

1 JEROME J. SCHLICHTER (SBN 054513)
jschlichter@uselaws.com
2 MICHAEL A. WOLFF (admitted *pro hac vice*)
mwolff@uselaws.com
3 JOEL D. ROHLF (admitted *pro hac vice*)
jrohlf@uselaws.com
4 SCHLICHTER BOGARD, LLP
100 South Fourth Street, Suite 1200
5 St. Louis, MO 63102
Telephone: (314) 621-6115
6 Facsimile: (314) 621-5934
Class Counsel for Plaintiffs

7
8 Steven M. Goldsobel (SBN 166405)
steve@sgoldsobel.com
Law Offices of Steven Goldsobel, A Professional Corporation
9 1901 Avenue of the Stars, Suite 1750
Los Angeles, CA 90067
10 Telephone: (310) 552-4848
Facsimile: (310) 695-3860
11 *Local Counsel for All Plaintiffs*

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 ALLEN MUNRO *et al.*,
16 *Plaintiffs,*
17 v.
18 UNIVERSITY OF SOUTHERN
CALIFORNIA, *et al.*,
19 *Defendants.*

Case No. 2:16-cv-06191-VAP-E

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
AND INCENTIVE AWARDS FOR
CLASS REPRESENTATIVES**

DATE: August 14, 2023
TIME: 2:00 p.m.
Courtroom 6A

Hon. Virginia A. Phillips

23
24
25
26
27
28

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES..... II

3 INTRODUCTION..... 1

4 CASE HISTORY.....3

5 I. The claims in the case3

6 II. The complex procedural history prior to trial3

7 III. Extensive discovery4

8 IV. *Daubert* motions.4

9 V. Preparing for trial5

10 VI. Mediations.....6

11 VII. Settlement.....6

12 ARGUMENT7

13 I. The Court should award Class Counsel a one-third fee, which is far

14 below the lodestar amount.8

15 A. The relevant factors support a one-third fee award.....8

16 1. Class Counsel obtained an exceptional result for the Class.....8

17 2. Class Counsel expended enormous effort on behalf of the

18 Class.....9

19 3. Class Counsel has extensive and unique experience9

20 4. The issues in the case were novel and complex..... 12

21 5. Class Counsel faced enormous risk of non-payment..... 13

22 6. No Class Member has objected to the fee request. 15

23 7. The requested award is below the non-multiplied lodestar. 15

24 B. A one-third fee has been awarded in similar actions. 19

25 II. The Court should award Class Counsel’s litigation expenses.20

26 III. The Court should approve a \$25,000 incentive award.....21

27 CONCLUSION25

28

TABLE OF AUTHORITIES

CASES

Abbott v. Lockheed Martin Corp., No. 06-701,
2015 U.S. Dist. LEXIS 93206 (S.D. Ill. July 17, 2015).....21, 25

AdTrader, Inc. v. Google LLC,
7 F.4th 803 (9th Cir. 2021).....7

Beesley v. Int’l Paper Co., No. 06-703,
2014 U.S. Dist. LEXIS 12037 (S.D. Ill. Jan. 31, 2014)11, 21, 24, 25

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)7

Boyd v. Bank of Am. Corp., No. 13-561-DOC,
2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014)9, 19

Campbell v. Best Buy Stores, L.P., No. 12-7794-JAK,
2016 U.S. Dist. LEXIS 184851 (C.D. Cal. Apr. 5, 2016).....13

Campos v. Converse, Inc., No. 20-1576-JGB,
2022 U.S. Dist. LEXIS 147715 (C.D. Cal. Aug. 15, 2022)19

Carlin v. DairyAmerica, Inc.,
380 F. Supp. 3d 998 (E.D. Cal. 2019),
vacated on other grounds, No. 09-430, 2022 U.S. Dist. LEXIS
27601 (E.D. Cal. 2019)25

Cassell v. Vanderbilt Univ., No. 16-2086,
2019 U.S. Dist. LEXIS 242062 (M.D. Tenn. Oct. 22, 2019).....25

Cates v. Trs. of Columbia Univ., No. 16-6524,
2021 U.S. Dist. LEXIS 200890 (S.D.N.Y. Oct. 18, 2021)...10, 16, 17, 18, 20, 24

Cervantez v. Celestica Corp., No. 07-729-VAP,
2010 U.S. Dist. LEXIS 78342 (C.D. Cal. July 6, 2010)14

Clark v. Duke Univ., No. 16-1044,

1 2019 U.S. Dist. LEXIS 105696 (M.D. N.C. June 24, 2019).....25
2 *Dorsette v. TA Operating LLC*, No. 9-1350-PA,
3 2010 U.S. Dist. LEXIS 153467 (C.D. Cal. July 26, 2010)20, 21
4 *Downey Surgical Clinic, Inc. v. OptumInsight, Inc.*, No. 09-5457-PSG,
5 2016 U.S. Dist. LEXIS 145000 (C.D. Cal. May 16, 2016).....12, 17
6 *Estakhrian v. Obenstine*, No. 11-3480-FMO,
7 2019 U.S. Dist. LEXIS 112828 (C.D. Cal. July 8, 2019)8
8 *Fischel v. Equitable Life Assur. Soc’y of U.S.*,
9 307 F.3d 997 (9th Cir. 2002).....16
10 *Ford v. Takeda Pharmaceuticals*, No. 21-10090,
11 Doc. 109 (D. Mass. Jan. 20, 2023).....17
12 *Ford v. Takeda Pharms. U.S.A., Inc.*, No. 21-10090,
13 2023 U.S. Dist. LEXIS 93286 (D. Mass. Mar. 31, 2023)10, 17
14 *Freeze v. PVH Corp.*, No. 19-1694-PSG,
15 2021 U.S. Dist. LEXIS 197291 (C.D. Cal. Jan. 7, 2021).....14
16 *Garcia v. Gordon Trucking, Inc.*, No. 10-324,
17 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. Oct. 29, 2012).....9
18 *Hanlon v. Chrysler Corp.*,
19 150 F.3d 1011 (9th Cir. 1998).....15
20 *Harris v. Marhoefer*,
21 24 F.3d 16 (9th Cir. 1994).....20
22 *Hughes v. Northwestern University*,
23 142 S. Ct. 737 (2022)12
24 *In re Am. Apparel Shareholder Litig.*, No. 10-6352-MMM,
25 2014 U.S. Dist. LEXIS 184548 (C.D. Cal. July 28, 2014)12
26 *In re Apple Inc. Device Performance Litig.*,
27 50 F.4th 769 (9th Cir. 2022).....7, 21
28

1 *In re Heritage Bond Litig.*, No. 02-1475-DT,
 2 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. June 10, 2005).....8, 12, 19
 3 *In re Hyundai & Kia Fuel Econ. Litig.*,
 4 926 F.3d 539 (9th Cir. 2019)..... 15
 5 *In re Online DVD-Rental Antitrust Litig.*,
 6 779 F.3d 934 (9th Cir. 2015).....7, 15
 7 *In re Pac. Enters. Sec. Litig.*,
 8 47 F.3d 373 (9th Cir. 1995)..... 19
 9 *In re Wash. Pub. Power Supply Sys. Secs. Litig.*,
 10 19 F.3d 1291 (9th Cir. 1994) (“WPPS”) 13, 14, 16
 11 *Jeter-Polk v. Casual Male Store, LLC*, No. 14-891-VAP,
 12 2016 U.S. Dist. LEXIS 204837 (C.D. Cal. June 29, 2016).....8
 13 *Jiangchen v. Rentech, Inc.*, No. 17-1490-GW,
 14 2019 U.S. Dist. LEXIS 180474 (C.D. Cal. Oct. 10, 2019)7, 19
 15 *Kane v. Smithfield Direct, LLC*, No. 21-4832-PA,
 16 2022 U.S. Dist. LEXIS 129774 (C.D. Cal. July 20, 2022)20
 17 *Kelly v. Johns Hopkins Univ.*, No. 16-2835,
 18 2020 U.S. Dist. LEXIS 14772 (D. Md. Jan. 28, 2020) 10, 17
 19 *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781,
 20 2015 U.S. Dist. LEXIS 91385 (D. Minn. July 13, 2015).....25
 21 *Kruger v. Novant Health, Inc.*, No. 14-208,
 22 2016 U.S. Dist. LEXIS 193107 (M.D. N.C. Sept. 29, 2016).....25
 23 *Lalli v. First Team Real Estate—Orange Cnty.*, No. 20-27-JWH,
 24 2022 U.S. Dist. LEXIS 161756 (C.D. Cal. Sept. 6, 2022)9
 25 *Low-Iacovino v. Ben. Plan. Comm. of the Nonbargained Program*, No.
 26 16-6614-AB,
 27 2018 U.S. Dist. LEXIS 226998 (C.D. Cal. July 2, 2018) 16
 28

1 *Marshall v. Northrop Grumman Corp.*, No. 16-6794-AB,
 2 2020 U.S. Dist. LEXIS 177056 (C.D. Cal. Sept. 18, 2020)
 31, 8, 9, 10, 12, 14, 16, 17, 18, 19, 20, 24
 4 *Mogck v. Unum Life Ins. Co. of Am.*,
 5 289 F. Supp. 1181 (S.D. Cal. 2003)16
 6 *Monterrubio v. Best Buy Stores, L.P.*,
 7 291 F.R.D. 443 (E.D. Cal. 2013).....13
 8 *Moreno v. City of Sacramento*,
 9 534 F.3d 1106 (9th Cir. 2008).....7
 10 *Morris v. Lifescan, Inc.*,
 11 54 Fed. App’x 663 (9th Cir. 2003).....19
 12 *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*,
 13 No. 07-3072-AHM,
 14 2009 U.S. Dist. LEXIS 132269 (C.D. Cal. June 24, 2009).....20
 15 *Munro v. USC*,
 16 896 F.3d 1088 (9th Cir. 2018).....3
 17 *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-4062,
 18 2017 U.S. Dist. LEXIS 86124 (N.D. Cal. June 5, 2017).....25
 19 *Nolte v. Cigna Corp.*, No. 07-2046,
 20 2013 U.S. Dist. LEXIS 184622 (C.D. Ill. Oct. 15, 2013)10, 25
 21 *Norris v. Mazzola*, No. 15-4962,
 22 2017 U.S. Dist. LEXIS 208610 (N.D. Cal. Dec. 19, 2017)17
 23 *Ontiveros v. Zamora*,
 24 303 F.R.D. 356 (E.D. Cal. 2014).....20
 25 *Pan v. Qualcomm Inc.*, No. 16-1885,
 26 2017 U.S. Dist. LEXIS 120150 (S.D. Cal. July 31, 2017).....25
 27 *Perez v. DIRECTV Grp. Holdings, LLC*, No. 16-1440-JLS,
 28

1 2023 U.S. Dist. LEXIS 13920 (C.D. Cal. Jan. 23, 2023)..... 13
2 *Pledger v. Reliance Trust Co.*, No. 15-4444,
3 2021 U.S. Dist. LEXIS 105868 (N.D. Ga. Mar. 8, 2021) 10, 17, 18, 24
4 *Roes v. SFBSC Mgmt., LLC*,
5 944 F.3d 1035 (9th Cir. 2019)..... 24
6 *Romero v. Producers Dairy Foods, Inc.*, No. 05-484,
7 2007 U.S. Dist. LEXIS 86270 (E.D. Cal. Nov. 13, 2007) 19
8 *Spano v. Boeing Co.*, No. 06-743,
9 2016 U.S. Dist. LEXIS 161078 (S.D. Ill. Mar. 31, 2016)..... 10, 21, 25
10 *Stanger v. China Elec. Motor, Inc.*,
11 812 F.3d 734 (9th Cir. 2016)..... 16
12 *Staton v. Boeing Co.*,
13 327 F.3d 938 (9th Cir. 2003)..... 7, 21
14 *Stetson v. Grissom*,
15 821 F.3d 1157 (9th Cir. 2016)..... 7, 16
16 *Sweda v. Univ. of Pa.*, No. 16-43294329,
17 2021 U.S. Dist. LEXIS 121336 (E.D. Pa. June 28, 2021)..... 10
18 *Taylor v. Shippers Transp. Express, Inc.*, No. 13-2092-BRO,
19 2015 U.S. Dist. LEXIS 191461 (C.D. Cal. May 14, 2015)..... 9
20 *Tibble v. Edison Int’l*, No. 07-5359-SVW,
21 2017 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017) 11
22 *Tibble v. Edison International*,
23 575 U.S. 523 (2015) 11
24 *Trujillo v. City of Ontario*, No. 04-1015-VAP,
25 2009 U.S. Dist. LEXIS 79309 (C.D. Cal. Aug. 24, 2009) 25
26 *Tussey v. ABB, Inc.*, No. 06-4305,
27 2015 U.S. Dist. LEXIS 164818 (W.D. Mo. Dec. 9, 2015),
28

1 [https://www.abajournal.com/news/article/biglaw-partners-hourly-](https://www.abajournal.com/news/article/biglaw-partners-hourly-billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-trustee)
2 [billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-](https://www.abajournal.com/news/article/biglaw-partners-hourly-billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-trustee)
3 [trustee](https://www.abajournal.com/news/article/biglaw-partners-hourly-billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-trustee) 18
4 Newberg & Conte, *Newberg on Class Actions* (4th ed. 2007)..... 19

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 INTRODUCTION

2 After more than six years of hard-fought litigation, Plaintiffs and Defendants,
3 the University of Southern California and the University of Southern California
4 Retirement Plan Oversight Committee (“USC”), reached a Settlement¹ to resolve all
5 remaining claims in return for payment to Plaintiffs’ Plans of \$13,050,000 and
6 other equitable relief. Under the common fund doctrine, Class Counsel seeks an
7 attorneys’ fee award of one-third of the Gross Settlement Amount (\$4,350,000) and
8 reimbursement of \$1,184,891 in reasonable litigation expenses incurred in
9 prosecuting this action. Class counsel also seeks incentive awards of \$25,000 for
10 each of the eight Class Representatives. This is consistent with fee awards in many
11 settlements handled by Class Counsel involving similar complex ERISA fiduciary
12 breach claims, including those in this District. *See Marshall v. Northrop Grumman*
13 *Corp.*, No. 16-6794-AB, 2020 U.S. Dist. LEXIS 177056, at *25 (C.D. Cal. Sept.
14 18, 2020); *Waldbuesser v. Northrop Grumman Corp. (In re Northrop Grumman*
15 *Corp. ERISA Litig.)*, No. 06-6213-AB, 2017 U.S. Dist. LEXIS 223293, at *17
16 (C.D. Cal. Oct. 24, 2017) (“*Northrop*”); Declaration of Jerome J. Schlichter ¶40
17 (“Schlichter Decl.”).

18 Class Counsel devoted over 14,678 hours of attorney and staff time to prosecute
19 this case, prepare it for trial, and obtain the settlement on the very eve of trial. At all
20 points in the litigation, this case was vigorously contested, including an appeal to
21 the Ninth Circuit, in which Plaintiffs prevailed, and substantial motion practice. The
22 parties reached a settlement in principle only on the eve of trial, after two prior
23 failed mediations with different mediators. The monetary settlement of \$13,050,000
24 is a tremendous result for the Class. Additionally, the settlement provides for
25 valuable affirmative relief, including a competitive bidding process for the Plans’
26 recordkeeping and administrative services (which has never been done for the

27 _____
28 ¹ All capitalized terms have the same definitions as in the Settlement Agreement (Doc. 362-1), unless otherwise indicated.

1 Plans) and a prohibition on the Plans’ recordkeeper from using participant data to
2 cross-sell non-Plan products. Doc. 362-1 Art. 10. Given the exceptional effort that
3 Class Counsel displayed throughout this action, and the enormous commitment of
4 time and resources, a fee of one-third of the common fund is fair and reasonable
5 compensation. That award would be a small fraction of the amount Class Counsel
6 would be entitled to even under a straight lodestar calculation (without a multiplier)
7 if Counsel charged the prevailing hourly rates for its time on this case. Thus, the
8 requested one-third fee does not even provide the amount that attorneys who handle
9 cases on an hourly rate charge with no risk, much less provide additional
10 compensation to Class Counsel for the risks they undertook. The request for
11 reimbursement of litigation expenses is also reasonable and comparable to
12 reimbursement amounts in similar ERISA fiduciary breach actions. It also is below
13 the amount Counsel estimated. Doc. 363 at 8.

14 Finally, the Class Representatives—Allen Munro, Daniel Wheeler, Jane
15 Singleton, Sarah Wohlgemuth, Rebecca Snyder, Dion Dickman, Corey Clark, and
16 Steven Olson—each should receive \$25,000 as an incentive award for the work
17 they provided in representing the Class. In bringing this action, they devoted
18 substantial time to assisting Counsel with the litigation of this case, committed to
19 cooperating for the trial, and bore the risk of a judgment for Defendants’ attorney
20 fees and/or costs had Defendants prevailed at trial. Without them as class
21 representatives, the Court could not have certified this class action (Fed. R. Civ. P.
22 23(a)(3)–(4)). The requested \$25,000 incentive award for each Class Representative
23 is also consistent with awards in similar cases.

24 The Independent Fiduciary under Article 3 of the Settlement Agreement has
25 reviewed the Settlement Agreement, including the payments requested in this
26 motion, and has approved and authorized it on behalf of the Plans. Decl. of Michael
27 A. Wolff ¶31 (“Wolff Decl.”).

1 **CASE HISTORY**

2 **I. The claims in the case**

3 In the Second Amended Complaint (the operative complaint), Plaintiffs alleged
4 that Defendants violated 29 U.S.C. §1104(a)(1)(B) by continuing to lock the Plans
5 into the CREF Stock Account and TIAA recordkeeping, causing the Plans to pay
6 unreasonable administrative fees to the Plans’ recordkeepers, and selecting and
7 retaining as Plan investment options mutual funds and annuities with poor
8 performance records and excessive fees. Doc. 149 at 135–45; Doc. 334. Plaintiffs
9 requested that Defendants make good to the Plans all losses caused by their
10 breaches of fiduciary duty pursuant to 29 U.S.C. §1109(a), along with all other
11 equitable or remedial relief deemed appropriate by the Court.

12 **II. The complex procedural history prior to trial**

13 Plaintiffs filed their initial complaint on August 17, 2016 (Doc. 1), which
14 Defendants moved to dismiss on Article III standing grounds (Doc. 37). Plaintiffs
15 filed an Amended Complaint on November 11, 2016. Doc. 40. Defendants moved
16 to compel arbitration of those claims based on individual employment agreements
17 between participants and USC. Doc. 47. The Court denied that motion on March
18 23, 2017. Doc. 55. Defendants appealed, and the Ninth Circuit upheld the Court’s
19 decision in a reported decision that established important precedent protecting not
20 only the participants in the USC Plans, but also the right of all plan participants to
21 bring actions in federal court to enforce ERISA’s fiduciary duties. *Munro v. USC*,
22 896 F.3d 1088 (9th Cir. 2018).

23 Plaintiffs filed their Second Amended Complaint on July 12, 2019 (Doc. 149),
24 which Defendants moved to dismiss (Doc. 155). Defendants also moved to strike
25 Plaintiffs’ demand for a jury trial (Doc. 156), which Plaintiffs disputed (Doc. 163).
26 The Court struck Plaintiffs’ jury demand and granted only portions of Defendants’
27 motion to dismiss. Doc. 175.

1 On July 15, 2019, Plaintiffs moved for class certification (Doc. 150), which
2 Defendants opposed (Doc. 180). The Court conducted a hearing on the motion
3 (Doc. 200) and then certified Plaintiffs' proposed class under Federal Rule of Civil
4 Procedure 23(b)(1), appointed the undersigned attorneys as Class Counsel, and
5 appointed the named plaintiffs as Class Representatives. Doc. 202.

6 **III. Extensive discovery**

7 Class Counsel pursued extensive discovery. They issued extensive written
8 discovery. Wolff Decl. ¶4; Doc. 248. Class Counsel reviewed more than 2,045,000
9 pages produced in response to those requests. Wolff Decl. ¶5. Class counsel
10 prepared for and took the depositions of eight fact witnesses and three expert
11 witnesses. *Id.* ¶7.

12 Defendants issued to the Class Representatives four sets of interrogatories and
13 three sets of requests for production of documents, which Class Counsel reviewed
14 with the Class Representatives and assisted in answering and making objections. *Id.*
15 ¶6. Defendants also took the depositions of each of the Class Representatives,
16 whom Class Counsel prepared and defended, as well as Plaintiffs' five expert
17 witnesses, whom Class Counsel also prepared and represented. *Id.* ¶8.

18 **IV. Daubert motions**

19 Defendants moved to exclude Plaintiffs' experts Ty Minnich, John Hare, and
20 Edward O'Neal (Docs. 264), and Plaintiffs moved to exclude Defendants' expert
21 Steven Gissiner (Doc. 277). The motions were opposed. Docs. 278, 290. The Court
22 granted Defendants' motion to exclude Hare and O'Neal and denied the remaining
23 motions. Doc. 317. Hare and O'Neal were critical experts for proving Plan losses
24 from Plaintiffs' imprudent investment claim. The Court, however, allowed Hare to
25 testify as to "topics such as the IPS criteria, whether Defendants' 2010 investment
26 options met those criteria, and whether Defendants offered an excessive number of
27 investment options." *Id.* at 23 n.1. Although Plaintiffs' imprudent investment claim
28

1 remained in the case, the exclusion of Plaintiffs' damages experts limited Plaintiffs'
2 ability to succeed on that claim at trial.

3 Plaintiffs sought to provide alternative damages calculations on their imprudent
4 investment claims based on the index fund calculations of their expert O'Neal. Doc.
5 328; Transcript for proceedings held on Dec. 13, 2022, 7:14–9:9. The Court
6 clarified that O'Neal could not testify on his damages calculation for any fund in
7 any respect. *Id.* at 11:3–18. Plaintiffs then intended to show Plan losses without
8 expert opinion by relying on publicly available SEC filings for certain investment
9 options in the Plans. *See* Doc. 336 at 41–42 (Joint Exhibit List); Doc. 334 at 17
10 (Plaintiffs' Proposed Findings of Fact and Conclusions of Law), to which
11 Defendants objected. After briefing the issue at the Court's request (Docs. 349–50),
12 the Court also precluded Plaintiffs from presenting that theory of damages. Doc.
13 355.

14 **V. Preparing for trial**

15 To prepare for trial, the parties worked together to prepare a joint exhibit list of
16 140 pages and over 3,000 exhibits. Doc. 336. The parties also filed extensive
17 memoranda of their claims and contentions of fact and law (Docs. 332, 334) and
18 proposed findings of fact and conclusions of law (Docs. 348-1, 352) along with
19 other extensive pretrial filings (Docs. 345–46 (deposition designations); Docs. 333,
20 335 (witness lists); Doc. 339 (proposed pretrial conference order and related
21 documents)). The parties designated thousands of exhibits for potential use at trial
22 and over 20 witnesses who could testify at trial, including seven expert witnesses.
23 In short, preparation for trial was as massive as prosecuting this case to trial.

24 Trial was set to commence on January 24, 2023 at 8:30 a.m. Doc. 356. On the
25 night before trial, the parties reached a settlement in principle (Doc. 360) and the
26 parties finalized the terms of the Settlement Agreement on February 23, 2023. Doc.
27 362-1.

1 **VI. Mediations**

2 The parties engaged in two mediations: on July 2, 2019 with David
3 Geronemus of JAMS (Doc. 148) and on June 28, 2022 with Robert Meyer of
4 JAMS (Doc. 263). The parties engaged in further repeated settlement negotiations
5 until the day before trial, when the parties reached a settlement in principle. Wolff
6 Decl. ¶12.

7 **VII. Settlement**

8 The Settlement obtained by Class Counsel confers valuable benefits to the
9 Class. *First*, Defendants will pay \$13,050,000 to a Qualified Settlement Fund,
10 which, after deducting attorneys' fees, class representative awards, litigation
11 expenses, and administrative expenses, will be distributed to the Plan and the Class
12 on a pro-rata basis. Doc. 362-1 at 5, 13, 15. *Second*, the Settlement Agreement
13 provides for meaningful affirmative relief during the three-year period from the
14 Settlement Effective Date (the "Settlement Period"). *Id.* at 22. The affirmative relief
15 includes requirements that (1) USC will instruct the Plans' recordkeeper that it may
16 not use information received as a result of providing services to the Plans for the
17 purpose of cross-selling non-Plan products to Plan participants; (2) USC will
18 conduct a request for proposal for recordkeeping and administrative services that
19 specifically requests that proposals include a single recordkeeper structure and per-
20 participant pricing; (3) USC will continue to provide annual fiduciary trainings to
21 the Plans' fiduciaries; (4) USC will continue to use a qualified investment
22 consultant; and (5) the USC Retirement Plan Oversight Committee will continue to
23 meet consistent with the terms of its most recent charter. *Id.* at 22–23 (Art. 10).

24 Class Counsel will monitor Defendants' compliance with the Settlement
25 Agreement, and, in the event of non-compliance, Class Counsel may bring an
26 action within the Settlement Period to enforce the terms. *Id.* at 26. Class Counsel
27 has agreed to do so at no additional cost to the Class and has also committed to
28

1 paying half of the Settlement costs if it is not approved. *Id.* at 26.

2 **ARGUMENT**

3 Class Counsel is entitled to an award of reasonable attorneys’ fees and litigation
4 expenses from the common fund they created for the benefit of the Class. Fed. R.
5 Civ. P. 23(h); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (citing
6 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). The purpose of the
7 “common fund” doctrine is to ensure “that those class members who benefit from
8 the lawsuit at no cost to themselves are not unjustly enriched at the lawyers’
9 expense.” *AdTrader, Inc. v. Google LLC*, 7 F.4th 803, 808 (9th Cir. 2021) (citing
10 *Boeing*, 444 U.S. at 478). “The district court has discretion to determine the
11 appropriate fee award[.]” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th
12 Cir. 2008). However, a district court abuses its discretion “when it uses a
13 mechanical or formulaic approach that results in an unreasonable award.” *In re*
14 *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015).

15 The district court may use the percentage-of-the-fund method to determine
16 reasonable attorneys’ fees. *In re Apple Inc. Device Performance Litig.*, 50 F.4th
17 769, 784 (9th Cir. 2022); *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016).
18 Courts recognize a 25% benchmark fee award, but increase it when necessary to
19 adequately compensate class counsel. *Apple*, 50 F.4th at 784. In fact, in “most
20 common fund cases, the award exceeds that benchmark.” *Jiangchen v. Rentech,*
21 *Inc.*, No. 17-1490-GW, 2019 U.S. Dist. LEXIS 180474, at *28 (C.D. Cal. Oct. 10,
22 2019) (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D.
23 Cal. 2010)); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir.
24 2002) (the benchmark is a “starting point” that “may be inappropriate in some
25 cases”).

26 In adjusting the benchmark, district courts consider: (1) the result obtained for
27 the class; (2) the effort expended by counsel; (3) counsel’s skill and experience;

1 (4) the complexity of the issues; (5) the risk of non-payment assumed by counsel;
2 (6) the reaction of the class; and (7) comparison with counsel’s lodestar. *Marshall*,
3 2020 U.S. Dist. LEXIS 177056, at *6–7 (quoting *Northrop*, 2017 U.S. Dist. LEXIS
4 223293, at *6 (citing cases)). Awards equal to one-third of the gross settlement
5 amount are “within the range approved by courts[.]” *Jeter-Polk v. Casual Male*
6 *Store, LLC*, No. 14-891-VAP, 2016 U.S. Dist. LEXIS 204837, at *17 (C.D. Cal.
7 June 29, 2016); *see also Marshall*, 2020 U.S. Dist. LEXIS 177056, at *25, and
8 *Northrop*, 2017 U.S. Dist. LEXIS 223293, at *17 (awarding one-third fees).

9 **I. The Court should award Class Counsel a one-third fee, which is far**
10 **below the lodestar amount.**

11 The relevant factors overwhelmingly justify an award of one-third of the
12 common fund in this case. Class Counsel has achieved an exceptional result for the
13 Class. Their unparalleled expertise and experience in not only handling complex
14 ERISA fiduciary breach actions, but being the first ever to bring such actions,
15 greatly benefited Class Members. In numerous other ERISA class action
16 settlements, federal courts across the country awarded the undersigned Class
17 Counsel a one-third fee for their efforts. *See infra* at 19. These factors
18 overwhelmingly support a one-third fee.

19 **A. The relevant factors support a one-third fee award.**

20 **1. Class Counsel obtained an exceptional result for the Class.**

21 Class Counsel obtained \$13,050,000 in monetary relief for the Class as well as
22 substantial affirmative relief. The exceptional result obtained for the Class “is a
23 significant factor to be considered in making a fee award.” *Estakhrian v. Obenstine*,
24 No. 11-3480-FMO, 2019 U.S. Dist. LEXIS 112828, at *8 (C.D. Cal. July 8, 2019)
25 (quoting *In re Heritage Bond Litig.*, No. 02-1475-DT, 2005 U.S. Dist. LEXIS
26 13555, at *62 (C.D. Cal. June 10, 2005)).

27 Defendants contended that they were not subject to *any* liability for the claimed
28

1 fiduciary breaches. Doc. 352 at 10–21 (¶¶60–100). The Court severely limited the
2 amount of damages it would award in this case by excluding Plaintiffs’ experts
3 from testifying on (and Plaintiffs from otherwise proving) the imprudent fund
4 damages. Doc. 355. This left only Plaintiffs’ recordkeeping claim with losses
5 valued at up to \$50,633,203. Doc. 266-5 at 24. Even then, the Court expressed
6 doubt about the basis of the recordkeeping damages opinions of Plaintiffs’ expert.
7 Doc. 317 at 19. The Settlement is equal to 26% of the claimed recordkeeping
8 damages.

9 **2. Class Counsel expended enormous effort on behalf of the Class.**

10 This litigation has spanned over six years and has been hard fought at every
11 stage, as described above. Class Counsel devoted tremendous time and effort to this
12 case. In total, over more than six years of litigation, Class Counsel invested 14,678
13 attorney and staff hours on this case. Wolff Declaration ¶¶13–18.

14 Class Counsel’s efforts are consistent with and, in fact, exceed efforts expended
15 by other class counsel that were awarded a one-third fee. *See, e.g. Taylor v.*
16 *Shippers Transp. Express, Inc.*, No. 13-2092-BRO, 2015 U.S. Dist. LEXIS 191461,
17 at *47–48 (C.D. Cal. May 14, 2015) (8,800 hours); *Boyd v. Bank of Am. Corp.*, No.
18 13-561-DOC, 2014 U.S. Dist. LEXIS 162880, at *28 (C.D. Cal. Nov. 18, 2014)
19 (3,000 hours); *Garcia v. Gordon Trucking, Inc.*, No. 10-324, 2012 U.S. Dist.
20 LEXIS 160052, at *24–25 (E.D. Cal. Oct. 29, 2012) (3,000 hours).

21 **3. Class Counsel has extensive and unique experience.**

22 Class Counsel has extensive experience in litigating complex ERISA class
23 actions, justifying an attorney fee award equal to one-third of the Gross Settlement
24 Amount. Schlichter Decl. ¶¶1–29. As courts in this District have recognized,
25 “significant experience in the particular type of litigation at issue[]” justifies a one-
26 third attorney fee award. *Lalli v. First Team Real Estate—Orange Cnty.*, No. 20-27-
27 JWH, 2022 U.S. Dist. LEXIS 161756, at *31 (C.D. Cal. Sept. 6, 2022) (quoting
28

1 *Marshall*, 2020 U.S. Dist. LEXIS 177056, at *11); *see also Boyd*, 2014 U.S. Dist.
2 LEXIS 162880, at *27 (one-third fee appropriate where “[c]ounsel litigated
3 effectively, and their experience was essential for obtaining the result”).

4 Courts in this District have found Class Counsel to be “exceptionally skilled,”
5 *Marshall*, 2020 U.S. Dist. LEXIS 177056, at *11, and “highly experienced in
6 representing plaintiffs in class action litigation, particularly ERISA class actions,”
7 *Northrop*, 2017 U.S. Dist. LEXIS 223293, at *10–11. Many other courts around the
8 country agree. *See, e.g., Ford v. Takeda Pharms. U.S.A., Inc.*, No. 21-10090, 2023
9 U.S. Dist. LEXIS 93286, at *4 (D. Mass. Mar. 31, 2023) (“Class Counsel is a
10 recognized leader in ERISA excessive fee litigation, having pioneered the field.”);
11 *Cates v. Trs. of Columbia Univ.*, No. 16-6524, 2021 U.S. Dist. LEXIS 200890, at
12 *13–14 (S.D.N.Y. Oct. 18, 2021) (“Class Counsel is the ‘preeminent firm’ in
13 excessive fee litigation[.]”) (quoting *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.
14 Dist. LEXIS 184622, at *8 (C.D. Ill. Oct. 15, 2013)); *Sweda v. Univ. of Pa.*, No. 16-
15 43294329, 2021 U.S. Dist. LEXIS 121336, at *10 (E.D. Pa. June 28, 2021) (noting
16 “counsel’s substantial experience in this field”); *Pledger v. Reliance Trust Co.*, No.
17 15-4444, 2021 U.S. Dist. LEXIS 105868, at *21 (N.D. Ga. Mar. 8, 2021) (“Class
18 Counsel are highly experienced and recognized experts in ERISA litigation.”)
19 (collecting cases); *Kelly v. Johns Hopkins Univ.*, No. 16-2835, 2020 U.S. Dist.
20 LEXIS 14772, at *9–10 (D. Md. Jan. 28, 2020) (Class Counsel “highest caliber”
21 (quoting *Nolte*, 2013 U.S. Dist. LEXIS 184622, at *9).

22 Class Counsel pioneered the field of ERISA excessive fee litigation. *See Ford*,
23 2023 U.S. Dist. LEXIS 93286, at *4. Their litigation efforts in the retirement space
24 have led “to fee reductions in the industry that total almost ‘\$2.8 billion in annual
25 savings for American workers and retirees[.]’” *Sweda*, 2021 U.S. Dist. LEXIS
26 121336, at *10. They have “significantly improved 401(k) plans across the country”
27 by bringing these cases. *Spano v. Boeing Co.*, No. 06-743, 2016 U.S. Dist. LEXIS
28

1 161078, at *9 (S.D. Ill. Mar. 31, 2016). Courts have characterized Class Counsel’s
2 commitment to the retirement space as an “exceptional example of a private
3 attorney general risking large sums of money and investing many thousands of
4 hours for the benefit of employees and retirees.” *Will v. Gen. Dynamics Corp.*, No.
5 06-698, 2010 U.S. Dist. LEXIS 123349, at *8 (S.D. Ill. Nov. 22, 2010); *Beesley v.*
6 *Int’l Paper Co.*, No. 06-703, 2014 U.S. Dist. LEXIS 12037, at *8 (S.D. Ill. Jan. 31,
7 2014) (Class Counsel’s “diligence and perseverance. . . reflect the finest attributes
8 of a private attorney general.”). Class Counsel’s efforts have also “clarified ERISA
9 standards in the context of investment fees” and “educated plan administrators, the
10 Department of Labor, the courts and retirement plan participants[.]” *Tussey v. ABB,*
11 *Inc.*, No. 06-4305, 2015 U.S. Dist. LEXIS 164818, at *7–8 (W.D. Mo. Dec. 9,
12 2015), *vacated and remanded on other grounds*, 850 F.3d 951 (8th Cir. 2017).

13 Class Counsel successfully tried the first full trial of an ERISA excessive fee
14 case in the United States as well as two appeals and multiple remands before
15 obtaining a \$55 million settlement after over 12 years of litigation. *See Tussey v.*
16 *ABB, Inc.*, No. 06-4305, 2019 U.S. Dist. LEXIS 138880, at *4–7 (W.D. Mo. Aug.
17 16, 2019). The Supreme Court has twice granted certiorari in Class Counsel’s
18 ERISA fiduciary breach cases and twice reached unanimous favorable rulings.
19 First, in *Tibble v. Edison International*, a case in this District, the Supreme Court
20 held that plan fiduciaries have an ongoing duty to monitor investments and remove
21 imprudent funds. 575 U.S. 523, 530 (2015). Following remand from the Supreme
22 Court and a unanimous *en banc* Ninth Circuit decision resulting in remand back to
23 this District, Class Counsel obtained a \$13.2 million judgment on behalf of the
24 Edison plan participants. *Tibble v. Edison Int’l*, No. 07-5359-SVW, 2017 U.S. Dist.
25 LEXIS 130806 (C.D. Cal. Aug. 16, 2017); *id.*, Doc. 602 at 1 (Oct. 25, 2018).
26 Second, in *Hughes v. Northwestern University*, the Supreme Court held that the
27 presence of some prudent options in a plan is not enough to excuse a fiduciary
28

1 breach; instead, plan sponsors must monitor each fund and remove each imprudent
2 option. 142 S. Ct. 737, 741 (2022).

3 Class Counsel’s extensive and unique experience led to the successful
4 settlement of this case. Defendants were represented by competent attorneys with
5 extensive experience handling complex matters. *See In re Am. Apparel Shareholder*
6 *Litig.*, No. 10-6352-MMM, 2014 U.S. Dist. LEXIS 184548, at *72 (C.D. Cal. July
7 28, 2014) (“the court should also consider the quality of opposing counsel as a
8 measure of the skill required to litigate the case successfully.”). Despite the quality
9 of Defendants’ representation, Class Counsel had repeated success in this case.
10 They defeated Defendants’ motion to compel arbitration, survived Defendants’
11 motion to dismiss, obtained class certification over opposition, and so thoroughly
12 prepared their case for trial that Defendants did not even move for summary
13 judgment.

14 **4. The issues in the case were novel and complex.**

15 The “novelty, difficulty and complexity” of the claims at issue are “significant
16 factors” in determining a fee award. *Marshall*, 2020 U.S. Dist. LEXIS 177056, at
17 *13–14 (quoting *Heritage*, 2005 U.S. Dist. LEXIS 13555, at *66). ERISA litigation
18 is difficult and complex. *Id.* at *14 (“ERISA 401(k) fiduciary breach class actions
19 involve complex questions of law and have not been widely litigated to this point.”)
20 (quoting *Northrop*, 2017 U.S. Dist. LEXIS 223293, at *12); *Downey Surgical*
21 *Clinic, Inc. v. OptumInsight, Inc.*, No. 09-5457-PSG, 2016 U.S. Dist. LEXIS
22 145000, at *31 (C.D. Cal. May 16, 2016) (recognizing the “transient nature of
23 standing ERISA law” and the need for “highly skilled counsel who could
24 understand the complexity of the law and adapt case law accordingly”).

25 This case involved complex ERISA claims, as demonstrated by Plaintiffs’ 150-
26 page Second Amended Complaint (Doc. 149), memorandum of Claims And
27 Contentions Of Fact And Law (Doc. 334), and 76-page proposed Findings Of Fact
28

1 And Conclusions Of Law (Doc. 348-1). All of the claims were vigorously contested
2 by Defendants.

3 **5. Class Counsel faced enormous risk of non-payment.**

4 ERISA litigation involves evolving law and perseverance against heavy
5 opposition undertaken on a contingency basis, resulting in a high risk that Class
6 Counsel will not be compensated for the tremendous amount of time and resources
7 invested in the case. Awarding contingent fees exceeding the fair market value of
8 services rendered “is an established practice in the private legal market to reward
9 attorneys for taking the risk of nonpayment[.]” *In re Wash. Pub. Power Supply Sys.*
10 *Secs. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (“*WPPS*”). Here, a one-third fee
11 will not even come close to compensating Class Counsel for their time at prevailing
12 market rates, much less anything for risk. Wolff Decl. ¶¶14–17.

13 “Courts have long recognized that the attorneys’ contingent risk is an important
14 factor in determining the fee award and may justify awarding a *premium* over an
15 attorney’s normal hourly rates.” *Perez v. DIRECTV Grp. Holdings, LLC*, No. 16-
16 1440-JLS, 2023 U.S. Dist. LEXIS 13920, at *26 (C.D. Cal. Jan. 23, 2023)
17 (emphasis added, quoting *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443,
18 457 (E.D. Cal. 2013)). Here, a one-third fee does not even match normal hourly
19 rates. The risk of non-payment after years of hard-fought litigation “weighs
20 substantially in favor” of a one-third fee. *Campbell v. Best Buy Stores, L.P.*, No. 12-
21 7794-JAK, 2016 U.S. Dist. LEXIS 184851, at *19–20 (C.D. Cal. Apr. 5, 2016).

22 Despite similar ERISA actions resulting in decades-long battles, Class Counsel
23 accepted this case on a contingency fee basis with no guarantee of compensation for
24 any of the thousands of hours invested in this case. Schlichter Decl. ¶¶34–39. The
25 firm incurred and continues to carry significant litigation costs with no guarantee of
26 repayment. Because Class Counsel has incurred substantial litigation costs and
27 “face[s] the risk of walking away with nothing after investing substantial resources
28

1 in this matter,” a one-third fee is warranted. *Freeze v. PVH Corp.*, No. 19-1694-
2 PSG, 2021 U.S. Dist. LEXIS 197291, at *22–23 (C.D. Cal. Jan. 7, 2021).

3 Indisputably, the risk of non-payment to Class Counsel was “great” as shown by the
4 fact that the settlement occurred only after over six years of litigation and on the
5 eve of trial.

6 Any recovery in this case was far from certain, which substantially contributed
7 to the financial risks assumed by Class Counsel. Defendants asserted substantial
8 defenses to each of Plaintiffs’ triable claims. *See* Doc. 351 (trial brief); Doc. 352
9 (proposed findings of fact and conclusions of law). Prior to trial, the Court also
10 excluded Plaintiffs’ damages experts for one of the two remaining claims, hindering
11 Plaintiffs’ ability to prove losses at trial. Doc. 317 at 7–12. Moreover, even though
12 two claims remained in the case, obtaining a favorable judgment was uncertain
13 because “trials of class actions are inherently risky and unpredictable propositions”
14 *Cervantez v. Celestica Corp.*, No. 07-729-VAP, 2010 U.S. Dist. LEXIS 78342, at
15 *10 (C.D. Cal. July 6, 2010).

16 It was possible that Class Counsel would not receive any compensation for the
17 work they performed. Courts have dismissed or granted summary judgment in
18 whole or part in several actions handled by Class Counsel. Schlichter Decl. ¶25. As
19 the Ninth Circuit has recognized, without being fully compensated for the risks of
20 receiving nothing, “very few lawyers could take on representation of a class client
21 given the investment of substantial time, effort, and money[.]” *WPPs*, 19 F.3d at
22 1300 (internal citations omitted). Before Class Counsel began bringing these cases
23 in 2006, *no one* took any risk in *any* similar ERISA fiduciary breach action in the
24 United States. Schlichter Decl. ¶38; *Marshall*, 2020 U.S. Dist. LEXIS 177056, at
25 *12 (noting that Class Counsel “create[ed] the field of 401(k) excessive fee
26 litigation, when neither the Department of Labor or any private law firm had ever
27 filed such a case”). The same is true for 403(b) cases. Before Class Counsel brought
28

1 this and other such cases in August, 2016, no one took any risk in a similar 403(b)
2 university case. Schlichter Decl. ¶¶26–27.

3 **6. No Class Member has objected to the fee request.**

4 Notice of this settlement, along with the Settlement Agreement and Plaintiffs’
5 memorandum in support of preliminary approval, have been published on the
6 website www.usc403bsettlement.com since March 31, 2023. Wolff Decl. ¶29. The
7 Settlement Administrator sent notices to Class Members of the Settlement and
8 Class Counsel’s request for attorneys’ fees, reimbursement of expenses, and
9 incentive awards to the Class Representatives on June 15, 2023. *Id.* These
10 documents disclosed Class Counsel’s intention to seek a one-third fee (\$4,350,000)
11 and reimbursement of up to \$1,500,000 in expenses. Doc. 362-1 at 20, 52, 59. Class
12 Counsel has not received any objection. Wolff Decl. ¶30. In addition, the Plans’
13 Independent Fiduciary has reviewed and approved the Settlement Agreement.
14 Wolff Decl. ¶31.

15 **7. The requested award is below the non-multiplied lodestar.**

16 When a district court calculates an attorney fee using the percentage-of-
17 recovery method, it may show that the calculated fee under that method is
18 reasonable by conducting a lodestar cross-check. *Online DVD-Rental*, 779 F.3d at
19 949. The lodestar calculation “measures the lawyers’ investment of time in the
20 litigation” and “provides a check on the reasonableness of the percentage award.”
21 *Vizcaino*, 290 F.3d at 1050. To calculate an attorney fee using the lodestar method,
22 the district court “begins with the multiplication of the number of hours reasonably
23 expended by a reasonable hourly rate” and “may then adjust the resulting figure
24 upward or downward to account for various factors[.]” *In re Hyundai & Kia Fuel*
25 *Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (quoting *Hanlon v. Chrysler Corp.*,
26 150 F.3d 1011, 1029 (9th Cir. 1998)). The district court must use “current rates for
27 all work done during the litigation” or “historical rates enhanced by an interest
28

1 factor” to arrive at fair and reasonable compensation for Class Counsel. *WPPSS*, 19
2 F.3d at 1305. Historic rates alone “inadequately compensate the firm for the delay
3 in receiving its fees.” *Id.* As such, “[a]ttorneys in common fund cases must be
4 compensated for any delay in payment[.]” *Stanger v. China Elec. Motor, Inc.*, 812
5 F.3d 734, 740 (9th Cir. 2016) (quoting *Fischel v. Equitable Life Assur. Soc’y of*
6 *U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002)). Failing to use current rates or otherwise
7 update the lodestar calculation to account for the delay in payment is reversible
8 error. *See id.* (failing to compensate for delay in payment is an abuse of discretion);
9 *Stetson*, 821 F.3d at 1166; *Fischel*, 307 F.3d at 1010. Class Counsel must submit
10 documentation sufficient to establish entitlement to an award, but that
11 documentation need not satisfy “green-eyeshade accountants.” *Fox v. Vice*, 563
12 U.S. 826, 838 (2011).

13 ERISA cases “involve a national standard and attorneys practicing ERISA law
14 in the Ninth Circuit tend to practice in different districts.” *Low-Iacovino v. Ben.*
15 *Plan. Comm. of the Nonbargained Program*, No. 16-6614-AB, 2018 U.S. Dist.
16 LEXIS 226998, at *5 n.2 (C.D. Cal. July 2, 2018) (quoting *Mogck v. Unum Life*
17 *Ins. Co. of Am.*, 289 F. Supp. 1181, 1191 (S.D. Cal. 2003)). Class Counsel has
18 brought actions across the country defended by national firms with ERISA
19 experience. Schlichter Decl. ¶¶22, 39. Few plaintiff’s firms have the necessary
20 expertise and are willing to take the risk and devote the resources necessary to
21 litigate complex ERISA claims. *Id.* ¶34, 38. As a result, the relevant hourly rate for
22 Class Counsel’s work is the “nationwide market rate.” *Marshall*, 2020 U.S. Dist.
23 LEXIS 177056, at *19 (citing cases); *Cates*, 2021 U.S. Dist. LEXIS 200890, at *8
24 (citing cases).

25 Class Counsel has expended 13,285 attorney hours and 1,393 staff hours
26 litigating this case. Wolff Decl. ¶13. Given the contentious six-year litigation of this
27 case, the time and labor expended is consistent with other ERISA fiduciary breach
28

1 class actions handled by Class Counsel. *See, e.g., Cates*, 2021 U.S. Dist. LEXIS
2 200890, at *8 (13,188 attorney hours and 2,288 non-attorney hours); *Pledger*, 2021
3 U.S. Dist. LEXIS 105868, at *19–20 (18,000 hours); *Marshall*, 2020 U.S. Dist.
4 LEXIS 177056, at *19 (7,497 attorney hours and 1,118 non-attorney hours).

5 ERISA is a field in which top attorneys command top rates, as heightened skill
6 and labor are “required to adequately address complex issues of ERISA law[.]”
7 *Norris v. Mazzola*, No. 15-4962, 2017 U.S. Dist. LEXIS 208610, at *39 (N.D. Cal.
8 Dec. 19, 2017) (quoting *Downey*, 2016 U.S. Dist. LEXIS 145000, at *31). Class
9 Counsel is the preeminent firm in this field with specialized experience in ERISA
10 fiduciary breach litigation. Schlichter Decl. ¶¶4–19. Their rates therefore reflect
11 their reputation and expertise in this area.

12 On March 31, 2023, Class Counsel’s reasonable hourly rates were approved in
13 a similar ERISA class action, *Ford v. Takeda Pharmaceuticals*, 2023 U.S. Dist.
14 LEXIS 93286, at *6–7. In that case, a recognized national expert in attorney fee
15 litigation, Sanford Rosen—who has extensive experience litigating in California
16 federal courts—testified that the same rates that Class Counsel requests here were
17 reasonable. *Ford v. Takeda Pharmaceuticals*, No. 21-10090, Doc. 109 at 3–4, 9,
18 21–25 (D. Mass. Jan. 20, 2023). He based his opinion on recent changes in the legal
19 market, Class Counsel’s experience litigating ERISA actions, and the rates charged
20 by national attorneys of equivalent experience, skill, and expertise in complex class
21 actions. *Id.* at 21–25. The court-approved hourly rates are \$1,370 for attorneys with
22 at least 25 years of experience, \$1,165 for attorneys with 15–24 years of
23 experience, \$840 for attorneys with 5–14 years of experience, \$635 for attorneys
24 with 0–4 years of experience, and \$425 for paralegals and law clerks. *Ford*, 2023
25 U.S. Dist. LEXIS 93286, at *6–7. The same rates approved in *Ford* only three
26 months ago are appropriate here. Schlichter Decl. ¶41; *see Kelly*, 2020 U.S. Dist.
27 LEXIS 14772, at *19–20 (adopting the same hourly rates as a prior court where
28

1 there were “close similarities” between the claims, class counsel was the same, and
2 the prior decision was recent); *Marshall*, 2020 U.S. Dist. LEXIS 177056, at *20
3 (noting that the requested fees had been approved by another court only nine
4 months earlier). Class Counsel has also had its requested hourly rates approved in
5 recent years for similar actions. *See, e.g. Cates*, 2021 U.S. Dist. LEXIS 200890, at
6 *9; *Pledger*, 2021 U.S. Dist. LEXIS 105868, at *22–23.

7 The requested rates are in line with Class Counsel’s recent fee awards and even
8 fall below the rates of highly skilled attorneys nationwide. It is common for leading
9 national attorneys to charge as much as \$1,500–\$1,875 per hour, and rates for
10 specialized attorneys are higher, even reaching upwards of \$2,000 per hour.²
11 Litigating an ERISA breach of fiduciary duty class action requires a deep
12 knowledge of defined contribution industry practices and involves managing a case
13 with sparse yet rapidly evolving law, extremely complex facts, and analysis of a
14 vast array of documents. Thus, ERISA litigation is one such field where top
15 attorneys command top rates. Class Counsel is recognized as the preeminent firm in
16 the field—they were the first to bring this type of action, the first to try a case to
17 completion, and the first and only to handle two ERISA excessive fee cases before
18 the Supreme Court. Class Counsel’s requested rates are reasonable in light of the
19 specialized area of law, their significant contributions to the field, and the results
20 achieved for Class Counsel’s clients.

21 With these approved rates, the lodestar compensation for Class Counsel is
22 \$13,713,325. Wolff Decl. ¶¶13–15. Class Counsel’s requested one-third fee is only
23 32% of the lodestar (0.32). *Id.* ¶16. That pales in comparison to the “most common”
24 lodestar multipliers of 1.5–3 approved in the Ninth Circuit. *Campos v. Converse,*
25 *Inc.*, No. 20-1576-JGB, 2022 U.S. Dist. LEXIS 147715, at *15 (C.D. Cal. Aug. 15,

26 _____
27 ² Debra Cassens Weiss, *BigLaw Partner’s Hourly Billing Rate of Nearly \$2,500*
28 *Draw Objections from Bankruptcy Trustee*, ABA JOURNAL (May 25, 2022),
available at <https://www.abajournal.com/news/article/biglaw-partners-hourly-billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-trustee>.

1 2022). A multiplier below 1 indicates the fee award “is a reasonable and fair
2 valuation of the services rendered to the class by class counsel.” *Jiangchen*, 2019
3 U.S. Dist. LEXIS 180474, at *34 (citation omitted). Even at the obsolete lower
4 rates that the Central District awarded to Class Counsel in similar ERISA fiduciary
5 breach actions, Class Counsel would not be fully compensated for the time it has
6 expended on this case. Wolff Decl. ¶17.

7 Because the fee request is so much less than the lodestar, the one-third fee
8 request is reasonable.

9 **B. A one-third fee has been awarded in similar actions.**

10 Courts look to fee awards in similar cases to guide the determination of a
11 reasonable fee. *Vizcaino*, 290 F.3d at 1049–50. This District has awarded Class
12 Counsel a one-third fee from the common fund in similar cases. *See, e.g., Marshall*,
13 2020 U.S. Dist. LEXIS 177056, at *25; *Northrop*, 2017 U.S. Dist. LEXIS 223293,
14 at *17. Class Counsel has received a one-third fee in 22 other settlements of similar
15 ERISA fiduciary breach cases. Schlichter Decl. ¶40. This District has awarded a
16 one-third fee also on larger settlements. *Heritage*, 2005 U.S. Dist. LEXIS 13555, at
17 *63 (one-third fee from \$27,783,000 settlement). The Ninth Circuit Court of
18 Appeals has approved one-third fee awards. *In re Pac. Enters. Sec. Litig.*, 47 F.3d
19 373, 379 (9th Cir. 1995); *Morris v. Lifescan, Inc.*, 54 Fed. App’x 663, 664 (9th Cir.
20 2003).

21 A one-third fee is recognized as average in class actions. *Romero v.*
22 *Producers Dairy Foods, Inc.*, No. 05-484, 2007 U.S. Dist. LEXIS 86270, at *10
23 (E.D. Cal. Nov. 13, 2007) (quoting 4 Newberg & Conte, *Newberg on Class Actions*
24 §14.6 (4th ed. 2007)); *Boyd*, 2014 U.S. Dist. LEXIS 162880, at *29 (“an award of
25 one third is within the range of percentages which courts have considered
26 reasonable...”); *Multi-Ethnic Immigrant Workers Org. Network v. City of Los*
27 *Angeles*, No. 07-3072-AHM, 2009 U.S. Dist. LEXIS 132269, at *10 (C.D. Cal.
28

1 June 24, 2009) (“Nationally, the average percentage of the fund award in class
2 actions is approximately one-third.”). It is the standard fee award in ERISA
3 fiduciary breach settlements. Schlichter Decl. ¶40; *see also Cates*, 2021 U.S. Dist.
4 LEXIS 200890, at *18–19 (one-third fee is the market rate in these cases).

5 **II. The Court should award Class Counsel’s litigation expenses.**

6 Class Counsel efficiently litigated this case for six years, and, as such, the
7 Court should reimburse Class Counsel’s litigation expenses as authorized by law
8 and the Settlement Agreement. Fed. R. Civ. P. 23(h); Doc. 362-1 at 2, 20. “There is
9 no doubt that an attorney who has created a common fund for the benefit of the
10 class is entitled to reimbursement of reasonable litigation expenses from that fund.”
11 *Kane v. Smithfield Direct, LLC*, No. 21-4832-PA, 2022 U.S. Dist. LEXIS 129774,
12 at *10–11 (C.D. Cal. July 20, 2022) (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356,
13 375 (E.D. Cal. 2014)). “The appropriate analysis in deciding which expenses are
14 compensable is whether the particular costs are of the type typically billed by
15 attorneys to paying clients in the marketplace.” *Dorsette v. TA Operating LLC*, No.
16 9-1350-PA, 2010 U.S. Dist. LEXIS 153467, at *21 (C.D. Cal. July 26, 2010) (citing
17 *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Consulting and expert witness
18 fees along with costs associated with “travel, meals, lodging, photocopying, long-
19 distance telephone calls, computer legal research, postage, courier service,
20 mediation, exhibits, documents scanning, and visual equipment are typically
21 recoverable” expenses. *Marshall*, 2020 U.S. Dist. LEXIS 177056, at *25–26.

22 Class Counsel incurred \$1,184,891 in litigation expenses. Wolff Decl. ¶¶19–
23 28 (providing detail by category). That is less than the \$1,500,000 allowed for
24 under the Settlement Agreement (Doc. 362-1 §7.1), which the Plans’ Independent
25 Fiduciary has reviewed and approved (Wolff Decl. ¶31).

26 Class Counsel had a strong incentive to limit costs, and did so, because they
27 brought this case without guarantee of any recovery or reimbursement. The
28

1 complexity and magnitude of this case necessarily required Class Counsel to incur
2 substantial costs. Schlichter Decl. ¶¶36–37. Moreover, the costs and expenses
3 incurred by Class Counsel are the types of costs and expenses that are routinely
4 reimbursed by fee-paying clients. *See Dorsette*, 2010 U.S. Dist. LEXIS 153467, at
5 *21. Class Counsel’s total expenses are justified given this case’s six-year litigation
6 history and are in line with the expenses reimbursed in similar fiduciary breach
7 actions, which underscores their reasonableness. *See, e.g., Tussey*, 2019 U.S. Dist.
8 LEXIS 138880, at *14–17 (over \$2.2 million); *Northrop*, 2017 U.S. Dist. LEXIS
9 223293, at *18–19 (over \$1.1 million); *Spano*, 2016 U.S. Dist. LEXIS 161078, at
10 *14 (over \$1.8 million); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.
11 Dist. LEXIS 93206, at *15 (S.D. Ill. July 17, 2015) (over \$1.6 million); *Beesley*,
12 2014 U.S. Dist. LEXIS 12037, at *15 (over \$1.5 million).

13 **III. The Court should approve a \$25,000 incentive award.**

14 The Ninth Circuit has repeatedly held that reasonable incentive awards to class
15 representatives are permitted. *Apple*, 50 F.4th at 785 (citing cases). In evaluating
16 the propriety of an incentive award, the Court considers, “among other factors”,
17 “the actions the plaintiff has taken to protect the interests of the class, the degree to
18 which the class has benefitted from those actions, the amount of time and effort the
19 plaintiff expended in pursuing the litigation, and any financial or reputational risks
20 the plaintiff faced.” *Id.* at 786 (quotation marks and citations omitted). Concern
21 over excessive incentive awards is focused on the risk that class representatives will
22 sell out the class with an inadequate settlement for an outsized personal recovery.
23 *Staton*, 327 F.3d at 976. Here, there is no such risk, because the settlement is
24 reasonable and was obtained only after six years of hard-fought litigation and two
25 failed mediations on the eve of trial.

26 A class action cannot proceed without plaintiffs who have standing to assert
27 claims that are typical of the class and who are adequate representatives of the
28

1 class. Fed. R. Civ. P. 23(a)(3)–(4). Defendants in fact moved to dismiss the original
2 complaint for lack of standing by the original plaintiffs. Doc. 37. Having class
3 representatives who were willing to pursue these claims through six years of
4 litigation and prepare for trial was indispensable to achieving the settlement for the
5 class. Not all potential plaintiffs want to endure the hardship of serving as a class
6 representative, producing documents and answering interrogatories about personal
7 matters, and enduring cross-examination at deposition and at trial. Wolff Decl. ¶3.
8 The Class Representatives dedicated their time and energy to this case for over six
9 years and subjected themselves to personal liability for potentially millions of
10 dollars. Declarations of Allen Munro, Daniel Wheeler, Jane Singleton, Rebecca
11 Snyder, Dion Dickman, Corey Clark, and Steven Olson, filed herewith. Their
12 involvement and commitment to this case warrants a \$25,000 incentive award for
13 each Class Representative.

14 The Class Representatives have taken significant actions over six years to
15 protect the interests of the class and have spent significant amounts of time in
16 pursuing this litigation over six years. Each of the Class representatives has been a
17 dedicated and active participant in this litigation for years. Class Representatives
18 Allen Munro, Daniel Wheeler, Jane Singleton, Sarah Wohlgemuth and Rebecca
19 Snyder came forward to initiate this action over six years ago, and Class
20 Representatives Dion Dickman, Corey Clark, and Steven Olson became involved
21 only three months later. *See* Doc. 1 at 5 (¶¶ 20–25); Doc. 40 at 8–9 (¶¶21–29). The
22 Class Representatives remained in contact with Class Counsel throughout the six-
23 year duration of the case. Wolff Decl. ¶9. The Class Representatives assisted with
24 preparing their declarations in support of class certification, Docs. 150-40–150-47,
25 and sat for their depositions, Docs. 150-32–150-39. Wolff Decl. ¶¶ 8, 10. They
26 worked with Class Counsel to respond to Defendants’ extensive written discovery
27 requests. *Id.* ¶6. Plaintiffs intended to call Class Representatives Allen Munro,
28

1 Steven Olson, Corey Clark, Jane Singleton, and Dion Dickman to testify at trial,
2 and each spent several hours preparing to testify. *Id.* ¶11. The other Class
3 Representatives also discussed issues in the case with Class Counsel to prepare for
4 trial. *Id.* Class Counsel provided the Class Representatives with the terms of the
5 tentative settlement and the Settlement Agreement and obtained their approval on
6 behalf of the Class. *Id.* ¶12. Throughout the six years of litigation, the Class
7 Representatives provided Class Counsel with information critical to the claims and
8 committed significant time to the case. Each Class Representative has spent
9 significant time over six years on this case. *See* Declarations of Allen Munro,
10 Daniel C. Wheeler, Jane A. Singleton, Sarah Wohlgemuth, Rebecca A. Snyder,
11 Dion Dickman, Corey Clark, and Steven L. Olson, filed herewith. Their dedication
12 and time spent on this case justify a \$25,000 incentive award.

13 The class clearly benefited from the actions of the Class Representatives. The
14 Settlement provides significant relief for the class as a whole, including a
15 \$13,050,000 Gross Settlement Amount and other relief that will benefit the Class
16 for years. Obtaining that relief now, rather than going through the delay and
17 uncertainties of trial and appeals, greatly benefits the class. In addition, the Plans
18 will benefit from the competitive bidding for the Plans' recordkeeping services and
19 the other affirmative relief. Given the six-year commitment that this case required,
20 without an incentive award there would be little to induce a plaintiff to serve as a
21 class representative. *See Northrop*, 2017 U.S. Dist. LEXIS 223293, at *19–20
22 (incentive awards are both “an inducement to participate in the suit” and
23 “compensation for time spent in litigation activities”).

24 The amount of the incentive award is an insignificant proportion of the Gross
25 Settlement Amount. Each \$25,000 award is only 0.19% of the Gross Settlement
26 Amount and the combined awards are only 1.53% of the Gross Settlement Amount.
27 An incentive award is necessary to incentivize individuals such as the Class
28

1 Representatives to prosecute actions such as these because the prospective
2 individual recoveries they might obtain are difficult to calculate and could be small.

3 The Class Representatives faced financial and reputational risks in their
4 employment status. Because ERISA is a fee-shifting statute, the Class
5 Representatives faced the risk of a judgment and personal liability for Defendants’
6 attorneys’ fees if they lost at trial. 29 U.S.C. §1132(g)(1). As shown by the lodestar
7 for Class Counsel’s fee, that personal liability could have exceeded \$12 million. In
8 *Tussey*, the defendants had \$42 million in attorney fees. 2015 U.S. Dist. LEXIS
9 164818, at *21. Even if a court would not have awarded fees against them, they
10 could have been personally liable for Defendants’ costs. Fed. R. Civ. P. 54(d).
11 Those costs would have been large. Class Counsel’s expenses exceed \$1 million.

12 The Class Representatives also had to take risks with respect to their
13 employment. “ERISA litigation against an employee’s current or former employer
14 carries unique risks and fortitude, including alienation from employers or peers.”
15 *Beesley*, 2014 U.S. Dist. LEXIS 12037, at *13–14; *Cates*, 2021 U.S. Dist. LEXIS
16 200890, at *22 (recognizing that the plaintiffs in a similar ERISA action “risked
17 their reputations and alienation from employers in bringing an action against a
18 prominent [university] in their community”) (citation and internal quotation marks
19 omitted). Here, the Class Representatives were current employees at USC as of
20 November 2016. Doc. 40 at 8–9 (¶¶21–29); *see Roes v. SFBSC Mgmt., LLC*, 944
21 F.3d 1035, 1057 (9th Cir. 2019) (reasonable fears of workplace retaliation factor
22 into the reasonableness of an incentive award). The Class Representatives accepted
23 just such risks. Declarations of Allen Munro, Daniel C. Wheeler, Jane A. Singleton,
24 Sarah Wohlgemuth, Rebecca A. Snyder, Dion Dickman, Corey Clark, and Steven
25 L. Olson, filed herewith.

26 Courts in this and other districts routinely approve the same incentive awards in
27 other ERISA fiduciary breach class actions litigated by Class Counsel. *Marshall*,

1 2020 U.S. Dist. LEXIS 177056, at *31 (citing cases); *Cates*, 2021 U.S. Dist. LEXIS
2 200890, at *23; *Pledger*, 2021 U.S. Dist. LEXIS 105868, at *18; *Sweda*, 2021 U.S.
3 Dist. LEXIS 239990, at *24; *Cassell v. Vanderbilt Univ.*, No. 16-2086, 2019 U.S.
4 Dist. LEXIS 242062, at *13 (M.D. Tenn. Oct. 22, 2019); *Tussey*, 2019 U.S. Dist.
5 LEXIS 138880, at *17–18; *Clark v. Duke Univ.*, No. 16-1044, 2019 U.S. Dist.
6 LEXIS 105696, at *15–16 (M.D. N.C. June 24, 2019); *Kruger v. Novant Health,*
7 *Inc.*, No. 14-208, 2016 U.S. Dist. LEXIS 193107, at *18 (M.D. N.C. Sept. 29,
8 2016); *Spano*, 2016 U.S. Dist. LEXIS 161078, at *13; *Abbott*, 2015 U.S. Dist.
9 LEXIS 93206, at *14; *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 U.S.
10 Dist. LEXIS 91385, at *11 (D. Minn. July 13, 2015); *Beesley*, 2014 U.S. Dist.
11 LEXIS 12037, at *14–15; *Nolte*, 2013 U.S. Dist. LEXIS 184622, at *15–16.

12 District courts in this Circuit have approved similar, and higher, incentive
13 awards in other cases. *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1026
14 (E.D. Cal. 2019), *vacated on other grounds*, No. 09-430, 2022 U.S. Dist. LEXIS
15 27601 (E.D. Cal. 2019) (\$45,000); *Pan v. Qualcomm Inc.*, No. 16-1885, 2017 U.S.
16 Dist. LEXIS 120150, at *43 (S.D. Cal. July 31, 2017) (\$50,000); *Nitsch v.*
17 *DreamWorks Animation SKG Inc.*, No. 14-4062, 2017 U.S. Dist. LEXIS 86124, at
18 *52 (N.D. Cal. June 5, 2017) (\$90,000); *Trujillo v. City of Ontario*, No. 04-1015-
19 VAP, 2009 U.S. Dist. LEXIS 79309, at *13 (C.D. Cal. Aug. 24, 2009) (\$30,000).

20 In addition to these factors, no Class member has provided Class Counsel any
21 objection to this award (*see supra* at 15) and the Plans’ Independent Fiduciary has
22 approved and authorized the Settlement Agreement that includes the provision for
23 those awards (Wolff Decl. ¶31).

24 For all of these reasons, the Court should award each Class Representative
25 \$25,000 from the Gross Settlement Amount.

26 CONCLUSION

27 Plaintiffs respectfully request that the Court grant their motion.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: June 30, 2023

Respectfully submitted,

By: /s/ Jerome J. Schlichter
Jerome J. Schlichter (SBN 054513)
Michael A. Wolff (admitted *pro hac vice*)
Joel D. Rohlf (admitted *pro hac vice*)
SCHLICHTER BOGARD, LLP

Class Counsel for All Plaintiffs