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, v. THE CITY OF NEW YORK, Defendant.	Case No. 20 Civ. 3389 (AT)

DAMAGES PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PAYMENT OF ATTORNEYS' FEES

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I. INTRODUCTION

The City's opposition to the motion to award attorneys' fees to Damages Class Counsel lacks merit for many reasons. First, it flies in the face of the many cases awarding attorneys' fees based on a percentage of the common fund ("POF"). The opposition is especially striking because (a) the percentage sought, 30%, is less than is often awarded and less than typically agreed to in contingent cases, and courts regularly approve multipliers greater than the 2.26 sought here, and (b) Damages Class Counsel took on greater risks than in many class cases by bringing a trailblazing, precedential case on a completely contingent basis. Second, the opposition ignores almost all facts in arguing that, for purposes of a lodestar award or cross-check, Damages Class Counsel's hours and rates are unreasonably high and should be reduced by about 35%. Third, the City blatantly misreads the Stipulation of Settlement in contending that the proposed fees would diminish Damages Class Members' backpay award below an agreed amount. And fourth, the City's argument that an already below market-rate attorneys' fee award will harm City taxpayers, and therefore should be further reduced, is false.

II. ARGUMENT

A. The Requested Award of 30% of the Damages Portion of the Common Fund Is In Line with, If Not Lower Than, a Reasonable Award in this Case.

1. The "percentage of the fund" method is preferred in this Circuit because it mimics the market, mirroring how individual plaintiffs compensate their counsel on a contingent basis.

The strong trend in this Circuit is toward the POF method, as even the City admits. ECF No. 189 at 12.[1] The City has not cited one common fund case in which the plaintiffs asked for an award based on the POF methodology and the Court instead used a lodestar approach.

[1] In this brief, citation to pages numbers in ECF documents are to the blue file-stamped numbering at the top of each ECF page rather than to a document's internal numbering at the bottom of the page.

Again, without caselaw support, the City twice suggests that the "presumptively reasonable" fee is the lodestar, not POF. See ECF 189 at 10, 14. Wrong. The Second Circuit rejected that argument—twice—last year in *Fikes Wholesale, Inc. v. HSBC Bank, USA N.A.*, 62 F.4th 704 (2d Cir. 2023), and before that in *Fresno Cnty. Employees' Retirement Assoc. v. Isaacson/Weaver Family Trust*, 925 F.3d 63 (2d Cir. 2019). As those cases make clear, a straight lodestar fee is not the presumptively reasonable fee in common fund cases. See *Fikes*, 62 F.4th at 727 ("Appellants argue that the straight lodestar--*i.e.*, the figure without any multiplier--is the presumptively reasonable fee in cases (such as this one) initiated under fee-shifting statutes. But we rejected that same argument in *Fresno Cnty*, explaining that "an attorney seeking a fee after establishing a common fund will receive a fee calculated using either the lodestar method or a percentage-of-the-fund method, which can yield a fee that is less than, equal to, or greater than the lodestar fee."). The City neglects to cite *Fikes* or *Fresno Cnty*.

As this Court has emphasized, the POF method is favored in common fund cases for very good reasons, including that it mimics the market in contingent cases:

> [I]t directly aligns the interests of the class and its counsel, *mimics the compensation system actually used by individual clients to compensate their attorneys*, provides a powerful incentive for the efficient prosecution and early resolution of litigation, and preserves judicial resources.

Monzon v. 103W77 Partners, LLC, Nos. 13 Civ. 5951, 14 Civ. 530, 2015 WL 993038, at *8 (S.D.N.Y. Mar. 5, 2015) (Torres, J.) (emphasis added); *see In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007 WL 4115808, at *3 (S.D.N.Y. Nov. 7, 2007) (the POF approach has several advantages, including that it "is uniquely the formula that mimics the compensation system actually used by individual clients to compensate their attorneys") (citing cases). And although the City blithely and wrongly asserts that "the purpose" of the POF method, and the explanation for this Circuit's trend toward it, "is to prevent overly compensating class

counsel," ECF No. 189 at 9, 12, it ultimately acknowledges, accurately, that "the POF method *is meant to mirror the market rate* for attorneys' fees, ECF No. 189 at 13 (emphasis added).

At 30 percent of the portion of the fund attributable to the Damages Class, the requested fee award here is *below* market. Research examines what "reasonable, paying clients," *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty of Albany*, 522 F.3d 182, 184 (2d Cir. 2008), even savvy, empowered clients with options, *actually* pay when they retain lawyers on a contingent basis. They regularly assign lawyers *33% or more* of total recoveries, plus expenses, which is ten percent more than the fee request here. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012) (surveying contingent fee contracts in patent litigation and finding that "Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery"); Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 The Advocate (Texas) 20 (2011) (article by a partner at Gibson Dunn, noting that, in big law, "A pure contingency fee arrangement is the most traditional alternative fee arrangement … Typically, the contingency is approximately 33%, with the client covering litigation expenses"); Expert Report Of Univ. of Texas Law Professor Charles M. Silver, 2015 Misc. Filings LEXIS 8380, *41-43 (noting that "sophisticated business clients regularly agree to pay fees in the same range" as personal-injury clients, where "market rates" "normally equal or exceed one-third of the recovery"); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (Professor, now Emeritus, at Cardozo Law School, noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries").

This Court has similarly observed that "An award of one third of the fund is consistent with what reasonable, paying clients pay in contingency employment cases." *Flores v. Anjost*

Corp., No. 11 CIV. 1531 AT, 2014 WL 321831, at *9 (S.D.N.Y. Jan. 29, 2014). Other courts have too. See *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623 (S.D.N.Y. 2012) ("'reasonable, paying client[s],' … typically pay one-third of their recoveries under private retainer agreements"); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 440 (E.D.N.Y. 2014) ("most [contingent] contracts award the lawyer a percentage (commonly, about one third) of the client's recovery."); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) ("Thirty three percent appears to be in line with what attorneys are able to command on the open market in arms-length negotiations with their clients."). And an award of one-third of the recovery is also what the five named plaintiffs in this case agreed to pay as attorneys' fees in this case. Lieder Declaration, ECF No. 124, ¶ 15.

Because the market rate for attorneys' fees is 33.33% or higher, mirroring the market rate would mean awarding fees of at least 33.33%. The requested 30% is a full 10% below market. It is not, as the City wrongly puts it, "overly compensating counsel." ECF 189 at 12–13. Rather, it is compensating counsel *below market rates.*

2. Courts in this Circuit regularly award percentages equal to or greater than the percentage and multiplier requested here.

The requested fee is 30% of the $27,500,000 portion of the common fund attributed to the Damages Class.[2] This works out to a "multiplier" of 2.26 times lodestar rates and hours, which, as this brief shows, is squarely in line with other awards by this Court, in this district, and in this Circuit, whether measured by the percentage of the fund or by the multiplier on lodestar.

[2] Damages Class Counsel also created most of the portion of the common fund that will be distributed to Pay Adjustment Class members and the formula by which they will be paid. If the approximately $2,400,000 of the pay adjustment portion of the common fund were included in the fee request, the request would be about $720,000 larger.

See Westchester Putnam Ctys. Heavy & Highway Laborers Local 60 Benefit Funds v. Brixmor Prop. Grp., Inc., 2017 WL 11470634 (S.D.N.Y. Dec. 13, 2017) (Torres, J.) (awarding fees of $8,400,000, which was 30% of the $28,000,000 common fund and a lodestar multiplier of 3.25). *See also Nichols v. Noom, Inc.*, No. 20-CV-3677 (KHP) (S.D.N.Y. July 12, 2022) (awarding fees of $18,666,666, which was one-third of the $56 million common fund and a lodestar multiplier of 2.88); *Bekker v. Neuberger Berman Grp. 401k Plan Inv. Comm.*, 504 F. Supp.3d 265 (S.D.N.Y. 2020) (awarding requested fee of $4,760,000, which was 28% of $17 million settlement and a lodestar multiplier of 5.85); *Osberg v. Foot Locker, Inc*., No. 07-cv-1358 (KBF), ECF No. 423 (S.D.N.Y. June 7, 2018) (awarding fees of $95,198,381, which was 33% of the settlement of $288,479,943 and a multiplier of 4.8); *Puglisi v. TD Bank, N.A.*, No. 13-cv-637 (GRB), 2015 WL 4608655 (E.D.N.Y. July 30, 2015) (awarding fees of $3,300,000, which was 33⅓ % of the $10 million maximum settlement fund amount and a lodestar multiplier of 4.86); *Colgate-Palmolive ERISA Litig.*, 36 F. Supp.3d 344 (S.D.N.Y. 2014) (awarding fees of $11,475,000, which was 25% of the common fund and a lodestar multiplier of 5.2); *In re JP Morgan Precious Metals*, No, 18-cv-10356, 2022 WL 2663863 (S.D.N.Y. May 6, 2022) (multiplier of 3.24; fees of 33.33% of $60 million settlement); *Haddock v. Nationwide Life Ins.* No. 01-cv-1552 (SRU), ECF Nos. 598-1, 601 (D. Conn. Apr. 9, 2015) (awarding fees of $49 million, which was 35% of the common fund settlement and a lodestar multiplier of 3.0); *In re U.S. Foodservice, Inc. Pricing Litig*., No. 07-md-1894 (AWT) ECF No. 521 (D. Conn. Dec. 9, 2014) (awarding fees of $99 million, which was 33⅓ % of a $297million settlement and a multiplier of 2.23); *Maley v. DEL Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fees of $3,832,950, which was 33⅓ % of an $11.5 million common fund and a multiplier of 4.65).

In response to all this caselaw, the City points to two cases in which awards of one-third of the common fund yielded multipliers of less than 1.0, *i.e.*, the lawyers received less than lodestar. *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 505-14 (S.D.N.Y. 2009) (award of 33 1/3% yielded multiplier of 0.7 based on adjusted lodestar); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261-263 (S.D.N.Y. 2003) (award of 33 1/3% yielded award of $500,000, amounting to hourly rate of $50.82). But in neither case did the Court say that fees generally should be capped at a multiplier of 1.0 or even less. Rather, the lawyers received multipliers of less than 1.0 because "the amount of time and labor counsel spent on this litigation is highly disproportionate to the settlement they achieved on behalf of the class." *In re Initial IPO*, 671 F. Supp. 2d at 515. Indeed, in *Initial IPO*, the class received less than 2% of the potential damages and the Court described class members' recoveries as "trivial." 671 F. Supp. 2d at 483, 510, 515. Here, as discussed below, Damages Class Counsel took on huge risks and achieved extraordinary success.

3. Damages Class Counsel's risks and results justify the requested awards.

Unlike in many of the cases cited above, Damages Class Counsel took on enormous risks by asserting novel claims on a contingent basis, won important victories throughout the litigation, and then obtained an excellent settlement. The City does not challenge that the claims were unusual and therefore risky in three ways.

First, Damages Class Counsel's liability theory compared the pay of two groups with different job titles employed *by two different City departments* (FDNY and the Dept. of Buildings). The Class alleged that, despite their substantially similar jobs, majority-white Building Inspectors are unlawfully paid more than majority-minority FPIs because of their race. Fewer than five similar cases have been filed. *See* ECF No. 63 at 7 (characterizing claim as "atypical"). Advancing this claim required Damages Class Counsel to sidestep landmines set by earlier cases unsuccessfully brought on comparable worth theories, *see, e.g., Am. Fed'n of State,*

Cty. & Mun. Emples. v. Cty. of Nassau, 609 F. Supp. 695, 708 (E.D.N.Y. 1985), and by the fact that the wage inequalities at issue had been collectively bargained for.

Second, *rather than limiting the class to Black FPIs, the class also included white FPIs*, alleging that their wages, too, are depressed because, under occupational "segregation," they work a minority job. To our knowledge, this is the first class case in the country to proceed on this theory. *See* ECF No. 93 at 6 ("Caselaw interpreting the contours of such claims is scant.").

Third, the claims were pursued here going back further than the limitations period would have allowed, by relying on the continuing violation theories available under the New York City Human Rights Law.

These unusual risks made success here far more contingent than in many other class employment cases. That "risk should be compensated." *Fikes Wholesale,* 62 F.4th at 727. This is especially true because, despite the risks, Class Counsel prevailed on motions to dismiss, for class certification, and to exclude expert testimony and then delivered a settlement that, we estimate, will provide Damages Class members with average awards of almost $35,000—after the payment of the requested fees (the average gross awards are about $50,000). For the majority who are also members of the Pay Adjustment Class, the average award after payment of the requested fees will be about $40,000. ECF No. 171, ¶¶ 12, 16. Awards at that level are rare in class employment litigation, another fact that the City does not dispute.

The City nonetheless argues that the Court should be guided by the fee awards in *Andrews v. City of New York*, 118 F. Supp. 3d 630 (S.D.N.Y. 2015) and *Local 1180, Commc'ns Workers of Am., AFL-CIO v. City of New York*, 392 F. Supp. 3d 361 (S.D.N.Y. 2019). ECF No. 189 at 26-28. Those are among the handful of cases successfully claiming that the employer discriminated by paying workers in one job title less than workers in another. Judging by the

average awards, they were far less successful than this case. The settlement in *Andrews* provided "for back pay awards ranging from $250 to $7,000 per plaintiff," 118 F. Supp. 3d. at 633, while the settlement in *Local 1180* created a fund of about $5,600,000 for over 2,000 class members, an average gross award of less than $3,000 per class member. 392 F. Supp. 3d at 371, 373. Other differences from this case are even more critical. The settlement in *Andrews* did not create a common fund; *hence the common fund doctrine did not apply and the POF method was unavailable*. 118 F. Supp. 3d at 636 (rejecting lawyers' argument for "the artificial creation by the Court of a common fund where none exists in order for [lawyers] to claim a portion of plaintiffs' recovery in addition to statutory attorney's fees"). And in *Local 1180*, counsel's risk was limited because the case settled before discovery even commenced. 392 F. Supp. 3d at 371, 375. Indeed, the decision does not reflect that counsel even asked for reimbursement of expenses, suggesting that expenses were minimal or that Local 1180 was paying them. These two cases say nothing about what the Court should award in this case.

B. The City's Calculation of a Multiplier of 3.5 over Lodestar is Wrong.

A fee award of $8,150,000 in this case will yield a multiplier of 2.26 over the total lodestar of $3,599,682.40. The City, however, contends that the lodestar should be lowered because Class Counsel's hours and billing rates supposedly are excessive. According to the City, the lodestar should be only $2,332,658, making the multiplier 3.5. ECF No. 189 at 22. Even if the City were correct about the lodestar and multiplier, courts in this Circuit frequently have approved multipliers of 3.5 or greater, making the requested fees well within the norm. *See supra* at 5 (describing fee awards in *Bekker*, *Osberg, Puglisi*, *Colgate-Palmolive*, and *Maley*). But the City's attempts to cut the lodestar are flawed.

1. The City's objections to hours are misguided.

The City's objections to hours are unfounded. Class Counsel had no incentive to overstaff or overwork this case and did not overstaff or overwork it. In particular:

The total number of hours is unexceptional. Counsel dedicated 4,157 hours to this case over 3.5 years. In comparison, in *Chen-Oster*, plaintiffs' class counsel dedicated 16,963 hours over 13 years. *Chen-Oster v. Goldman Sachs*, No. 1:10-cv-6950-AT-RWL, ECF No. 1451 at 4. In both cases, that's about 1,300 hours a year. And that number of hours or more is often what employment class actions against the City requires. In *Sierra v. City of New York*, No. 20-cv-10291-CMG-WG, 2023 WL 7016348 (S.D.N.Y. Oct.25, 2023), class counsel dedicated 4,360 hours over three years, or roughly 1,400 a year. *Id.* at *7 (S.D.N.Y. Oct. 25, 2023). In *Sow v. City of New York*, No. 21-cv-00533-CMG-WG, 2024 WL 964595 (S.D.N.Y. Mar. 5, 2024), class counsel worked more than 9,000 hours over three years, or 3,000 hours each year. *Id. at* *7.

Counsel neither overstaffed nor inappropriately staffed this case. The City's meat-cleaver approach to hours—arbitrarily requesting a 20% reduction in hours—is neither substantiated nor appropriate. There's no math behind the City's 20% legerdemain. ECF No. 189 at 21-22. With access to Class Counsel's complete time records, the City could have audited at least a portion of them before arbitrarily proposing a 20% reduction. But it did not. Instead, it contends that "Class Counsel sent at least four attorneys to every mediation session," where, by contrast, the City "was represented by a single attorney." ECF No. 189 at 20. But the complexity of this case warranted the use of multiple lawyers, including in mediation. *New York State Ass'n for Retarded Child., Inc. v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983) (affirming attorney fee award because "plaintiffs' use of multiple counsel was appropriate in light of the complexity of the litigation"). But even if sending four lawyers to the mediation sessions was unreasonable,

compensating Class Counsel for the time of two lawyers during the six mediation sessions would mean only about a 1.5% reduction in hours and compensating for the time of only one lawyer during those sessions would come to about a 3% reduction in total hours. Supposedly excessive staffing at mediation does not come close to justifying a 20% reduction.

The City could not point to other examples of supposedly excessive staffing because Damages Class Counsel staffed the case very leanly. Until October 2021, Mehri & Skalet partner Michael Lieder and associate Aisha Rich worked about 80% of the lawyer hours. The only reason it was not 90% is that Mehri & Skalet partner Ellen Eardley stepped in for Mr. Lieder when he had to take family medical leave. But in October 2021, Ms. Rich, who had dedicated 743 hours to the case—left Mehri & Skalet. ECF No. 124 ¶¶ 5, 9, 16, 21, 23, 46 (describing Ms. Rich's contribution). After her departure until the case moved to the settlement stage in September 2022, Mr. Lieder did the great majority of the lawyer work.

The *only* other reason the City gives for proposing a 20% reduction is "the top-heavy staffing in this case." ECF No. 189 at 21. But again, the staffing would not have seemed top-heavy before October 2021, when Ms. Rich departed. The lion's share of the work for the next year after her departure was briefing, in opposition to the City's motion to dismiss the amended complaint fleshing out the claims of white class members, in support of the motion for class certification and to exclude the City's expert, and in opposition to the City's motion to exclude Plaintiffs' experts. Mr. Lieder did almost all that briefing work. It would have been wasteful to ask a new associate, with no knowledge of the case, to draft the briefs. And after the Court issued its class certification decision on September 19, 2022, the case moved into settlement discussions. Thereafter, the case was staffed almost exclusively by partners, who had experience

in settling complex cases. Under these circumstances, the case was not staffed in an unreasonably top-heavy manner.

In addition, the City's objections to "top-heavy" billing are misguided given the small size of Damages Class Counsel's firms. "As numerous courts have recognized, 'Plaintiffs' counsel's small firms are not structured like large defense firms,' and '[t]hey should not suffer consequences in a fee award because a significant amount of the work fell on [partners'] shoulders due to the size of their firms.'" *In re Delta/Airtran Baggage Fee Antitrust Litig.*, No. 1:09-MD-2089-TCB, 2015 WL 4635729, at *24 (N.D. Ga. Aug. 3, 2015); *In re Vitamin C Antitrust Litig.,* Nos. 06–md–1738, 05–cv–453, 2013 WL 6858853, at *5 (E.D.N.Y. Dec. 30, 2013) ("[Smaller] law firms frequently follow a different model than large mega-firms in terms of the allocation of work between partners and associates, placing much more responsibility at higher levels. I see no general infirmity in using this model."); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.,* No. IP-96-1718, 2002 WL 1801647, at *6 (S.D. Ind. July 5, 2002) (objection to top-heavy billing was "misguided," "reflect[ed] a persistent but not always accurate caricature of law practice in which senior partners do relatively little hands-on work while more junior minions do the bulk of the work").

2. The City's unfounded objections to hourly rates ignore market facts.

For both Mehri & Skalet and Valli Kane &Vagnini, the hourly rates underlying their lodestars are their normal hourly rates for paid and contingent work. ECF No. 124, ¶ 153; ECF 125, ¶ 32. And they are fully in line with the market rates charged by similarly accomplished plaintiffs'-side complex litigators.

For Mehri & Skalet, the hourly rates of lawyers and paralegals on this case range from $225 for paralegals and law clerks to $997 for senior partners (at least 20 years). At Valli Kane &

Vagnini, the hourly rates for lawyers and paralegals who worked on this case range from $200 for law clerks to $633 for senior partners. By way of comparison, in *Chen-Oster*, hourly rates for Lieff Cabraser ranged from $250 for paralegals (with some paralegals billing at as high as $510, including one who billed 1,429 hours on the case) to $1,230 for partners (including for Kelly Dermody, who billed 5,161 hours in that case); and at Outten & Golden, hourly rates ranged from $325 for paralegals to $1,500 per hour for partners (including $1,150 per hour for Adam Klein, who billed 4,291 in that case).

The rates in *Chen-Oster* were not outliers. Courts in this district have repeatedly awarded fees to experienced, successful plaintiffs' lawyers at rates in these ranges. See *Rosario v. City of New York*, No. 18 Civ. 4023 (LGS), 2023 WL 2523624, at *3, 5 (S.D.N.Y. March 15, 2023) (awarding requested hourly rates ranging from $200 for paralegals to $900 for partners, while noting that those "requested rates are also [only] approximately half of the rates charged by lawyers in Manhattan at large firms," despite the fact that "[t]he skills required to win a complex civil rights case" are "comparable to" those required of lawyers in Manhattan's large firms for complex commercial cases); *Nichols v. Noom, supra,* 2022 WL 7205354 (rates ranging from $260 per hour for junior associates to $995 per hour for lead counsel); *Pearlstein v. BlackBerry Ltd.*, No. 13 CV 7060 (CM), 2022 WL 4554858, *10 (Sept. 29, 2022) (hourly rates ranging from $500 for associates to $1,200 for senior partners); *Belton v. GE Capital Consumer Lending,* No. 21-cv-9492, ECF Nos. 11, 17 (S.D.N.Y. Feb. 10, 2022) (awarding fees with attorney rates ranging from $350 to $1,100 an hour); *In re Hudson's Bay Co. Consumer Litig.*, No. 18-cv-8472, ECF Nos. 187, 189-218 (S.D.N.Y. June 8, 2022) (awarding fees with hourly attorney rates of $330-$1,000).

The City neither disputes nor distinguishes the hourly rate submissions in *Chen-Oster*; and its objections to M&S's rates as being Washington D.C. rates, based on the Laffey Matrix (ECF 189 at 14), are beside the point: forum (S.D.N.Y.) rates for peer plaintiffs'-side firms are comparable or higher than Laffey rates.[3]

C. The City's Suggestion that "Several Million Dollars" of Counsel's Fees "Will Be Paid from the Class's Apportionment of Backpay" Misrepresents this Settlement.

The revised settlement agreement here provides that "From the QSF, no more than $25,099,216 may be used to pay backpay awards." ECF No. 168-1, ¶ III.3. From that sentence, and only that sentence, the City argues, in its opposition, that $25,099,216 of the total lump-sum settlement amount of $29,907,500 is attributed to "back pay earned by the FPI Damages Class members," and that Damages Class Counsel wants to take millions of dollars in fees from that backpay award to their clients. ECF No. 189 at 11. That's totally false.

The City ignores the words "*no more than.*" The agreement doesn't say how much will be used to pay backpay awards; it only places a ceiling on the amount. Nobody can know what the total backpay amount will be until the Expert calculates the awards for each Damages Class member under the settlement formula. ECF No. 168-1, ¶¶ IV.4, 5. Those calculations can't occur until after any class members opt out, the Court determines the Plaintiffs' service awards and attorneys' fees and expenses, the expenses for the administrator and expert are paid, the Pay Adjustment Period ends in February 2025, the City calculates how much each Pay Adjustment

[3] The City provides no support or explanation for its suggestion that Joshua Karsh (1989) should be paid at a rate $125 lower than Mr. Mehri (1988) and Mr. Lieder (1984). Mr. Karsh has been a class action lawyer for more than 30 years, with his achievements and skill recognized by, among others, his election as a Fellow of the College of Labor and Employment Lawyers, and his election as a member of the American Law Institute (ALI). https://www.linkedin.com/in/joshua-karsh-13a31932/. And while Ellen Eardley, Mehri & Skalet's managing partner, graduated from law school in 2003, later than the other three Mehri & Skalet partners who worked on this case, the City offers no reasoned justification for her being billed at $750 per hour.

Class member is owed, and the amount of interest earned by the settlement fund is known. *Id.*, ¶¶ IV.6, IV.20, 21. The calculations won't occur until mid-2025.

Instead of representing an impossible effort to calculate total backpay awards for Damages Class members before necessary data was available, the $25,099,216 cap serves a completely different purpose. Plaintiffs understand that the City, which insisted on the inclusion of the figure, is funding the settlement in this case from two buckets: the FDNY pays the backpay and the City Comptrollers' Office pays everything else. This figure supposedly placed a cap on the FDNY contribution.[4]

And although neither party knows what the Damages Class total backpay award will be, the parties know for certain that the total backpay award won't be anywhere close to $25,099,216, *even if the Court awards Damages Class Counsel only the $2,332,658 in fees that the City urges.* The parties estimate that the Damages Class portion of the settlement fund will be about $27,500,000. The City does not oppose the $246,739.77 in expense reimbursements sought for Damages Class Counsel. ECF No. 189 at 9. Thus, the fees that the City says Damages Class Counsel are entitled to and the expenses total about $2,580,000. This reduces the money available for Damages Class member awards to under $25,000,000. The Expert will allocate Damages Class member awards between backpay and interest based on a formula. ECF No. 168-1, ¶ IV.9. If the average Damages Class member has ten years of tenure, only about 50% of the awards, about $12,500,000, will be allocated to backpay. *Id.* In short, the $25,099,216 figure was not meant to be a bona fide estimate of the amount of backpay for Damages Class members.

[4] Normally, Plaintiffs would not disclose anything conveyed during mediation but the City's blatant misrepresentation demands an explanation.

In short, the City's argument is based on fiction. The fees awarded to Damages Class Counsel will not take a dime from an agreed amount of backpay for Damages Class members. There is no agreed amount of backpay and, in fact, the amount is unknowable.

D. The City's Suggestion that a Lower Fee Award Would Save Taxpayers Money Is Disingenuous.

In the last paragraph of its opposition, the City beseeches the Court not to burden local taxpayers, arguing that "money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services." ECF No. 189 at 31. That argument is a non sequitur in this case. Fees will be awarded from an agreed settlement fund. There is no reverter. The amount the City must pay into the settlement fund does not vary with the amount paid out of that fund for attorneys' fees. Public tax dollars will be used to fund this settlement *in the same amount* —$29,907,500—regardless of the amount paid as attorneys' fees. Neither an increase nor a reduction in attorneys' fees changes the City's payment obligation under the settlement by even one penny.

The relevant policy argument is this: upholding and enforcing our nation's and the City's civil rights laws are of utmost importance. Awarding class counsel a fair fee in accordance with applicable case law is critically important to ensuring that experienced lawyers are willing to take the sometimes huge risks necessary to enforce anti-discrimination laws on a class basis.

III. CONCLUSION

Damages Class Plaintiffs' motion for attorneys' fees and expenses should be granted in full. Expenses, totaling $246,739.77, are uncontested and the City has not identified any valid reason for opposing the fee request of $8,150,00.

The deadline for class members to comment on or oppose the requests for attorneys' fees and expenses is still more than 60 days in the future. By 14 days before the final fairness hearing,

Class Counsel will make a supplemental filing, bringing any comments and objections about the fees or expenses to the Court's attention.

Dated: September 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that, on September 10, 2024, he caused a true and correct copy of the foregoing Damages Plaintiffs' Reply in Support of Motion for Payment of Attorneys' Fees to be served via electronic mail/ ECF to all registered parties.

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