of Settlement in August 2023. Plaintiffs filed a motion for preliminary approval later in the month. ECF No. 120. On November 20, they followed with a Motion for Payment of Service Awards and Attorneys' Fees and Reimbursement of Attorneys' Expenses. ECF No. 122.

F. Denial of Preliminary Approval and Negotiation of a Revised Settlement

The Court denied Plaintiffs' motion for preliminary approval on January 16, 2024, holding that the Damages Plaintiffs and Damages Class Counsel had a conflict in concurrently representing both the Damages Class and the Pay Adjustment Class and were inadequate representatives of the latter class. ECF No. 137, at 6. A few days later, the Court terminated the motion for service

awards, fees, and expenses, but without prejudice to renewing that motion in connection with any revised settlement. ECF No. 138.

In response to the denial of preliminary approval, Messrs. Bowman and Stack, who are members of the Pay Adjustment Class but not of the Damages Class, intervened as Plaintiffs. ECF No. 147. They also retained separate Pay Adjustment Counsel (the firm of Gladstein, Reif & Meginniss, LLP), and they have asked that Pay Adjustment Counsel be named as counsel for the class. ECF Nos. 142, 147. In the interim, Local 2507 has provided financial support for Pay Adjustment Counsel. But Pay Adjustment Counsel represent only the Pay Adjustment Class. They do not represent the union in this action. ECF No. 142, at 1 n.1.

Pay Adjustment Counsel evaluated the salary increases negotiated by Damages Class Counsel for the Pay Adjustment Class. They concluded that those increases are fair, reasonable, and adequate. ECF No. 165, ¶¶ 7-11. They have, however, obtained several changes to the original Stipulation of Settlement. First, the Pay Adjustment Period is extended by 5 ½ months because collective bargaining negotiations, which had been anticipated to begin in the fall of 2023 when the original Stipulation was negotiated, did not in fact begin until June 12, 2024. Accounting for those extra 5 1/2 months adds over $700,000 to the settlement amount. Second, the Pay Adjustment Class is certified under Rule 23(b)(3) instead of Rule 23(b)(2). And third, a new process allows Pay Adjustment Class members to challenge their awards. *Id.*, ¶ 12.

Two factors complicated and lengthened the negotiation of the revised settlement. First, Ms. Barker left the City's employment and Lora Minicucci replaced her as lead counsel for the City. Ms. Minicucci did a remarkable job of getting up to speed on a complicated settlement, but that learning process prolonged the negotiations. Lieder Supp. Decl., ¶ 10. Second, because ten-

months have passed since the original settlement was inked, the deadlines for virtually every step in the settlement process had to be changed, resulting in substantial work. *Id*., ¶ 11.

G. Qualifications of Damages Class Counsel

Michael. Lieder of M&S, who has led this litigation and worked more hours on it than any other Plaintiffs' lawyer, has been practicing law for 40 years and has concentrated on employment class action litigation for the last 33 years. ECF No. 124, ¶ 44. He has led or had a leading role in at least 20 employment class action lawsuits during that time. *Id*. Cyrus Mehri, the founder of M&S, consulted about the case during its first few years and became heavily involved when the case entered settlement negotiations. *Id.*, ¶¶ 40, 56. Mr. Mehri has engaged in civil rights class action litigation for 30 years and is well-known nationally for obtaining two of the largest race discrimination class action settlements in history at the time, *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) and *Roberts v. Texaco Inc*., No. 94 Civ. 2015 (CLB), 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997), as well as for playing a leading role in developing the Rooney Rule. ECF No. 124, ¶¶ 42-43; https://en.wikipedia.org/wiki/Cyrus_Mehri. Ellen Eardley, M&S's managing partner who graduated from law school 21 years ago, also worked on this case. She has spent almost all her career on plaintiffs'-side employment litigation, *id*., ¶ 45. and has led or played leading roles in numerous successful employment discrimination class action lawsuits. *Id.* Before becoming an M&S associate, Aisha Rich graduated from Harvard Law School in 2015, clerked for three judges, and worked as an assistant district attorney. *Id.*, ¶ 46. More information about M&S and its lawyers can be found on the firm resume, ECF No. 124-1, and on the M&S firm website, https://findjustice.com.

Matthew Berman, a partner at VKV, was initially that firm's primary attorney working on this case. Mr. Berman has 26 years of experience, first working for an employment discrimination

defense firm, then with Bernstein Litowitz Berger & Grossmann LLP, where he gained extensive Plaintiffs-side class action experience, and now with VKV. Along with Sara Wyn Kane and Robert J. Valli, Jr., Mr. Berman has worked on some of the largest class and collection actions handled by VKV. ECF No. 125, ¶¶ 6, 24-25. Ms. Kane, a founding partner of VKV, has been monitoring the case since the firm's involvement began. She played a significant role in the mediation and the settlement negotiation process, including finalizing the agreement and motion for approval. Ms. Kane has over 20 years of Plaintiffs-side employment discrimination experience and is primarily responsible for overseeing or serving as co-lead counsel on nearly all the firm's class, collective, and mass action cases listed in her declaration. *Id.*, ¶¶ 23-24. Ms. Kane and Mr. Berman attended the mediation sessions in this case. *Id.*, ¶ 11. In an exercise of billing judgment, Mr. Valli was not present for the mediation sessions, but he was engaged in the litigation from the start of VKV's involvement. When the matter transitioned to a settlement posture, his involvement increased. A founding partner of VKV, Mr. Valli has been practicing for 33 years, seven as a prosecutor and 26 representing plaintiffs in employment discrimination, wage and hour, and whistleblower claims. *Id.*, ¶¶ 20-22.

III. ARGUMENT

A. Plaintiffs' Request for a Fee Award of 30% of the Damages Portion of the Common Fund Is Fair and Reasonable.

The common fund doctrine governs an award of fees and expenses in a class action that creates a common fund even if the case, as here, is brought under fee-shifting statutes. *Fresno County Emples. Ret. Ass'n v. Isaacson*, 925 F.3d 63 (2d Cir. 2019). Under the common fund doctrine, district court judges may use "either the lodestar amount … or a percentage of the fund," but "the trend in this Circuit" is to apply "the percentage method." *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 62 F.4th 704, 723 (2d Cir. 2023). Courts favor percentage-of-the-fund awards mainly

because the percentage approach "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 U.S. Dist. LEXIS 22663, at *74 (S.D.N.Y. Nov. 26, 2002)). The percentage method also mirrors the practice of contingent fee attorneys, who "typically negotiate percentage fee arrangements with their clients." *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003)); *see also Sewell v. Bovis Lend Lease LMB, Inc.*, No. 09 Civ. 6548, 2012 U.S. Dist. LEXIS 53556, at *29 (S.D.N.Y. Apr. 16, 2012) ("[The percentage] method is similar to private practice where counsel operates on a contingency fee, negotiating a reasonable percentage of any fee ultimately awarded."). This Court has repeatedly used the percentage method to determine a fair and reasonable fee. *See, e.g., Monzon v. 103W77 Partners, LLC*, No. 13 Civ. 5951 (AT), 2015 U.S. Dist. LEXIS 30047, at *4-5 (S.D.N.Y. Mar. 5, 2015); *Flores v. Anjost Corp.*, No. 11 Civ. 1531 (AT), 2014 U.S. Dist. LEXIS 11026, at *22 (S.D.N.Y. Jan. 28, 2014).

Under the percentage-of-the-fund approach, as well as the other factors that courts in this Circuit typically consider, an award of 30% of the $27,500,000 portion of the common fund attributable to the Damages Class, or $8,150,000, is fair and reasonable. Indeed, if the parties had not agreed to limit Damages Class Counsel's attorneys' fee award to 30% of the fund, an award of one-third of the fund would have been fully justified, as discussed below.

1. The request for 30% of the common fund created by Damages Counsel's work is fair and reasonable.

When applying the percentage method, courts in this Circuit frequently award fees equal to one-third of the common fund created by class settlements— even in cases with much larger common funds and yielding larger multipliers. *See, e.g., In re U.S. Foodserv., Inc.*, No. 3:07-md-

1894 (AWT), 2014 U.S. Dist. LEXIS 200758, at *12-13 (awarding $99 million, one-third of $297 million gross settlement); *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 513-16 (S.D.N.Y. 2009) (awarding $170 million, one-third of $510 million net settlement). This Court also has repeatedly approved fee awards equal to one-third of the common funds created by both larger and smaller class case settlements. *See Chen-Oster,* 2023 U.S. Dist. LEXIS 200333, at *20 (1/3 of $215,000,000 common fund); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2018 U.S. Dist. LEXIS 60772, at *9 (S.D.N.Y. Apr. 9, 2018) (1/3 of $19,100,000 common fund); *Monzon,* 2015 U.S. Dist. LEXIS 30047, at *4-5 (1/3 of $500,000 common fund); *Flores,* 2014 U.S. Dist. LEXIS 11026, at *22 (1/3 of $1,050,000 common fund); *see also Mercado v. Metro. Transp. Auth.*, No. 20 Civ. 6533 (AT), 2023 U.S. Dist. LEXIS 84303 at *8-11 (S.D.N.Y. May 15, 2023) (although rejecting settlement for other reasons, concluding that requested award of 1/3 of $7,250,000 common fund is reasonable); *Soler v. Fresh Direct, LLC,* 20 Civ. 3431 (AT), 2023 U.S. Dist. LEXIS 42647, at *11 (S.D.N.Y. Mar. 14, 2023) (explaining that planned fee request for 1/3 of $900,000 common fund "will not weigh against preliminary approval" because a 1/3 award "is 'well within the applicable range of reasonable percentage fund awards'") (citation omitted).

An award of 33 1/3% —over $900,000 more than Damages Counsel are requesting— would be justified in this suit. The claims here were novel, unprecedented and therefore risky. This is not a cookie cutter case. It is one that has broken new ground. Damages Class Counsel took the risk of litigating on a completely contingent basis discrimination claims that the Court correctly characterized as "atypical … in that they "do[] not rely on a comparator group of [non-minority] 'co-employees.'" ECF No. 63, at 7 (quoting *Hill v. City of New York*, 136 F. Supp. 3d 304, 335 (E.D.N.Y. 2015)). A larger fee request would have been justifiable. *See McNeely v. Metro. Life Ins. Co.,* No. 1:18-CV-00885-PAC, slip op. at 5-6 (S.D.N.Y. Jan. 15, 2020) (Lieder Supp. Decl.,

Ex. C) (awarding Mehri & Skalet and co-counsel fees equal to 35% of settlement fund when "Class Counsel overcame the legal complexities arising out of a case containing three types of claims governed by both federal law and the laws of seven states to achieve a settlement with a substantial gross average award to Class Members").

Damages Class Counsel also compounded their risk by bringing "associational discrimination" claims on behalf of white FPIs. As the Court recognized, the "[c]aselaw interpreting the contours of such claims [was] scant." ECF No. 93, at 6. Indeed, Plaintiffs believe that on-point precedent was nonexistent and that the Court broke new ground with its ruling here. *See Burns v. Falconstor Software, Inc.,* 10 CV 4632 (ERK), 2014 U.S. Dist. LEXIS 203061, at *24 (E.D.N.Y. Apr. 10, 2014) (awarding fees of 1/3 of $5,000,000 common fund in securities class action partly because of risks created by case being "one of first impression in this circuit").

Also, most of the damages that Damages Class Counsel sought for FPIs would not be available without the benefit of the continuing violation doctrine. And while courts have repeatedly affirmed the doctrine's viability under the NYCHRL in the context of rulings on motions to dismiss, no court, to our knowledge, has yet awarded damages under it. Employment discrimination cases are always risky.[3] But they are especially risky when they break new legal ground, as this case did.

Despite the novel and atypical claims, Damages Class Counsel prevailed on motions to dismiss, on a class certification motion, and on cross-motions to exclude expert testimony, and

[3] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103, 104 (2009) ("results in the federal courts disfavor employment discrimination plaintiffs[.] … Jobs cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts"); Theodore Eisenberg, *The Relationship between Plaintiff Success Rates before Trial and at Trial*, 154 J. ROYAL STAT. SOC. 111, 114-16 (1991) (data shows that the only type of federal cases with lower success rates on pretrial motions and at trial are prisoner petitions).

then negotiated a settlement of almost $30 million, of which roughly $27.5 million, *about $50,000 gross per class member (before deduction of fees, expenses, service awards, and administrative fees)*, is attributable to the Damages Class.[4] The recovery here far exceeds the average awards in most other employment discrimination class settlements. *See, e.g., Soler,* 2023 U.S. Dist. LEXIS 42647, at *10 (preliminarily approving settlement providing fees equal to 1/3 of settlement fund that will provide awards of "approximately $1,156 per class member"); *Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359, 364, 365 (E.D.N.Y. 2014) (approving settlement providing for gross average awards of about $7,800 per class member and fees equal to 30% of settlement fund in gender discrimination class action); *Duling v. Gristede's Operating Corp.*, No. 06 Civ. 10197 (LTS)(HBP), 2013 U.S. Dist. LEXIS 87126, at *4, 5 (S.D.N.Y. June 19, 2013) (approving settlement in gender discrimination class case creating settlement fund of $1,450,000 for which 666 class members submitted claims, an average of about $2,177 per claimant); *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *4, 14-15 (S.D.N.Y. Nov. 30, 2010) (approving settlement in gender discrimination class action creating settlement fund of $152,500,000 for class of 6,206 women, an average of about $24,573 per class member).[5] In addition, the settlement in this case provides an increase in FPIs' pay for 17.5 months. Making this outcome all the more impressive is that an FPI' average salary is currently about $60,000, so that the recovery here is not just more dollars than most recoveries. It is also far larger in terms of the salary amounts at stake. It is an extraordinary result.[6]

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[4] The average Pay Adjustment Class member also will receive more than $5,000 before taxes. ECF No. 164, ¶ 16. Damages Class members who are also Pay Adjustment Class members – most Damages Class members are members of both classes – will receive an average of more than $55,000 gross.

[5] In *Velez*, a well-publicized trial resulted in a huge victory for plaintiffs and yet the parties settled for about half the amount per class member as the settlement here.

[6] Under the firms' co-counsel agreement and based on the relative lodestars of the two firms, M&S will receive $6,688,824.66 of a $8,150,000 award and VKV will receive $1,461.175.34

The fact that the Pay Adjustment Plaintiffs are seeking lodestar-based fees does not change the analysis. Pay Adjustment Counsel faced much less risk than Damages Counsel for four reasons. First, when Pay Adjustment Counsel became involved in January 2024, the legal battles had already been won. The parties had agreed to a settlement. While their task required considerable knowledge and skill, it did not involve the same risk. Second, Pay Adjustment Counsel has been involved in the litigation for only about six months, not almost five years. Third, Pay Adjustment Counsel did not incur significant out-of-pocket costs, or carry those costs for years, as Damages Counsel did. Fourth, Local 2507 paid a percentage of Pay Adjustment Counsel's fees on a billable hourly basis. They were not working on a pure contingency.

2. A lodestar cross-check supports that Damages Class Counsel's proposed fee award is reasonable.

When applying the percentage method, courts often use the lodestar method as a "cross-check" of reasonableness. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *see Flores*, 2014 U.S. Dist. LEXIS 11026, at *26 (finding percentage-of-the-fund request to be reasonable after "[a]pplying the lodestar method as a 'cross check'"). But "[b]ecause the lodestar is being used merely as a cross-check, it is unnecessary for the Court to delve into each hour of work that was performed by counsel to ascertain whether the number of hours reportedly expended was reasonable." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388-89 (S.D.N.Y. 2013) (quoting *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 506 (S.D.N.Y. 2009)). "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.*, No. 09 Civ. 6548 (RLE), 2012 U.S. Dist. LEXIS 53556, at *37 (S.D.N.Y. Apr. 16, 2012) (quotation omitted).

Although the Court need not review Damages Class Counsel's time records in depth, Damages Class Counsel have previously submitted fee reports showing their work through

October 24, 2023, as well as the rates charged for those lawyers and paralegals in 2023. ECF No. 124-2; ECF No. 125, at 35-124. With this filing, Class Counsel are submitting further fee reports for October 25, 2023, through July 19, 2024. Lieder Supp. Decl., ¶ 6 & Ex. A; Declaration of Sara Kane in Support of Revised Fee and Expense Motion ("Kane Supp. Decl."), ¶ 5 & Ex. A.

These reports contain time records contemporaneously maintained by each attorney, paralegal, and law clerk who worked on the case, as reduced through the exercise of billing judgment. ECF No. 124, ¶¶ 48-51; ECF No. 125, ¶¶ 26-33; Lieder Supp. Decl., ¶ 6; Kane Supp. Decl., ¶ 4-5. As part of that billing judgment, Damages Class Counsel have removed time that seemed questionable or excessive and all time for anyone who worked fewer than ten hours on this matter. ECF No. 124, ¶ 51; ECF No. 125, ¶ 33. After removing that time, Damages Class Counsel and their staffs devoted a total of 4,682 hours to this action through July 19, 2024, resulting in an aggregate lodestar of $3,599,682.40, using the same 2023 rates that they used in the original motion for an award of fees and expenses. ECF No. 124, ¶¶ 52-55; ECF 124-2; ECF No. 125, ¶¶ 27, 28, 32; Supp. Lieder Decl., ¶¶ 6-7; Supp. Kane Decl., ¶¶ 5-6. If the firms had used their 2024 rates, the lodestar would be larger still.

The time records show that this case was staffed efficiently. Until settlement talks began, four lawyers – Michael Lieder, Ellen Eardley, and Aisha Rich of M&S and Matthew Berman of VKV – performed almost all the attorney work.[7] ECF No. 124, ¶ 56; ECF No. 125, ¶ 6. The two firms coordinated to avoid duplication. And they focused on material issues, avoiding peripheral discovery or motion practice. For example, Damages Class Counsel took only seven non-expert

[7] Ms. Eardley became actively involved in the case in December 2020 when Mr. Lieder stepped away for a couple months because of the fatal illness of his wife, and Ms. Eardley stayed involved after he returned. ECF No. 124, ¶ 56. Ms. Rich left M&S in October 2021 and wasn't replaced on the case because almost no work other than briefing was performed between her departure and the start of settlement negotiations. *Id.*

depositions; six were cited in the class certification motion. ECF No. 124, ¶ 19. Only once settlement discussions started did Mr. Mehri, Ms. Kane, and Mr. Valli, all of whom are very experienced in settling employment discrimination class action litigation, substantially increase their work on the case. And Ms. Eardley largely ceased working on the case once settlement discussions started to minimize attorney staffing. *Id.*, ¶ 56; ECF No. 125, ¶ 11. Since the original settlement was signed, Mr. Lieder and Ms. Kane have done 85% of the attorney work of Damages Class Counsel. Lieder Supp. Decl., ¶ 8. For all these reasons, the amount of time that Damages Class Counsel devoted to the case was reasonable, not excessive.

The rates for each timekeeper also are reasonable, as shown by a comparison of M&S and VKV rates with of the rates charged by Outten & Golden ("O&G") and Lieff Cabraser Heimann & Bernstein ("LCHB"), class counsel in *Chen-Oster*. All four firms devote large percentages of their resources to complex civil rights and employment class action litigation nationwide. All four have earned strong national reputations. ECF No. 124, ¶¶ 40-46 (M&S); ECF No. 125, ¶¶ 19-25 (VKV); https://www.outtengolden.com/ (O&G); https://www.lieffcabraser.com/civil-rights/ (LCHB). The table below compares the average billing rates of M&S, VKV, O&G, and LCHB lawyers, paralegals, and law clerks, as disclosed in five fee motions filed by those firms since 2020, for cases litigated in New York, San Francisco, and Los Angeles: *Chen-Oster* (O&G and LCHB); *Reed v. Balfour Beatty Rail, Inc*., 2023 U.S. Dist. LEXIS 128546 (C.D. Cal. June 22, 2023) (O&G); *Cottle v. Plaid Inc*., 2022 U.S. Dist. LEXIS 128967 (N.D. Cal. July 20, 2022) (LCHB); *Alonso v. New Day Top Trading, Inc*., 2020 U.S. Dist. LEXIS 116047 (S.D.N.Y. June 29, 2020) (O&G); *Martinez v. Chestnut Holdings of N.Y., Inc*., 2020 U.S. Dist. LEXIS 4126 (S.D.N.Y. Jan. 9, 2020) (O&G).[8]

[8] If an O&G or LCHB lawyer worked on multiple cases, we used the rate requested and approved in the most recent decision. We excluded any lawyer whose title is shown as "staff attorney" because neither

The table below, using data from the filings in those cases, groups attorneys by experience level, using the levels incorporated in the Laffey Matrix, which M&S applies to set its rates. The Laffey Matrix divides lawyers into five experiential groups, *see* http://www.laffeymatrix.com/see.html (setting out the classifications and rates each year under the matrix). The table omits lawyers with 11-19 and 0-3 years of experience because no M&S or VKV lawyers at those experience levels worked on this case:

Type of Timekeeper	**M&S**	**VKV**	**O&G**	**LCHB**
Lawyers 20+ years	$997	$633	$979	$1058
Lawyers 8-10 years	$733	N/A	$561	$569
Lawyers 4-7 years	$465	N/A	$425	$509
Paralegals	$225	N/A	$337	$377
Law Clerks	$225	$200	$325	$349

If Damages Class Counsel had used O&G's and LCHB's average rates, their lodestar of about $3,600,000 would have been about $3,750,000 using Outten & Golden's average rates and over $4,000,000 using Lieff Cabraser's average rates, as shown in appendix Table 1. This comparison shows that Class Counsel's rates are not excessive or unreasonable.

Additional factors support the reasonableness of the M&S and VKV rates as well. M&S is headquartered in Washington, D.C., and the firm sets its rates using the Laffey Matrix, which applies to complex litigation in the DC area. ECF No. 124., ¶ 57; *see generally DL v. D.C.*, 924 F.3d 585, 588 (D.C. Cir. 2019) (describing Laffey Matrix); *see also House v. Wackenhut Servs.*, No. 10 Civ. 9476 (CM)(FM), 2012 U.S. Dist. LEXIS 118416, at *5-6 (S.D.N.Y. Aug. 8, 2012) (treating Laffey rate as factor in determining commercially reasonable rate for D.C. litigator).[9]

M&S nor VKV employs staff attorneys, and we excluded any lawyers whose title is shown as "associate" even though they graduated from law school 20 or more years ago because those persons may have been out of the workforce for many years and neither M&S nor VKV has associates who graduated 20 or more years ago.

[9] Decisions that reject attempts by non-District of Columbia litigators to use the Laffey Matrix to establish the reasonableness of their rates are inapposite. *See, e.g., N.G.B. v. New York City Dep't of Educ.*, No. 21-cv-11211 (LJL), 2023 U.S. Dist. LEXIS 55632, at *36-38 (S.D.N.Y. Mar. 30, 2023).

Second, M&S primarily engages in litigation on a contingent basis, but when it does litigate on an hourly basis, it typically charges its Laffey Matrix rates. ECF No. 124, ¶ 65. That is, M&S's rates, set using the Laffey Matrix, are also its market rates. *See Norwest Fin., Inc. v. Fernandez*, 121 F. Supp. 2d 258, 262-64 (S.D.N.Y. 2000) (rejecting challenge to reasonableness of fee request where client was "billed on the basis of services provided at fixed hourly rates which were charged at [counsel's] usual and customary rates"). Third, courts have repeatedly approved M&S's requested fees in common fund cases using M&S's Laffey-based rates as part of the lodestar cross-check, including in this District. ECF No. 124, ¶¶ 63-64; *see, e.g.,* Lieder Supp. Decl., Ex. D, at 11 (attaching *Stevenson v. Allstate Ins. Co.*, No. 4:15-cv-4788-YGR, ECF No. 87, at 11 (N.D. Cal. May 28, 2024); *Borders v. Walmart Stores, Inc.*, No. 17-cv-506-SMY, 2020 U.S. Dist. LEXIS 26300, at *7 (S.D. Ill. Apr. 29, 2020)*; McNeely*, *supra* at 5-6; *Roberts v. TJX Cos.*, No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *43-45 (D. Mass. Sep. 30, 2016); *In re MagSafe Apple Power Adapter Litig.*, No. 5:09-CV-01911-EJD, 2015 U.S. Dist. LEXIS 11353, at *39 (N.D. Cal. Jan. 30, 2015).

Courts in this District and elsewhere also repeatedly have approved VKV's rates in common fund and other cases. *See, e.g., Tither-Kaplan et al. v. Franco*, No. 19STCV35156 (Sup. Ct. CA, Cty. of Los Angeles, Feb. 24, 2023); *Leach v. NBCUniversal*, 1:15-cv-7206 (LGS) (JCF) (S.D.N.Y. Aug. 24, 2017); *Roberts v. TJX Cos.*, No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987 (D. Mass. Sep. 30, 2016); *Beaty v. Hillshire Brands*, No. 2:14-cv-58 (E.D. Tex. Dec. 21, 2015). And while many of VKV's cases are contingency fee based, the rates used by the firm for the cross-check are the hourly rates that VKV charges when it represents clients on an hourly basis. ECF No. 125, ¶ 32. Finally, since VKV submits fee applications in courts around the country, some of which generally approve lower rates than the S.D.N.Y (including its neighbor the

E.D.N.Y), VKV's rates are on the lower end of the spectrum for comparable class action counsel in this District. *Id.* at 11. Thus, VKV's rates used here are eminently reasonable.

As stated above, Damages Class Counsel's requested fees of $8,150,000 are about 2.26 times their total lodestar of $3,599,682.40. The lodestar will continue to increase and the multiplier to decline as Damages Class Counsel spends time "responding to objections, overseeing the settlement administration process, and potentially litigation of appeals." *Hesse v. Godiva Chocolatier*, No. 19 Civ. 972, 2022 U.S. Dist. LEXIS 72641, at *41 (S.D.N.Y. Apr. 20, 2022).[10]

Even without taking into account counsel's additional obligations under the Stipulation of Settlement, a 2.26 multiplier is far lower than in many other common fund cases with seven-figure fee awards. *See, e.g., Fikes*, 62 F.4th at 726-27 (affirming award of attorneys' fees of $523 million, which was a multiplier of 2.45 over lodestar); *Bekker v. Neuberger Berman Group 401k Plan Inv. Comm.,* 504 F. Supp. 3d 265 (S.D.N.Y. 2020) (awarding attorneys' fees of $4,760,000, which is 28% of the common fund and a multiplier of 5.85 times lodestar); *Aboud v. Charles Schwab & Co*., 2014 U.S. Dist. LEXIS 157205, at *13 (S.D.N.Y. Nov. 4, 2014) (awarding attorneys' fees of $1,266,666.67, which is one-third of the common fund and a multiplier of 4.4 times lodestar); *Yuzary v. HSBC Bank USA, N.A*., No. 12 Civ. 3693 (PGG), 2013 U.S. Dist. LEXIS 144327, at *29 (S.D.N.Y. Oct. 2, 2013) (awarding attorneys' fees of almost $5 million, which is 31.7% of the common fund and a multiplier of 7.6 times lodestar); *Beckman v. KeyBank, N.A*., 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (awarding attorneys' fees of $1,617,000, which is 33% of the common fund and a multiplier of 6.3 times lodestar); *see generally Bondi v. DeFalco*, No. 17-CV-5681 (KMK), 2020 U.S. Dist. LEXIS 84701 at *20 (S.D.N.Y. May 13, 2020) ("courts in the Second Circuit have often 'award[ed] lodestar multipliers between two and six'") (quoting *Sewell v. Bovis Lend Lease,*

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Inc., No. 09-CV-6548, 2012 U.S. Dist. LEXIS 53556, at *13 (S.D.N.Y. Apr. 16, 2012). Thus, the cross-check fully supports the requested award.

3. All the Second Circuit's *Goldberger* factors support the fee award.

Courts in this Circuit may also consider six factors that the Second Circuit identified in *Goldberger* to evaluate the reasonableness of an attorneys' fee award: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (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." *Fikes*, 62 F.4th at 723 (quoting *Goldberger*, 209 F.3d at 50). Several of the factors have already been discussed above. All of them support the requested fee.

a. Damages Class Counsel's time and labor

Damages Class Counsel expended substantial time and labor to achieve this impressive settlement: 4,682.5 hours through July 19, 2024, resulting in an aggregate lodestar of $3,599,682.40. ECF No. 124, ¶ 55; ECF No. 125, ¶ 27, 28, 31; Lieder Supp. Decl., ¶ 5; Kane Supp. Decl., ¶ 5. Damages Class Counsel took unusual initiative during the case. When the Court initially dismissed the claims of white FPIs, Damages Class Counsel immediately started work interviewing witnesses, preparing an Amended Complaint, and performing legal research to present a more persuasive case for their associational discrimination claim under the NYCHRL. ECF No. 124, ¶ 26. They not only successfully moved for class certification but also largely successfully moved to exclude the City's expert. ECF No. 98, at 15-25. And when legal issues threatened to derail the settlement discussions, Damages Class Counsel performed extensive legal research and prepared several detailed summaries and analyses for Ms. Barker and Ms. Gise. ECF No. 124, ¶ 33.

b. The magnitude and complexity of the litigation.

This case was legally complicated because it was based on an "atypical" and novel legal theory – that an employer could be liable for racial discrimination for paying employees in one job title that was occupied primarily by people of color less than mostly white employees in another job title who worked in a different department of the employer. This new theory necessitated showing that the job duties of the FPIs and the comparator group were sufficiently similar to avoid having this case pigeon-holed as a discredited comparable worth case. *Am. Fed'n of State, Cty. & Mun. Emples. v. Cty. of Nassau*, 609 F. Supp. 695, 708 (E.D.N.Y. 1985). And the success of the litigation is important beyond this case: in the very month in which Plaintiffs filed their class certification motion, the New York City Council issued a report on pay that identified "occupational segregation" as the main cause of racial and gender pay disparities in the City's workforce. That is, women and workers of color are concentrated in positions with lower pay, even when they are assigned duties similar to the duties of white men earning more but with other job titles. ECF No. 62-2, at 7. This case is among the first to challenge that occupational segregation.

This case also pioneered the inclusion of a white Plaintiff and white employees working in job titles otherwise comprised mostly of people of color in a pay discrimination case—on the theory that they, too, earn less because of the occupational segregation. ECF No. 124, ¶¶ 9, 26.

c. The risk of the litigation

"[T]he difficulty in proving [employment] discrimination on a class-wide basis" is well known, and the unusual risk attendant to that difficulty further justifies the requested award. *Cronas v. Willis Group Holdings, Ltd*., No. 06 Civ. 15295 (RMB), 2011 U.S. Dist. LEXIS 147171, at *16 (S.D.N.Y. Dec. 19, 2011) (quoting *Warren v. Xerox Corp*., No. 01 Civ. 2909, 2008 U.S. Dist. LEXIS 73951, at *22 (E.D.N.Y. Sept. 19, 2008)).

In employment cases, Plaintiffs and their lawyers frequently receive minimal or no recovery because of rulings on motions to dismiss or summary judgment and, especially since the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), on motions for class certification. The novel issues raised by Plaintiffs in this case made an adverse result here even more likely. Indeed, the Court initially dismissed the claims of the white FPIs, who comprise about 25% of the settlement classes.

d. The quality of representation

The results achieved provide the best measure of the quality of Damages Class Counsel's work. *See, e.g., In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 U.S. Dist. LEXIS 128998, at *58-59 (S.D.N.Y. July 21, 2020); *Christine Asia Co. v. Jack Yun Ma*, No.: 1:15-md-02631 (CM) (SDA), 2019 U.S. Dist. LEXIS 179836, at *64-65 (S.D.N.Y. Oct. 16, 2019). As discussed above, those results are outstanding. Despite the novelty of Damages Counsel's legal theories, Plaintiffs defeated the City's attacks on their claim of pay discrimination and on their associational discrimination theory. They prevailed on their class certification motion, mostly prevailed on their motion to exclude the City's expert witness, and prevailed completely on the City's motion to exclude Plaintiffs' expert witnesses.

The settlement terms are equally impressive. Damages Class members will receive average gross awards of about $50,000, based largely on Damages Class Counsel's contentions that the continuing violation doctrine applied more than ten years prior to the start of the limitations period. Damages Class Counsel also negotiated for Pay Adjustment Class members awards for one year in amounts that matched the average pay rates of comparable construction building inspectors. Pay Adjustment Class Counsel have now added an additional 5.5 months of pay to account for the delay in the start of CBA negotiations at the same adjusted rates per hour. The Pay Adjustment

awards will average more than $5,000 per class member. The City will pay the employer share of employment taxes on awards, which also will be pensionable. Finally, the settlement creates a labor-management committee to address issues that cause FPIs to believe that they are disrespected on account of their racial composition.

These results, along with the quality of Damages Class Counsel's submissions to the Court throughout the litigation, show that counsel provided high-quality representation.

e. The fee in relation to the settlement

As described in section III.A.1, courts in this Circuit, and this Court in particular, have regularly approved attorneys' fee awards in the range of 30 to 33 1/3% of a common fund, . *See generally Soler* 2023 U.S. Dist. LEXIS 42647, at *11 ("Courts in this district have approved similar attorney's fees of approximately one-third from class settlement funds, which is 'well within the applicable range of reasonable percentage fund awards.'") (quoting *DDAPV Direct Purchaser Antitrust Litig.*, No. 05 Civ. 2237, 2011 U.S. Dist. LEXIS 97487 (S.D.N.Y. Nov. 28, 2011)). While those decisions show that the fee request here is in line with other fee awards, the fee equal to 30% of the common fund is also fair and reasonable in this case for at least four more reasons.

First, the requested 30% fee is less than the pre-litigation fee agreements between Plaintiffs and Class Counsel, which authorized counsel to be awarded 33.3% of any recovery. ECF No. 124, ¶ 15. The percentage in the agreements with the individual plaintiffs is significant. "[C]ourts apply a presumption of reasonableness where a fee request is consistent with an *ex ante* agreement." *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *61-62 (citing *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *15 (S.D.N.Y. Dec. 23, 2009)).

Second, Damages Class Counsel are not seeking 30% of the total recovery. They are excluding the amount of the settlement fund estimated to be paid to Pay Adjustment Class members, even though they negotiated the formula used to calculate awards for the Pay Adjustment Class and the awards for the first 12 months of the pay adjustment period. If attorneys' fees were awarded based on the total settlement fund, the award would exceed the amount requested by more than $700,000 (30% of the difference of $2,407,150 is $722,145).

Third, Damages Class Counsel also is not seeking an award based on the City's agreement to pay the employer share of employment taxes. This provision of the settlement, as noted above, is worth at least one million dollars to members of the settlement classes. If the City's obligation to pay those taxes was included in the settlement amount, the award would be increased by at least $300,000.

Finally, Damages Plaintiffs are seeking 30% for Counsel, not 33 1/3%, which is awarded in many – probably most – other employment discrimination class cases. The difference is over $900,000. All the foregone potential attorneys' fees will go to Damages Class members in increased awards.

f. Public policy considerations

In addition to other factors, "courts consider the social and economic value of the class action, 'and the need to encourage experienced and able counsel to undertake such litigation.'" *Surdu v. Madison Global, LLC*, No. 15 Civ. 6567 (HBP), 2018 U.S. Dist. LEXIS 48356, at *33 (S.D.N.Y. Mar. 23, 2018) (quoting *Siler v. Landry's Seafood House-North Carolina, Inc.*, No. 13 Civ 587 (RLE), 2014 U.S. Dist. LEXIS 90088, at *28 (S.D.N.Y. June 30, 2014)). Those public policy considerations fully support the requested fee here.

The NYCHRL recognizes the importance of civil rights litigation. The law's statement of policy begins, "In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color …." N.Y.C. Admin Code § 8-101. As a result, the NYCHRL's provisions "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." *Id.* § 8-130(a). To further the NYCHRL's broad, remedial purposes, courts should incentivize experienced, able lawyers to bring class action cases when the NYCHRL is being violated. Incentives are especially important when potential litigation involves untested theories. The requested award here reasonably and fairly accomplishes that goal.

These public policy considerations are more, not less, important when the defendant is the City. First, lawyers are often reluctant to sue governments, preferring, all things equal, to sue private defendants, believing that private entities often make rational cost-benefit decisions more quickly, facilitating settlement. Second, the public interest in eliminating discrimination is at least as strong for discrimination in the public sector as in the private sector: taxpayer dollars should not be used to discriminate. Third, the identity of the defendant—public or private—is irrelevant to decisions about a percentage fee to be deducted from an aggregate, all-inclusive settlement amount. A lower fee doesn't return any money to the City. A higher fee doesn't cost the City any more.

B. Plaintiffs' Request for Reimbursement of Damages Class Counsel's Expenses of $246,680.95 Is Fair and Reasonable.

Damages Plaintiffs request reimbursement from the settlement fund of $246,680.95 for Damages Class Counsel's actual reasonable and necessary litigation expenses. The principal expenses were expert witness, mediator, and court reporter fees (for deposition transcripts). In

addition, Damages Class Counsel paid court fees, document management fees, legal research fees, postage, attorney travel, printing, and copying. ECF No. 124, ¶ 70; ECF No. 125, ¶ 36; Lieder Supp. Decl., Ex. B; Kane Supp. Decl., Ex. B. These types of expenses are in line with costs charged to individual clients billed monthly, ECF No. 124, ¶¶ 67-71; ECF No. 125, ¶ 34, and with costs awarded in other class cases. *See In re Signet Jewelers Ltd. Sec. Litig.*, No. 16 Civ. 6728, 2020 U.S. Dist. LEXIS 128998, at *64, *69 (S.D.N.Y. July 21, 2020) (granting reimbursement of expenses including "expert fees, deposition costs, on-line legal and factual research, document management and hosting, mediation fees, travel costs, and photocopying expenses"); *Fleisher v. Phx. Life Ins. Co.*, No. 11 Civ. 8405, 2015 U.S. Dist. LEXIS 121574, at *76-77, *80 (S.D.N.Y. Sep. 9, 2015) (granting reimbursement of "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation"); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (awarding expenses where the "lion's share of these expenses reflects the cost of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses").

Damages Class Counsel incurred total expenses of $246,739.77 in prosecuting this action. ECF No. 124, ¶¶ 66-71; ECF 124-3; ECF No. 125, ¶¶ 34-36; ECF No. 125-5; Supp. Lieder Decl., ¶¶ 14-15, Ex. B; Supp. Kane Decl., ¶12-13, Ex B. For a class case, expenses of about $250,000 are not unusual. The total comes to less than $400 per class member. A primary purpose of a class action, the spreading of costs over many class members, was served here. If a class member could have found a lawyer to take on such risky litigation individually – a very unlikely scenario – the expenses would have dwarfed $400, which is less than 1% of the average award.

IV. CONCLUSION

For all the reasons above, Plaintiffs respectfully request that the Court approve the requested award of attorneys' fees and reimbursement of Damages Class Counsel's expenses.

Dated: Washington, DC
July 26, 2024

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Attorneys for Damages Plaintiffs and Proposed Damages Class

APPENDIX TABLE 1

Group	Hours Worked	Outten & Golden		Lieff Cabraser	
		Ave. Rate	Lodestar	Ave. Rate	Lodestar
Lawyers 20+	3,109.33	$979	$3,044,034.07	$1058	$3,289,671.14
Lawyers 8-10	743.6	$561	$417,159.60	$ 569	$423,108.40
Lawyers 4-7	24.8	$425	$10,540.00	$ 509	$12,623.20
Paralegal	655.5	$337	$220,903.50	$ 377	$247,123.50
Law Clerk	166.0	$325	$53,950.00	$ 349	$57,934.00
Total	4,699.23		$3,746,587.17		$4,030,460.24