Michelle C. Yau (*Admitted Pro Hac Vice*)
Mary J. Bortscheller (*Admitted Pro Hac Vice*)
Daniel R. Sutter (*Admitted Pro Hac Vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699

Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
2030 Addison St. ● Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Fax: (510) 269-7994

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Charles Baird, *et al.*,

Plaintiffs,

vs.

BlackRock Institutional Trust Company, N.A., *et al.*,

Defendants.

Case No: 4:17-cv-01892-HSG

NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

Hearing: October 21, 2021 2:00 PM

NOTICE OF MOTION

NOTICE OF MOTION TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on October 21, 2021 at 2:00 pm, or as soon thereafter as the matter may be heard in Courtroom 2 of this Court, located at 1301 Clay Street, Oakland, California 94612, Plaintiffs Charles Baird and Lauren Slayton, will and hereby do move under Federal Rule 23, for Court approval of their Motion for Attorneys' Fees, Reimbursement of Expenses and Service Awards. Plaintiffs' Motion is based on this Notice of Motion and Motion, Memorandum of Points and Authorities, the pleadings in this action, and such other materials and evidence as may be presented to the Court.

Dated: August 20, 2021

Respectfully submitted,

By: /s/ *Mary J. Bortscheller*

Michelle C. Yau (admitted Pro Hac Vice)
Mary J. Bortscheller (admitted Pro Hac Vice)
Daniel R. Sutter (admitted Pro Hac Vice)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW, Suite 500
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
myau@cohenmilstein.com
mbortscheller@cohenmilstein.com
dsutter@cohenmilstein.com

Nina Wasow
Todd Jackson
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
2030 Addison Street, Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Facsimile: (510) 269-7994
nina@feinbergjackson.com
todd@feinbergjackson.com

Attorneys for Plaintiffs and the Class

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I. INTRODUCTION

Plaintiffs and Class Counsel have created a considerable common fund to benefit members of the Class, and thus should be awarded attorneys' fees, reimbursement of advanced expenses, and Class Representative service awards. Over the past four years, Named Plaintiffs Charles Baird and Lauren Slayton, represented throughout by Class Counsel, have diligently pursued this contentious and complicated ERISA action against BlackRock. Through their sustained efforts, the participants and beneficiaries of the BlackRock Retirement Savings Plan ("Plan") will receive a significant recovery on alleged losses, suffered due to Defendants' ERISA violations, from a $9,650,000 settlement facilitated by Magistrate Judge Donna M. Ryu in February of 2021. This Settlement will restore to the Class members' retirement accounts nearly 30% of damages Class Counsel intended to prove at trial.

Plaintiffs advanced several novel legal theories in this case, which dealt with complex financial instruments and transactions. There was little applicable case law on certain theories, and indeed BlackRock from the outset contended that Plaintiffs' claims lacked merit. Success on these claims was not assured and as a result, Class Counsel undertook significant risk in representing Plaintiffs and the Class. To date they have received no payment for their work, nor reimbursement for the out-of-pocket expenses they advanced on the Class's behalf. Any compensation to Class Counsel is contingent upon the Court's approval of fees and costs as provided by the Settlement. Similarly, the Named Plaintiffs have been vigorously pursuing their legal interests and those of their fellow Class members in the face of reputational risks attendant to suing one's former employer, which are perhaps magnified when that employer is as well-known and formidable as BlackRock.

In short, Plaintiffs and Class Counsel achieved a sizeable recovery for the Class despite the spirited defense mounted by BlackRock, all while facing significant financial and other risks. In connection with this Settlement, Plaintiffs and Class Counsel respectfully petition the Court to approve: (1) an award of attorneys' fees in the amount of $2,798,500.00 (equal to 29% of the gross settlement fund) to Class Counsel; (2) a reimbursement of $641,557.58 in litigation expenses advanced by Class Counsel; and (3) service awards in the amount of $15,000 to each of the Named Plaintiffs as Class Representatives.

II. BACKGROUND

The Settlement was achieved after long, hard-fought litigation. Plaintiff Baird commenced the lawsuit on April 5, 2017, challenging Defendants' management of the Plan, after a lengthy pre-suit investigation by Class Counsel. ECF No. 1 (Compl.); Bortscheller Decl. ¶ 11. After the Parties completed their briefing on the Motion to Dismiss, Plaintiff Baird amended his Complaint with leave of Court on October 18, 2017 to add Plaintiff Slayton and assert additional claims concerning defendant BlackRock Institutional Trust Company, N.A.'s compensation and management of certain commingled investment vehicles. ECF No. 75 (Am. Compl.). Plaintiffs amended their Complaint again on August 27, 2018 to plead additional allegations and name as a defendant Mercer Investment Consulting ("Mercer"), based on discovery. ECF No. 154 (Second Am. Compl., "SAC").

Plaintiffs asserted claims on behalf of the BlackRock Plan Class which included novel and untested theories about a fiduciary's duty to monitor securities lending activity and compensation and ERISA disclosure requirements for increasingly popular collective trust funds, as well as more familiar theories related to inclusion of proprietary funds in an employer's 401(k) plan.[1] Bortscheller Decl. ¶ 12; *e.g.*, SAC ¶¶ 118, 303, 407. Plaintiffs successfully advanced their novel theories through summary judgment without the benefit of apposite case law and helped clarify a fiduciary's evolving duties in the process. *E.g.*, *Baird v. BlackRock Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 781-82 (N.D. Cal. 2019); *Baird v. BlackRock Institutional Tr. Co., N.A.*, 2021 WL 105619, at *4 (N.D. Cal. Jan. 12, 2021).

BlackRock zealously defended this case at each stage of litigation, which necessarily increased the time and resource investment by Class Counsel to pursue Plaintiffs' claims. BlackRock brought numerous dispositive motions, moving to dismiss each of Plaintiffs' three complaints and seeking summary judgment in conjunction with their motion to dismiss Plaintiffs' First Amended Complaint. ECF Nos. 35; 79; 181 (Mots. To Dismiss). Plaintiffs opposed each of these motions and moved for

[1] In the Second Amended Complaint, Plaintiffs asserted the same claims involving these theories on behalf of two classes: the BlackRock Plan Class which is the subject of the Settlement, and the putative "CTI Class," which was comprised of other retirement plans which invested in BlackRock funds which engaged in securities lending. SAC Counts III, VIII, IX; Bortscheller Decl. ¶¶ 13, 17.

relief from BlackRock's early motion for summary judgment under Rule 56(d). ECF Nos. 51; 84; 210 (Plfs.' Opp'ns To Mots. To Dismiss); ECF No. 85 (Rule 56(d) Mot.). BlackRock's motions also included substantial extrinsic evidence which required argument and briefing regarding judicial notice. *E.g.*, *Baird*, 403 F. Supp. 3d at 777 (noting that "Defendants submitted such voluminous materials beyond the SAC," and the Court "afforded the parties a chance to submit supplemental briefing to identify issues that they believed could be resolved without the Court considering the extrinsic materials.").

The Parties engaged in extensive discovery into the claims and defenses in this case. Bortscheller Decl. ¶ 17. This discovery concerned BlackRock's securities lending and cash management practices—topics that were relevant to both the BlackRock Plan and putative CTI Classes—and the investment selection and monitoring process of the Plan's named fiduciaries—a topic that was unique to the BlackRock Plan Class. *Id.* Among other things, Class Counsel took fourteen fact depositions and four expert depositions, received and reviewed over 250,000 pages of documents and emails, and exchanged hundreds of pages of written discovery. *Id.* ¶ 16. The Named Plaintiffs responded to Defendants' discovery requests, which required responding to numerous interrogatories and producing text messages, emails, bank statements and other documents. Baird Decl. ¶ 8; Slayton Decl. ¶ 8. Moreover, the Named Plaintiffs were each required to sit for lengthy in-person depositions that required advance preparation through calls and meetings with Class Counsel. Baird Decl. ¶ 9; Slayton Decl. ¶ 9.

For its part, BlackRock resisted many of Plaintiffs' discovery requests. As a result, the parties engaged in substantial negotiation and numerous meet and confers about the scope of discovery, which often led to impasse. Bortscheller Decl. ¶ 18. These impasses resulted in a substantial number of discovery disputes that required joint letter briefing before Magistrate Judge Kandis A. Westmore to resolve. *Id*. In total, the Parties submitted eleven discovery disputes to Judge Westmore, concerning matters ranging from untimely disclosure of trial witnesses to inadequately prepared Rule 30(b)(6) witnesses. *Id.* Plaintiffs prevailed, in whole or in part, on all eleven disputes. ECF Nos. 114; 115; 116; 117; 119; 209; 238; 240; 241; 252; 262.

Plaintiffs moved to certify two classes on June 3, 2019. ECF No. 292 (Plfs.' Mot. for Class Cert.). One class, the BlackRock Plan Class, consisted of only current and former participants in the BlackRock Plan. *Id*. The other, the putative CTI Class, consisted of participants in numerous retirement plans whose retirement savings were invested in certain BlackRock collective trust investment vehicles that engaged in securities lending. *Id*. While the membership scope of the two classes was different, the factual and legal claims regarding the CTI instruments were identical for both the CTI and BlackRock Plan Classes. On February 11, 2020, the Court certified the BlackRock Plan Class but denied Plaintiffs' motion to certify the CTI Class. ECF No. 360 (Order on Mot. for Class Cert.). Plaintiffs sought a Rule 23(f) appeal of the Court's denial of the CTI Class certification (ECF No. 367); the Rule 23(f) petition was denied (ECF No. 373). Though the CTI Class was not certified, the scope of the case was substantially the same with or without the CTI Class because of the overlap in the claims and evidence adduced in discovery to prove them. Bortscheller Decl. ¶¶ 13, 17; SAC Counts III, VIII, IX. However, for purposes of lodestar cross-check, Class Counsel has excluded attorneys' fees incurred in connection with their 23(f) petition in response to the Court denying the motion to certify the CTI Class. Bortscheller Decl. ¶ 4; Wasow Decl. ¶ 4.

While the class certification motion was pending, the parties hired a private JAMS mediator and engaged in a day-long mediation. Bortscheller Decl. ¶ 22. Despite Class Counsel's best efforts in February of 2020, and ongoing informal negotiation following the JAMS session, the parties were unable reach a resolution due to irreconcilable views on liability and damages. *Id.*

Prior to and following class certification, the Parties engaged in expert discovery. Plaintiffs retained one expert, Dr. Charles Cowan, primarily for purposes of class certification. Bortscheller Decl. ¶ 20. They also retained two experts for summary judgment and trial, Dr. Steven Pomerantz and Marcia Wagner. Dr. Pomerantz provided a report concerning damages, securities lending compensation, and securities lending cash management requirements. Dr. Pomerantz's report contained three different models to measure damages to Plan participants resulting from the alleged ERISA violations and opined on appropriate ways to manage securities lending cash collateral. *Id.* Plaintiffs' other expert, Ms. Wagner, provided a report concerning fiduciary process, opining that BlackRock's processes were flawed in numerous ways. *Id.* These two experts also submitted rebuttal

reports addressing Defendants' three expert reports. *Id.* In addition, Class Counsel deposed Defendants' three expert witnesses, and prepared and defended their three experts at deposition. *Id.* ¶ 16.

After expert discovery closed, Plaintiffs moved for partial summary judgment (ECF No. 385) and Defendants moved for summary judgment on all claims (ECF No. 396) on September 24, 2020. During a status conference on January 11, 2021, the Court advised the parties that it would deny both motions, and also referred the parties to participate in a magistrate judge settlement conference. ECF Nos. 449 (Minute Entry); 450 (Order). Summary judgment was denied to both parties on January 28, 2021; the Court's decision noted, among other things, that the parties' expert reports and testimony created issues of fact necessitating trial. *Baird v. BlackRock Institutional Tr. Co., N.A.*, 2021 WL 681468, at *1 (N.D. Cal. Jan. 28, 2021).

With an impending February 5 settlement conference and a February 9 final pretrial conference, Class Counsel simultaneously prepared materials for the settlement conference and for trial. Specifically, in late January 2021, Class Counsel identified 698 trial exhibits and 15 trial witnesses; designated extensive deposition testimony for use at trial; lodged objections to Defendants' designated evidence; and filed two motions *in limine* (ECF No. 453), a trial brief (ECF No. 459) and a pre-trial conference statement (ECF No. 464) in accordance with this Court's procedures. Bortscheller Decl. ¶ 21. In short, by the time the parties held the February 5 settlement conference with Magistrate Judge Ryu, Class Counsel had completed a significant portion of their substantive and logistical preparation for a 7-day, in-person trial scheduled to start on March 1, 2021. *Id.*

Ultimately, through the settlement conference facilitated by Magistrate Judge Ryu, the parties reached a $9,650,000 settlement a few weeks before trial was scheduled to commence. Both Named Plaintiffs attended the entire seven-hour settlement conference and approved the Settlement. Baird Decl. ¶ 15; Slayton Decl. ¶ 14. This substantial recovery would not have been achieved without Class Counsel's dogged efforts in the pre-trial discovery process and their skilled legal work which garnered favorable decisions at several critical junctures.

The Settlement is structured in a manner beneficial to the Class. It provides a lump-sum "restorative" payment that cannot revert to BlackRock. ECF No. 471-2 ("Settlement Agreement")

§ 4.2.7. As a restorative payment, each Class member's recovery is eligible for favorable tax treatment because the funds can be considered retirement funds. *See* IRS Rev. Rul. 2002-45. Moreover, the Settlement will automatically be deposited into the accounts of active Plan participants, eliminating virtually all administrative burden for most Class Members. Settlement Agreement Ex. E ("Plan of Allocation") at 4-6. The Settlement releases only the claims pled in the Complaint and only on behalf of the BlackRock Class as certified by the Court. Settlement Agreement § 8. It does not release broader claims or release the claims of the putative CTI Class as that class was not certified. *Id*. The Settlement Agreement specifically provides that Class Counsel would seek (1) an award of attorneys' fees not exceeding 29% of the Gross Settlement Amount; (2) reimbursement of all reasonable litigation costs and expenses advanced and carried by Class Counsel for the duration of this case; and (3) Service Awards, in an amount not to exceed $15,000 per Named Plaintiff which shall be recovered from the Gross Settlement Amount. *Id.* § 7.1.

On March 23, 2021, Class Counsel moved to preliminarily approve the Settlement. ECF No. 471. On July 12, 2021, this Court granted preliminary approval. ECF No. 476.

III. LEGAL STANDARD

Equity entitles counsel and litigants to recover fees from a common fund for the work they performed to obtain the benefit of the lawsuit. *E.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). Any award granted as a percentage of a common fund must be reasonable under the circumstances. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law"); *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d at 1295; *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1048 (9th Cir. 2002) ("Selection of . . . any other rate must be supported by findings that take into account all of the circumstances of the case"). A 25% award is "benchmark rate" and "starting point for analysis" that may be adjusted upwards depending on the circumstances of the case. *Vizcaino*, 290 F.3d at 1048.

The circumstances relevant to the reasonableness of a fee request include: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent

nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *See Vizcaino*, 290 F.3d at 1048-50; *Franco v. E-3 Sys.*, 2021 WL 2333851, at *7 (N.D. Cal. June 8, 2021) (Gilliam, J.); *In re Linkedin User Priv. Litig.*, 309 F.R.D. 573, 590 (N.D. Cal. 2015). Moreover, reasonableness of a fee awarded as a percentage of a common fund can be confirmed with a lodestar cross-check. *Vizcaino*, 290 F.3d at 1050-51 (affirming as reasonable a 28% fee award after finding that award was 3.65 times counsel's lodestar).

IV. ARGUMENT

The requested attorneys' fees in the amount of $2,798,500.00 (29% of the Gross Settlement Fund) to Class Counsel; (2) reimbursement of $641,557.58 in litigation expenses; and (3) service awards in the amount of $15,000 to each of the Named Plaintiffs as Class Representatives are each reasonable, for the reasons described below. All circumstances relevant to the reasonableness of a fee weigh in favor of a 29% fee award. This conclusion is affirmed by a lodestar cross check, which demonstrates that Class Counsel is not seeking compensation for a substantial amount of work they performed.

A. The Requested Fees are Reasonable Under the Percentage of Recovery Method

(1) Counsel Achieved an Excellent Result for the Class

The outcome achieved through counsels' work is the "most critical" factor in determining the reasonableness of the fee request. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). Here, Class Counsel recovered a substantial sum for the Class despite the vigorous defense from BlackRock outlined above. The Settlement represents 28.4% of the damages Class Counsel sought to prove at trial,[2] and it is a tremendous result for the Class in the face of Defendants' view that the Class suffered "negative damages."[3] This recovery also compares favorably to other class action settlements. *See, e.g.*, *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020) (awarding 33% fee from settlement involving 401(k) mismanagement that represented

[2] ECF No. 476 at 10; ECF No. 381-7 at Ex. 7 (Plaintiffs' expert calculating $33.96 million in damages).
[3] ECF No. 396 (Defs.' Mot. for Summ. J.) at 17.

approximately 29% of damages); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *2, *5 (M.D.N.C. May 6, 2019) (awarding 33% fee from settlement that represented 19% of estimated damages in connection with similar ERISA claims); *Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019) (awarding 33% fee for settlement that represented 10% of maximum damages); *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (recovery of approximately 27% of conservatively estimated damages was "plainly reasonable").

The structure of the Settlement is also favorable to the Class. It provides a cash payment that cannot revert to Defendants. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("The [monetary recovery] is in cash, not in kind, which is a good indicator of a beneficial settlement."); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3rd Cir. 2013) (reversion "risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement."). Moreover, the Settlement was structured as a tax-qualified restorative payment that is automatically deposited into active Plan retirement accounts or is eligible to deposit into personal retirement accounts for Class members that rolled-out of the Plan, thus minimizing Class members' tax expense and administrative burden. Plan of Allocation at 4-6. Overall, the excellent outcome supports Class Counsel's fee request. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046.

(2) Counsel Incurred Substantial Risk by Pursuing this Case Against the World's Largest Asset Manager on a Contingency Basis

BlackRock mounted a robust defense to this litigation for over four years. *See supra* Part II. At the time of settlement, Class Counsel and Defendants were prepared to take the case through trial. BlackRock's zealous defense compounded what was already a complicated litigation. *Baird*, 403 F. Supp. 3d at 770 (denying BlackRock's motion to dismiss and acknowledging the "complicated set of facts" at issue). Among other things, Class Counsel: (i) challenged investment products sold by the world's largest asset manager despite Defendants' contention that the Class paid virtually no fees and thus suffered "no harm;" (ii) advanced novel theories about a fiduciary's duty to disclose securities lending compensation; and (iii) challenged financial crisis-era risk taking. *See generally* SAC; ECF No. 35 at 2 (Defs.' Mot. to Dismiss Compl., stating the at-issue investments were "fee-free").

Obtaining relevant evidence and proving these claims was a complicated task, which increased the risk that Class Counsel would be unable to prevail. *Vizcaino*, 290 F.3d at 1048-49 (explaining fee award justified because vigorous opposition created risk for class counsel); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) (similar).

The risks to Class Counsel were substantial because they litigated the case on a contingency basis. *See Vizcaino*, 290 F.3d at 1050; *Franco*, 2021 WL 2333851, at *7; *see also* Bortscheller Decl. ¶¶ 27-28; Wasow Decl. ¶¶ 6-7. If Class Counsel was unable to prevail for trial, they would receive no recovery for the Class and no compensation for over four years of work. Moreover, Class Counsel undertook opportunity costs because this matter limited the time and resources available to work on other cases. Bortscheller Decl. ¶ 28; Wasow Decl. ¶ 8. Notably, these risks materialized when Class Counsel unsuccessfully moved to certify a broader CTI Class.[4] The real risk that Class Counsel would receive no compensation for over four years of work on this complex matter supports Class Counsel's fee request. Further underscoring the risk inherent in hard fought contingent litigation, even if Class Counsel receive the full fees requested, that amount will represent less than 25% of actual lodestar expended in securing the Settlement.

(3) The Case Involved Complex Issues and Required Specialized Skill

In determining whether a fee request is reasonable, the Court should also consider the skill and experience of Class Counsel. *E.g.*, *Officers for Just. v. Civ. Serv. Comm'n of S. F.*, 688 F.2d 615, 625 (9th Cir. 1982); *Franco*, 2021 WL 2333851, at *7 (awarding a 33% award due, in part, to counsel's subject matter experience and competence). ERISA and class actions are notorious for their complexity and the skill involved to successfully litigate them. *E.g.*, *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003) ("the Court observes that ERISA cases are often considered to be complex [and] ERISA plaintiff cases are often undesirable"); *Knight*, 2009 WL 248367, at *6 (explaining the "prosecution and management of a complex . . . class action requires unique legal skills and abilities.") (citation omitted).

[4] As noted above, Class Counsel has excluded from its lodestar cross-check the hours of work expended appealing the denial of Plaintiffs' motion to certify the CTI Class.

This case was no exception. It involved highly technical subject matters ranging from the proper measure of credit risk in a cash portfolio to the proper decision-making process for conflicted fiduciaries under ERISA. *E.g.*, ECF No. 423 Part III.A, III.D (Opp. to Defs.' Mot. for Summ. J.). BlackRock's zealous defense made Class Counsel's up-hill battle even steeper. *See supra* Part II. Class Counsel nevertheless prevailed, on the whole, through summary judgment before reaching this Settlement.

Class Counsel is comprised of recognized ERISA practitioners that have many years of successful litigation experience. Bortscheller Decl. ¶¶ 7-8, Wasow Decl. ¶ 5. Such quality representation was necessary for success here because Class Counsel was litigating against highly skilled ERISA litigators at a top firm in the nation. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). Thus, the complexity of this matter and the skill needed to successfully litigate it likewise supports Class Counsel's fee request.

(4) The Requested Fee is In-line with Other Fee Awards

Upward adjustment from this district's 25% benchmark fee is common in complex matters, and the typical range of fee awards in common fund cases is "20-30%." *Vizcaino*, 290 F.3d at 1047; *Bower v. Cycle Gear, Inc*, 2016 WL 4439875, at *6 (N.D. Cal. Aug. 23, 2016) (Gilliam, J.) (reviewing the *Vizcaino* factors and awarding a fee above the 25% benchmark); *Knight*, 2009 WL 248367, at *6 (awarding a fee in excess of 25%, explaining that "in most common fund cases, the award exceeds that benchmark").[5] Plaintiffs' 29% fee request is also consistent with, if not below, awards in similar ERISA matters. *See e.g., Marshall*, 2020 WL 5668935, at *2 (awarding 33% common fund fee in

[5] *See also Smith v. Kaiser Found. Hosps.*, 2021 WL 2433955, at *9 (S.D. Cal. June 15, 2021) (awarding a 30% fee, noting "[w]here, as here, the gross settlement amount is less than $10 million, courts often award fees in the range of 30-50% of the funds."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) ("[I]n most common fund cases, the award exceeds [the] benchmark."); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (noting, "that typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved before trial").

ERISA plan mismanagement action).[6]

Therefore, Plaintiffs' fee request is reasonable and an upward adjustment from the 25% benchmark is warranted here because Plaintiffs recovered a substantial portion of the Plan's losses, faced and overcame a zealous defense despite a complicated legal landscape and the risk of no payment, and the request is below fee awards granted in similar complex class action cases.

B. The Lodestar Cross Check Confirms the Reasonableness of the Requested Percentage Fee

A fee request in the amount of counsel's lodestar is "presumptively reasonable." *Cunningham v. Cty. of L.A.*, 879 F.2d 481, 488 (9th Cir. 1988). "[T]he lodestar method can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Rosado v. Ebay Inc.*, 2016 WL 3401987, at *6 (N.D. Cal. June 21, 2016) (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011)). Here, there is no exorbitant award. Class Counsel's fee request is far less than their lodestar; it represents less than 25% of lodestar Class Counsel expended in gaining this Settlement on behalf of the BlackRock Plan Class. Bortscheller Decl. ¶ 4, Wasow Decl. ¶ 3. A common fund award that is less than the lodestar crosscheck is indicative of a reasonable fee request. *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 601 (N.D. Cal. 2020); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D. Cal. 2019); *see also Vizcaino*., 290 F.3d at 1050-51 (affirming an award with a 3.65x multiplier; explaining the risk attendant to contingency work justifies a lodestar premium).

Class Counsel's fee request is thus reasonable and should be granted. As discussed above, a fee of 29% of the common fund is reasonable because of the strong outcome achieved; the risks to Class Counsel; the complexity and contentious nature of the case; and because it is in-line with awards in similar, complex matters. The lodestar cross-check confirms this conclusion.

C. Class Counsel Should be Reimbursed for the Litigation Expenses Advanced on

[6] *See also Sims v. BB&T Corp.*, 2019 WL 1995314, at *2, *5 (M.D.N.C. May 6, 2019) (same); *In re Northrop Grumman ERISA Litig.*, No. 06-cv-6213, ECF No. 803 (Order Granting Att'y Fees) at 5 (C.D. Cal. Oct. 24, 2017) (same); *Hurtado v. Rainbow Disposal Co.*, 2021 WL 2327858, at *4 (C.D. Cal. May 21, 2021) (awarding 30% common fund fee in ERISA self-dealing action); *Kanawi v. Bechtel Corp.*, 2011 WL 782244 (N.D. Cal. Mar. 1, 2011) (awarding 30% common fund fee in ERISA plan mismanagement action).

Behalf of the Class

"An attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation costs from that fund." *Carlin*, 380 F. Supp. 3d at 1023. Counsel is permitted to recover costs that a paying-client would shoulder, which include: "(1) meals, hotels, and transportation; (2) photocopies; (3) postage, telephone, and fax; (4) filing fees; (5) messenger and overnight delivery; (6) online legal research; (7) class action notices; (8) experts, consultants, and investigators; and (9) mediation fees." *Id.* at 1023-24; *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1048-49.

Class Counsel requests reimbursement of $641,557.58 in costs and expenses incurred in connection with the litigation. Bortscheller Decl. ¶ 32, Wasow Decl. ¶ 11. The submitted expenses were all reasonable, necessary, and directly related to the prosecution of this action and include standard litigation related expenses such as costs for experts, travel, court transcripts, court reporters, copying and postage. Bortscheller Decl. ¶¶ 32-35, Wasow Decl. ¶ 11. The expenses incurred in this litigation are further described in the accompanying declaration and should be approved. These are the type of expenses typically billed to paying clients in the marketplace and were reasonable and necessary for prosecuting this four-year class action case up until the eve of trial.

Class Counsel's request for reimbursement of expenses does not include the "Administrative Expenses" defined in the Settlement Agreement, which include, among other things, the costs of the Settlement Administrator in issuing Class Notice and distributing settlement funds, and the fee to the Independent Fiduciary.[7] *See* Settlement Agreement § 1.3. The Settlement Agreement contemplates that the "Administrative Expenses shall be paid from the Gross Settlement Amount" of $9.65 million and it excludes from the definition of Administrative Expenses the parties' "respective legal expenses." *Id*. Thus, Class Counsel by this motion seeks reimbursement only of their legal expenses.

Here, Class Counsel was motivated to, and did, minimize expenditures to what was reasonable.

[7] Class Counsel anticipates that the Settlement Administrator's fees will not exceed $60,000, and the Settlement Agreement provides that Class would only bear the cost of the Independent Fiduciary's fee, up to $25,000. Bortscheller Decl. ¶ 34; Settlement Agreement § 1.3.

Class Counsel bore the risk of not being reimbursed for such expenditures absent a favorable judgment or settlement, and thus was incentivized not to undertake unreasonable expenses. Bortscheller Decl. ¶¶ 34-35, Wasow Decl. ¶ 11. Class Counsel has further declared that such expenses were reasonable, customary and necessary in the prosecution of this Action. *Id.* Class Counsel's request for reimbursement of out-of-pocket expenses is thus reasonable and should be granted.

D. The Requested Service Award is Reasonable and Reflects the Effort and Reputational Risk the Named Plaintiffs Undertook

It is common in the Ninth Circuit to award successful named plaintiffs a reasonable service award for their efforts in prosecuting an action. *E.g.*, *Rodriguez*, 563 F.3d at 958–59. Service awards are granted in recognition of the effort undertaken by the named plaintiffs in recovering for a class and taking reputational risk. *Id.* Whether a requested service award is reasonable depends on (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the amount of time and effort the plaintiff expended in pursuing the litigation; (4) the risk of retaliation; and (5) the size of the award relative to the total settlement fund. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015). Class Counsel's request of $15,000 for each Named Plaintiff is reasonable when viewed in light of their sustained dedication to this case.

First, Mr. Baird and Ms. Slayton both expended diligent effort over four years to protect the interests of the Class and recover $9.65 million for Class Members. After initiating this litigation, Mr. Baird and Ms. Slayton were both subjected to discovery requests that probed issues beyond their participation in the Plan, such as multiple inquiries regarding their personal finances. Baird Decl. ¶ 8; Slayton Decl. ¶ 8. They searched for and provided documents and ESI responsive to BlackRock's requests, including production of potentially embarrassing emails and texts about their past employer and personal financial records which BlackRock cited as part of an effort to show they were inadequate representatives. *Id*. Moreover, both Plaintiffs sat for lengthy in-person depositions which required hours of preparation. Baird Decl. ¶ 9; Slayton Decl. ¶ 9 (Ms. Slayton's deposition ran approximately five hours and Mr. Baird's deposition ran over 8 hours). During these depositions, Defendants insisted on eliciting testimony on several personal topics ranging from divorce to workplace social life.

Both Plaintiffs also expended substantial time participating in this litigation beyond discovery. Baird Decl. ¶¶ 7, 10-15; Slayton Decl. ¶¶ 7, 10-15. Mr. Baird and Ms. Slayton reviewed each version of the complaint before it was filed on their behalf. Baird Decl. ¶ 7; Slayton Decl. ¶ 7. Throughout this litigation, they were continuously in touch with Class Counsel to discuss the status of the litigation, become educated about the litigation process, and learn about the strengths and weaknesses of the case in order to prepare for the two formal settlement negotiations in which the parties engaged. Baird Decl. ¶ 12; Slayton Decl. ¶ 11. Both Mr. Baird and Ms. Slayton actively participated in a seven-hour mediation with Judge Ryu that resulted in this settlement. Baird Decl. ¶ 15; Slayton Decl. ¶ 14. Prior to settlement, Mr. Baird and Ms. Slayton were willing and intending to provide testimony at an in-person trial. Baird Decl. ¶ 12; Slayton Decl. ¶ 11.

Second, the Class stands to enjoy a material benefit from Mr. Baird's and Ms. Slayton's actions. The $9.65 million Settlement recovers nearly 30% of the damages Plaintiffs sought to prove at trial. *Supra* Part IV.A.(1). This recovery is structured as a "restorative payment" that can be invested directly into a retirement account without imposing a tax burden. *Supra* Part II. This result would not have occurred without Mr. Baird's and Ms. Slayton's efforts over four years. And *third,* both Mr. Baird and Ms. Slayton faced material reputational risk by suing their past employer. BlackRock is the world's largest asset manager; news that its former employees were challenging BlackRock's management of a retirement plan and products was well publicized in the industry.[8]

Finally, the size of the requested service awards relative to the common fund is reasonable. Here, the service award would collectively be 0.31% of the common fund and would individually be 0.16% of the common fund. This is rate is lower than awards granted in similar cases. *Marshall*, 2020

[8] There are dozens of news articles published about the litigation, including articles by major investment news outlets like Bloomberg, Barrons, and Pensions & Investments Online. *E.g.*, *BlackRock Accused of Self-Dealing With 401(k) Plan*, Bloomberg Law (Apr. 6, 2017), https://news.bloombergtax.com/employee-benefits/blackrock-accused-of-self-dealing-with-401-k-plan?context=article-related; Darren Fonda, *'Shame on Them.' Fund Companies Got Sued By Their Own Employees Over Pricey 401(k) Plans*, Barron's, (Oct. 19, 2018, 3:42 PM), https://www.barrons.com/articles/fidelity-blackrock-401k-lawsuit-1539977967; Robert Steyer, *BlackRock accused in lawsuit of self-dealing in 401(k) plan*, Pensions & Investments Online (April 7, 2017) https://www.pionline.com/article/20170407/ONLINE/170409893/blackrock-accused-in-lawsuit-of-self-dealing-in-401-k-plan.

WL 5668935, at *11 (awarding $25,000 to six class representatives, which amounted to 1.2% of the common fund in total, and 0.2% on an individual basis); *Tibble v. Edison Int'l*, 2018 WL 6131151, at *2 (C.D. Cal. June 25, 2018), *aff'd*, 789 F. App'x 586 (9th Cir. 2020) (awarding $25,000 to six class representatives which amounted to 1.14% of the common fund in total and 0.19% on an individual basis).

Mr. Baird and Ms. Slayton were far more than just names on a court filing. They contributed time to this case, up to the brink of trial, that could otherwise have been devoted to work and family obligations, and they did so to help their fellow Class members achieve a significant award. Their role as Class Representatives demanded attention that no other Class member had to bear. It is a stressful thing to engage in litigation, no matter how confident one may feel about the merits of the claims asserted or about the counsel chosen. These actions provided great benefit to the members of the Class and thus the requested awards to Named Plaintiffs are appropriate and reasonable. *Marshall* , 2020 WL 5668935, at *11 (collecting cases; awarding $25,000 to each of six class representatives in similar four-year ERISA action employees brought against their employer); *Tibble*, 2018 WL 6131151, at *2 (awarding $25,000 to each of six class representatives in ERISA action brought against employer); *Villalpando v. Exel Direct Inc.*, 2016 WL 7785852, at *2 (N.D. Cal. Dec. 9, 2016) (awarding $15,000 to each of three class representatives in connection with $13.5 million settlement).

V. CONCLUSION

Plaintiffs and Class Counsel respectfully request that the Court grant this motion, and award the requested attorneys' fees, costs, and service awards.

Michelle C. Yau (*Admitted Pro Hac Vice*)
Mary J. Bortscheller (*Admitted Pro Hac Vice*)
Daniel Sutter (*Admitted Pro Hac Vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699

Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
2030 Addison Street ● Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Fax: 510) 269-7994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

Charles Baird, *et al*.,

Plaintiffs,

vs.

BlackRock Institutional Trust Company, N.A., *et al.,*

Defendants.

Case No: 4:17-cv-01892-HSG

DECLARATION OF MARY BORTSCHELLER IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

I, Mary Bortscheller, declare as follows:

1. I am a member in good standing of the District of Columbia, Illinois and Minnesota bars, and am admitted *pro hac vice* in this case. I am a partner with the law firm Cohen Milstein Sellers & Toll PLLC ("CMST"), one of the counsel of record representing Plaintiffs Charles Baird and Lauren Slayton and the BlackRock Plan Class in this case. I make these statements based on personal knowledge and would so testify if called as a witness.

2. This Declaration is submitted in support of Plaintiffs' Motion for an Award of Attorneys' Fees and Costs.

3. As shown in Table 1 below, the value of the professional services provided by CMST attorneys, summer associates, and paralegals on behalf of the Class through May 31, 2021 totals $10,586,183.75. The values in Table 1 are derived from the contemporaneously-tracked time records of the attorneys and paralegals who worked on this case.

4. In connection with submitting this Motion, I reviewed all time entries in this case, from its inception through May 31, 2021, and removed the time entries that were erroneously attributed to this matter. I also exercised billing judgment to remove time that was otherwise improperly billed and removed all time entries associated with Plaintiffs' Rule 23(f) petition on the denial of class certification for the putative CTI Class. The hours and lodestar for all remaining CMST time in the case is shown in Table 1.

Table 1: CMST Lodestar

Attorney	Title	Hours	Rate	Lodestar
Bortscheller, Mary, J.	Partner	4,000.25	665.00	$2,660,166.25
Yau, Michelle, C.	Partner	3,050.00	805.00	$2,455,250.00
Sutter, Daniel	Associate	4,612.75	525.00	$2,421,693.75
Holz, Sarah	Associate	1,235.75	545.00	$673,483.75
Horwitz, Julia	Associate	1,051.50	625.00	$657,187.50
Selesnick, Julie	Of Counsel	390.50	775.00	$302,637.50
Lempert, Scott	Of Counsel	349.50	840.00	$293,580.00
Handorf, Karen, L.	Partner	240.75	1,025.00	$246,768.75
Wheeler, Ryan	Law Fellow	230.50	395.00	$91,047.50
Bowers, Jamie	Associate	55.75	585.00	$32,613.75
Geer, Martha A.	Partner	21.75	840.00	$18,270.00
Summer Associates		133.75	290.00	$38,662.50
Other Attorneys		9.75	various	$9,441.25
Subtotal		15,516.25		$9,900,802.50
Paralegals				
Greenman, Sydney		256.00	325.00	$83,200.00
O'Neill, Ciara		296.25	325.00	$96,281.25
Hamel, Dirk		1,113.00	310.00	$345,030.00
Grant-Knight, Connor		108.25	290.00	$31,392.50
Dewees, Maria		364.75	290.00	$105,777.50
Other Paralegals		78.50	various	$23,700.00
Subtotal		2,216.75		$685,381.25
TOTAL		**17,733.00**		**$10,586,183.75**

5. CMST lawyers and staff will incur additional legal fees prior to the Final Approval Hearing in handling such tasks as responding to inquiries from Class Members regarding the Settlement; supervising the Settlement administration process; and preparing the Motion for Final Approval.

6. The rates used in the preparation of Table 1 are the same as the rates that CMST charges for other ERISA class action work on behalf of participants and beneficiaries in employee benefit plans. CMST's hourly rates have been approved by numerous courts when awarding attorneys' fees in class action settlements, including in recent years. *E.g.*, *In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig.*, No. 1:11-cv-00784 (N.D. Ga. Jul. 20, 2020) ECF No. 302 (order awarding attorney fees to CMST); *Feather v. SSM Health*, No. 4:16-cv-01669 (E.D. Mo. May 6, 2019) ECF No. 124-1 (motion seeking fees at similar attorney rates to this action) and ECF No. 135 (order finally approving class settlement and granting attorney fees) (E.D. Mo. July 17, 2019); *In re Mercy Health ERISA Litig.*, No. 1:16-cv-00441 (S.D. Ohio October 29, 2018) ECF No. 99-1 (motion for attorney fees and expenses, seeking fees at similar attorney rates to this action) and ECF No. 107 (order finally approving class settlement and granting attorney fees) (S.D. Ohio Nov. 28, 2018); *Stapleton v. Advoc. Health Care Network and Subsidiaries*, No. 1:14-cv-01873 (N.D. Ill. May 11, 2018) ECF No. 166 (motion for attorney fees and expenses, seeking fees at similar attorney rates to this action) and ECF No. 172 (order finally approving class settlement and granting attorney fees) (N.D. Ill. June 27, 2018).

7. CMST has substantial nationwide ERISA experience. The ERISA group has served as class counsel or has been appointed lead counsel or co-lead counsel in numerous ERISA class actions dating back more than a decade, including the following:

- *Fuller v. SunTrust Banks, Inc.*, No. 11-cv-00784 (N.D. Ga.);
- *Feinberg v. T. Rowe Price Grp., Inc.*, No. 1:17-cv-00427 (D. Md.);
- *Palmason v. Weyerhaeuser Co.*, No. C11-695RSL (W.D. Wash);
- *In re Merrill Lynch & Co., Inc. Sec., Derivative and ERISA Litig.*, No. 07-cv-10268 (S.D.N.Y.);
- *Overall v. Ascension Health*, No. 2:13-cv-11396 (E.D. Mich.);
- *Chavies v. Cath. Health E.*, No. 2:13-cv-01645 (E.D. Pa.);
- *Lann v. Trinity Health Corp.*, No. 8:14-cv-02237 (D. Md.);
- *Medina v. Cath. Health Initiatives*, No. 13-cv-01249 (D. Colo.);
- *Stapleton v. Advoc. Health Care Network & Subsidiaries*, No. 1:14-cv-01873 (N.D. Ill.);

- *Griffith v. Providence Health & Servs.*, No. C14-01720 (W.D. Wash.);
- *Holcomb v. Hosp. Sisters Health Sys.*, No. 3:16-cv-03282 (C.D. Ill.);
- *In re Wheaton Franciscan ERISA Litig.*, No. 16-cv-04232 (N.D. Ill.);
- *Carver v. Presence Health Network*, No. 15-cv-02905 (N.D. Ill.);
- *Garbaccio v. St. Joseph's Hosp. & Med. Ctr.*, No. 2:16-cv-02740 (D.N.J.);
- *Sanzone v. Mercy Health*, No. 4:16-cv-00923 (E.D. Mo.);
- *Smith v. OSF Healthcare Sys.*, No. 3:16-cv-00467 (S.D. Ill.);
- *Owens v. St. Anthony Med. Ctr., Inc.*, No. 1:14-cv-04068 (N.D. Ill.);
- *Hodges v. Bon Secours Health Sys., Inc.*, No. 1:16-01079 (D. Md.); and
- *In re Beacon Assocs. Litig.*, No. 1:09-cv-00777 (S.D.N.Y.).

8. Lawyers at CMST are well-versed in class action litigation and are among the leading litigators of class actions on behalf of Plaintiffs. CMST is consistently lauded as one of the most successful plaintiffs' firms in the country. *Forbes* has called us a "class action powerhouse," while *Inside Counsel* has dubbed us "[t]he most effective law firm in the United States for lawsuits with a strong social and political component."

9. Moreover, the lawyers in CMST's Employee Benefits group have over 50 combined years of experience litigating ERISA class actions and have recovered hundreds of millions of dollars on behalf of participants in employee benefit plans.

10. This case, settled on the eve of trial, demanded an extensive amount of work over a number of years. The partners supervising the litigation – Michelle Yau and myself – endeavored to maximize efficiency by assigning appropriate tasks to junior attorneys and summer associates, and by minimizing duplication of work on the team. However, the complexity of the issues and the strength of the defense mounted by Defendants required significant, and sustained, efforts by the legal team at CMST. These efforts are described in greater detail below.

11. CMST lawyers and staff conducted the initial investigation of the allegations alleged in the Complaint, which required analyzing publicly available information, requesting and analyzing information produced by government agencies through the Freedom of Information Act, speaking with BlackRock Plan participants and analyzing information from those participants.

12. CMST lawyers also researched all legal theories and were the primary drafters of all versions of the complaint. The theories Plaintiffs pleaded and successfully advanced through summary judgment concerned the selection and monitoring of a retirement plan's investments, a fiduciary's duty to monitor securities lending activity, a fiduciary's duty to disclose securities lending fees, and

restrictions on the management of securities lending cash collateral. To the best of my knowledge, a number of Plaintiffs' theories were novel and untested in other litigation, including their theory that 29 CFR § 2550.404a-5 required expense ratio disclosure of securities lending compensation in unregistered collective trust funds and that 12 CFR § 9.18 limited the maximum maturity of at-issue floating rate securities.

13. The claims CMST lawyers advanced on behalf of the BlackRock Plan Class about securities lending compensation and securities lending cash management, and the evidence CMST lawyers discovered to prove those claims, were coextensive with the claims and proof relevant to the CTI Plan Class allegations. For example, Plaintiffs alleged on behalf of both the BlackRock Plan Class and the putative CTI Class that BlackRock charged excessive compensation for securities lending, and that BlackRock mismanaged the securities lending cash collateral. Class Counsel sought and obtained evidence on those allegations, which Class Counsel relied upon as they briefed summary judgment (both Plaintiffs' affirmative motion and opposing Defendants' motion) and prepared for trial on behalf of the certified BlackRock Plan Class.

14. CMST lawyers also were extensively involved in researching and briefing all motions, together with co-counsel at Feinberg Jackson Worthman & Wasow ("FJWW"). This included opposing three motions to dismiss, moving for leave to amend the Complaint, moving for class certification, opposing two motions for summary judgment, moving for partial summary judgment, moving to exclude two expert witnesses' testimony, moving to compel substantial withheld discovery, moving to compel additional deposition testimony, moving to exclude improperly disclosed witnesses, and moving *in limine* to exclude witnesses before trial. Because Defendants marked every page of produced discovery as "CONFIDENTIAL," pursuant to the Court's protective order, many of Plaintiffs' filings had to be redacted, filed in both redacted and (highlighted) unredacted form, and accompanied with administrative motions to file under seal and declarations in support.

15. CMST lawyers also prepared for and argued to the Court Plaintiffs' oppositions to Defendants' motion to dismiss and motion to preliminarily approve the Settlement.

16. CMST lawyers were responsible for drafting all of Plaintiffs' discovery requests, including requests for production, requests for interrogatories, and requests for admission. CMST

lawyers were the first chair at 10 fact depositions and three expert depositions; we also assisted our co-counsel in preparing for the five depositions that FJWW took as first chair (including an expert deposition), and in defending the Named Plaintiffs at their depositions. In response to Plaintiffs' discovery requests, CMST lawyers received and reviewed over 250,000 pages of documents and emails and exchanged hundreds of pages of written discovery.

17. The Parties engaged in extensive discovery into the claims and defenses in this case. This discovery concerned BlackRock's securities lending and cash management practices—topics that were relevant to both the BlackRock Plan and putative CTI Classes—and the investment selection and monitoring process of the Plan's named fiduciaries—a topic that was unique to the BlackRock Plan Class.

18. Plaintiffs on numerous occasions had to compel Defendants to produce discovery in response to Plaintiffs' requests. In connection with those discovery disputes, the parties engaged in numerous written, in-person, and telephonic meet and confers to resolve disputes without Court intervention. However, the parties reached impasse at least eleven times and sought intervention from Magistrate Judge Kandis A. Westmore through the Court's joint dispute letter process. CMST lawyers led these meet and confer and briefing processes, with assistance from FJWW.

19. CMST lawyers also prepared objections and responses to discovery requests propounded on the Named Plaintiffs and worked with the Named Plaintiffs to compile information and documents to be produced.

20. CMST lawyers, together with FJWW, engaged three expert witnesses and assisted them in the preparation of their reports and rebuttals. These expert engagements included Dr. Charles Cowan, for purposes of class certification and concerning damages from securities lending collateral management; Dr. Steven Pomerantz, concerning three plan-wide damage models, reasonableness of securities lending compensation, and securities lending cash management requirements; and Marcia Wagner, concerning fiduciary process. In addition to their opening reports, Dr. Pomerantz and Ms. Wagner offered rebuttal reports addressing Defendants' three expert reports.

21. Before and after summary judgment was denied in January of 2021, Class Counsel spent substantial time preparing for the trial scheduled to begin on March 1, 2021. Specifically, CMST

and FJWW lawyers vetted and formally identified 698 trial exhibits and over 15 trial witnesses, designated extensive deposition testimony for use at trial, lodged objections to Defendants' designated evidence, filed two motions *in limine*, and filed a trial brief and a pre-trial conference statement in accordance with this Court's procedures. By the time the parties reached a settlement in this case, Class Counsel had completed a significant portion of the substantive and logistical preparation for the scheduled seven-day trial starting March 1, 2021 in Oakland.

22. The parties on two separate occasions engaged in formal settlement negotiations. I participated in both negotiations. The first formal negotiation session took place with the assistance of a private mediator, Robert Meyer of JAMS ADR, on February 7, 2020, while the motion for class certification was pending. The parties did not reach a resolution that day, and while the parties continued to engage in some informal discussion of settlement following the February 7 mediation, the parties were not able to reach a settlement.

23. The second settlement negotiation was a Court-ordered settlement conference occurring on February 5, 2021 and facilitated by Magistrate Judge Donna M. Ryu. This settlement conference was conducted by virtual means due to the pandemic, and it lasted for several hours (approximately two more hours that Judge Ryu had initially allocated for the session). The legal team that was preparing for trial attended the conference, as did the Class Representatives.

24. During the settlement conference, the parties extensively discussed the merits of the case and risks of trial in a joint session with Judge Ryu, and thereafter the parties exchanged multiple offers and counter-offers with Judge Ryu's assistance before arriving at an agreement that evening; the Settlement in principle was for the amount of $9,650,000. The entire negotiation was done at arm's-length and with the active supervision and assistance of Judge Ryu.

25. The Settlement amount of $9,650,000 provided 28.4% of the damages Class Counsel intended to prove at trial based upon the modeling done by Dr. Pomerantz, who opined that, compared to Defendants' own benchmarks from the Investment Policy Statement, the Class suffered approximately $33.96 million in losses due to the underperformance of the proprietary funds in the Plan.

26. Class Counsel sought to minimize any administrative burdens on Class Members in receiving the proceeds of the Settlement. Specifically, Class Counsel proposed a Plan of Allocation whereby the Class Members who are current Plan participants with an active account will receive their Settlement funds via a direct contribution into their retirement accounts, and former Plan participants will receive a check sent to the last known address maintained by the Plan's recordkeeper, without requiring a claims process.

27. The retainer agreements with the Named Plaintiffs in this case provide that Class Counsel will not seek attorneys' fees that exceed one-third of any common fund obtained to benefit the class. These retainer agreements are consistent with the contingency fee retainer agreements that I have entered into with employees participating in ERISA-governed employee benefit plans in other class action cases.

28. At the time that CMST originally agreed to take on this litigation, we were aware based on our prior experience that this case would likely require expert opinion and therefore be expensive, and that the case moreover would be hard-fought and potentially lengthy. Also, given the risky nature of ERISA class action litigation, we were aware that there was a significant likelihood that, after having invested a substantial amount of time and expense, Plaintiffs and the class might recover nothing and Class Counsel might not be paid fees or reimbursed for expenses. In taking this representation, CMST lawyers expended time and resources that otherwise could have been spent on other matters.

29. Until Plaintiffs reached agreement with Defendants, we understood that there was a significant likelihood that this case would proceed to trial. Indeed, Class Counsel was fully preparing to go to trial at the time of the settlement conference and had completed the bulk of the substantive and logistical preparation for an in-person trial in Oakland. Furthermore, we understood based on discussions with defense counsel that Defendants likely would seek an appeal from any adverse judgment.

30. Because of the time CMST dedicated to successfully litigating this matter, the attorneys and staff assigned to it necessarily had to forego working on other cases.

31. Before representing Plaintiffs in this action, neither I nor any other attorney at CMST had any prior relationship with them. We do not represent them in any other matters, and do not anticipate that we will in the future.

32. As shown in Table 2, below, CMST has expended a total of $636,958.22 in necessary expenses in the litigation of this matter, which have been invoiced and recorded in our accounting system through August 18, 2021.

Table 2: CMST Litigation Expenses

Category	Expense
Expert Witness/Consultant	$414,988.75
Online Legal Research	$68,198.65
Online Document Hosting	$49,099.83
Deposition Transcript/Court Reporter	$49,074.07
Travel - Transportation	$21,745.86
Travel - Hotel	$9,654.99
Mediation Fees	$8,109.27
Court Fees	$4,501.95
Telephone	$3,946.40
Postage	$2,879.52
Business Meals	$2,274.30
Travel - Meals	$1,748.42
Misc.	$719.81
Printing	$16.40
Total	**$636,958.22**

33. I have reviewed the expenses incurred in this case and have removed from the total stated in Table 2 any expenses which were improperly attributed to this matter.

34. The expenses that we seek to recover, described in Table 2, were customary expenses – such as filing fees, expert fees, costs associated with depositions and court hearings, and document database hosting costs – necessary for the litigation of this class action case, and all reasonably incurred. Class Counsel's request for reimbursement of expenses does not include the "Administrative Expenses" defined in the Settlement Agreement, which include, among other things, the costs of the Settlement Administrator issuing Class Notice and distributing settlement funds, and the cost of the Independent Fiduciary. Based on a negotiated fee cap with the Settlement Administrator, I anticipate that the costs associated with issuing Class Notice and distributing funds will not exceed $60,000. I

further understand that the Class will only bear the cost of the Independent Fiduciary's fee up to $25,000, based on the terms of the Settlement Agreement.

35. Throughout the litigation, my partner Michelle Yau and I monitored case expenses to minimize expenditures to what was reasonable and necessary for the case. Further, while a team of CMST lawyers was preparing to travel to Oakland to conduct trial starting on March 1, 2021, the vast majority of the expenses associated with the anticipated trial effort were refunded and thus CMST does not seek reimbursement for such expenses.

36. To date, I have not received any objections by any members of the Settlement Class to the Settlement or to the fees and expenses requested by Class Counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 20, 2021

By: *Mary J. Bortscheller*
Mary J. Bortscheller

Michelle C. Yau (*Admitted Pro Hac Vice*)
Mary J. Bortscheller (*Admitted Pro Hac Vice*)
Daniel Sutter (*Admitted Pro Hac Vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699

Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
2030 Addison Street ● Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Fax: 510) 269-7994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

Charles Baird, *et al*.,

Plaintiffs,

vs.

BlackRock Institutional Trust Company, N.A., *et al.*,

Defendants.

Case No: 4:17-cv-01892-HSG

DECLARATION OF NINA WASOW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

I, Nina Wasow, declare as follows:

1. I am a member in good standing of the State Bar of California and a partner with the law firm Feinberg, Jackson, Worthman & Wasow, LLP ("FJWW"), one of the counsel of record representing Plaintiffs Charles Baird and Lauren Slayton, on behalf of themselves and the Class in this case. I make these statements based on personal knowledge and would so testify if called as a witness.

2. This Declaration is submitted in support of Plaintiffs' Motion for An Award of Attorneys' Fees and Costs

3. As shown in the table below, the value of the professional services provided by FJWW attorneys, paralegals and staff on behalf of the Class through July 29, 2021 at current rates totals $1,212,453. This value was arrived at by using the "lodestar" methodology, which involves determining "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The below amounts do not include amounts expended on the Rule 23(f) petition or preparing the motion for attorneys' fees or associated documents:

First Name	Last Name	Title	Hour	Rate	Lodestar
Dan	Feinberg	Partner	2.3	$975.00	$2,242.50
Todd	Jackson	Partner	673.90	$975.00	$657,052.50
Nina	Wasow	Partner	593.40	$850.00	$504,390.00
Darin	Ranahan	Partner	0.50	$650.00	$325.00
Genevieve	Casey	Attorney	0.10	$580.00	$58.00
Olivia	Ruiz	Paralegal	1.70	$250.00	$425.00
Bethany	Balchunas	Law Clerk	4.80	$325.00	$1,560.00
Rianna	Hidalgo	Law Clerk	11.40	$325.00	$3,705.00
Caitlin	Kauffman	Fellow	81.80	$400.00	$32,720.00
TOTAL			**1380.90**		**$1,202,478.00**

4. The above totals represent the recorded hours charged in this case by FJWW attorneys, law clerks and paralegals multiplied by the customary hourly rates charged by such attorneys and professionals in pension litigation such as this. I estimate that FJWW will incur additional fees prior to the Final Approval Hearing.

5. The rates used in the preparation of the above are the same as the rates that FJWW charges for other class work as well as for non-class litigation on behalf of participants and beneficiaries in employee benefit plans, although depending on the financial circumstances of a client or other considerations, we will sometimes provide a discount on my rates. In several other ERISA class actions, for example *Neil v. Zell*, 753 F. Supp. 2d 724 (N.D. Ill. 2010) and *Choate v. Wilmington Trust, N.A.*, Case No. 17-250-RGA (D. Del.), FJWW has been awarded a percentage of the common fund that amounted to well in excess of $1,000 per hour for partners' time. FJWW's hourly rates have been approved by numerous courts when awarding attorneys' fees in class action settlements, including in recent years. *E.g., Sosa v. Marriott Int'l, Inc*., No. 18CV335342 (Cal. Super. June 25, 2021) (order finally approving class settlement including attorneys' fees, where lodestar was calculated using $975 per hour for Todd Jackson); *Cunningham v. Wawa, Inc*., 2021 WL 1626482, at *8 (E.D. Pa. April 21, 2021) (order finally approving class settlement including attorneys' fees, where lodestar was calculated using $975/hour for Daniel Feinberg, $895/hour for Todd Jackson, and $795/hour for Nina Wasow).

6. The retainer agreements with Plaintiffs are consistent with the contingency fee retainer agreements that I have entered into in class action litigation with employees in ERISA-governed employee benefit plans. Most employee-clients who have employee-benefits related issues cannot afford to pay on an hourly basis and will choose to pay on a contingency fee arrangement. The retainer agreements with Plaintiffs in this case provide that Class Counsel will not seek attorneys' fees that exceed one-third of a common fund.

7. At the time that FJWW originally agreed to take on this litigation, we were aware based on our prior experience handling ERISA class action litigation in general and these types of cases that such litigation could be expensive, hard-fought, and lengthy. Also, given the risky nature of ERISA class action litigation in general, we were aware that there was a significant likelihood

that, after having invested a substantial amount of time and expense, Class Counsel might recover nothing. Until Plaintiffs reached agreement with BlackRock and the fiduciaries of the BlackRock 401(k) Plan, we understood that there was a significant likelihood that this case would proceed to trial and Defendants would seek an appeal from any adverse judgment.

8. As illustrated by the amount of time expended in this litigation and the significant amount of work that I and other attorneys performed in this matter, I was prevented from working on or pursuing other matters as was my partner, Todd Jackson. As illustrated by the fact that other attorneys worked on this case, at times, the work on this case exceeded the ability for Mr. Jackson and I to handle the workload (even with co-counsel).

9. Before representing Plaintiffs in this action, neither Mr. Jackson nor I had any prior relationship with them. We do not represent them in any other matters, and do not anticipate that we will in the future.

10. Among other tasks, I was responsible for defending the depositions of Charles Baird and Lauren Slayton. Each deposition lasted more than a half day, and each Plaintiff spent time preparing for their deposition. Each of the Plaintiffs were readily available for telephone calls with Class Counsel and promptly responded to emails from Class Counsel and often asked questions or made inquiries about the case unprompted by Class Counsel.

11. As shown in the table below, FJWW has expended a total of $4,599.36 in necessary expenses in the litigation of this matter, which have been invoiced and recorded in our accounting system through July 29, 2021. These expenses that we seek to recover in class action cases are the same types of expenses that we charge fee paying clients.

Type of Expense	**Amount**
Court Fees	$435.00
Postage	$50.22
Travel – Transportation	$1,626.99
Travel - Lodging	$1,911.58
Travel – Meals	$276.76

Printing	$283.85
Westlaw	$14.96
Total	**$4,599.36**

12. To date, I have not received any objections by any members of the Settlement Class to the Settlement or to the fees and expenses requested by Class Counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 20, 2021 in Berkeley, California.

By: */s/ Nina Wasow*

Michelle C. Yau (*Admitted Pro Hac Vice*)
Mary J. Bortscheller (*Admitted Pro Hac Vice*)
Daniel R. Sutter (*Admitted Pro Hac Vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699

Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
2030 Addison St. ● Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Fax: (510) 269-7994

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Charles Baird, *et al.*,

Plaintiffs,

vs.

BlackRock Institutional Trust Company, N.A., *et al.*,

Defendants.

Case No: 4:17-cv-01892-HSG

DECLARATION OF CLASS REPRESENTATIVE CHARLES BAIRD IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

Hearing: October 21, 2021 2:00 PM

I, Charles Baird, declare under penalty of perjury of the laws of the United States:

1. I am a Class Representative in the above litigation concerning the BlackRock Retirement Savings Plan (the "Plan"). As a Named Plaintiff and later as a Class Representative, I have worked with the lawyers in this litigation and discussed litigation decisions with them.

2. I submit this Declaration in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards.

3. I have personal knowledge of the matters set forth in this Declaration .

4. I am more than 18 years of age and would testify competently to the matters set forth herein if called upon to do so.

5. I was an employee at Barclays Global Investors ("BGI") from 2000 until 2009, when BGI was acquired by BlackRock Institutional Trust Company, N.A. ("BlackRock"), and an employee of BlackRock from 2009 until July 2016. I participated in the Plan during the Class Period.

6. I have been personally involved in this litigation and contributed to the case. I have earnestly worked with Class Counsel to understand how the Plan I participated in was allegedly operated in violation of ERISA's requirements. I was aware of, and took seriously, my duty to act in the best interests of the Class.

7. I worked with Cohen Milstein and assisted in developing the factual information necessary to file a complaint. I provided Cohen Milstein's attorneys my documents related to the Plan and reviewed the Complaint filed on April 5, 2017. I also provided information for and reviewed the First and Second Amended Complaint filed on October 18, 2017 and July 13, 2018, respectively.

8. I actively participated in discovery in this case. I had multiple calls with the attorneys at Cohen Milstein to review requests for interrogatories that Defendants served on me and provided information requested in them. I searched my computer, physical records, emails, phone, and other repositories for documents Defendants requested I produce. Among other things, I located and produced to my counsel text messages between me and my peers about this litigation; bank records; and other records about my 401(k) account.

9. I also responded to questioning during an in-person deposition. I prepared to be deposed for 3 hours and sat for a deposition for nine hours on November 7, 2018 in San Francisco.

10. I reviewed and approved a declaration filed on July 25, 2019. I reviewed draft and final filings with the court which Class Counsel provided to me.

11. I attended the hearing on Class Certification in Oakland on September 6, 2019.

12. I participated in numerous telephone and email communications with Class Counsel over the past four-plus years. These calls concerned my discovery obligations; my duties as a Class Representative; case events and strategy; trial preparation; and possible settlements.

13. Class Counsel conferred with me before, during, and after the February 7, 2020 mediation about the possible outcomes in this case and a potential settlement.

14. Similarly, Class Counsel conferred with me before the February 5, 2021 settlement conference to prepare me for what to expect during mediation.

15. I attended the parties' seven-hour settlement conference with Judge Donna M. Ryu on February 5, 2021. Having been present at and actively participated in the settlement conference, I understand the risks involved in this litigation and possible outcomes if we proceeded to trial.

16. I support the proposed Settlement, and I believe that it is fair, reasonable and adequate and is a good, favorable result for the Class.

17. Based on the risks of continuing litigation compared to accepting the proposed Settlement, I believe the proposed Settlement provides a better outcome for the Class, which I represent, because it achieves a significant recovery and eliminates risks, inc1uding the risk of achieving no recovery at trial.

18. I understand that Class Counsel seek an award of their attorneys' fees of 29% of the $9.65 million Settlement, reimbursement of the expenses they advanced to litigate the case, and Service Awards in the amount of $15,000 each for the two Class Representatives, including myself.

19. While I understand that the decision on the motion for an award of attorneys' fees and expenses and Service Awards is left to the Court, in my role as a Class Representative, I have considered and support that motion.

20. I recognize that Class Counsel took risks in litigating this case, and I believe that Class Counsel represented the Class well. Class Counsel communicated the basis of major litigation decisions to me and answered my questions about the litigation. I believe that Class Counsel carefully considered what was in the Class's best interest throughout the lawsuit including when they recommended settlement.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed this 19 day of August 2021.

Charles Baird

Charles Baird

Alameda, California

Michelle C. Yau (*Admitted Pro Hac Vice*)
Mary J. Bortscheller (*Admitted Pro Hac Vice*)
Daniel R. Sutter (*Admitted Pro Hac Vice*)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699

Todd Jackson (Cal. Bar No. 202598)
Nina Wasow (Cal. Bar No. 242047)
FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
2030 Addison St. ● Suite 500
Berkeley, CA 94704
Telephone: (510) 269-7998
Fax: (510) 269-7994

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Charles Baird, *et al.*,

Plaintiffs,

vs.

BlackRock Institutional Trust Company, N.A., *et al.*,

Defendants.

Case No: 4:17-cv-01892-HSG

DECLARATION OF CLASS REPRESENTATIVE LAUREN SLAYTON IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

Hearing: October 21, 2021 2:00 PM

I, Lauren Slayton, declare under penalty of perjury of the laws of the United States:

1. I am a Class Representative in the above litigation concerning the BlackRock Retirement Savings Plan (the "Plan"). As a Named Plaintiff and later as a Class Representative, I have worked with the lawyers in this litigation and discussed litigation decisions with them.

2. I submit this Declaration in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards.

3. I have personal knowledge of the matters set forth in this Declaration.

4. I am more than 18 years of age and would testify competently to the matters set forth herein if called upon to do so.

5. I was an employee at Barclays Global Investors ("BGI") from 2006 until 2009, when BGI was acquired by BlackRock Institutional Trust Company, N.A. ("BlackRock"), and an employee of BlackRock from 2009 until March 2012. I have been a participant in the Plan at all times during the Class Period.

6. I have been personally involved in this litigation and contributed to the case. I have earnestly worked with Class Counsel to understand how the Plan I participated in was allegedly operated in violation of ERISA's requirements. I was aware of and took seriously my duty to act in the best interests of the Class.

7. I provided Cohen Milstein's attorneys my documents related to the Plan and reviewed the Amended Complaint filed on October 18, 2017. I provided information for and reviewed the Second Amended Complaint filed on July 13, 2018.

8. I actively participated in discovery in this case. I had multiple calls with the attorneys at Cohen Milstein to review requests for interrogatories Defendants served on me and provided information requested in them. I searched my computer, physical records, emails, phone, and other repositories for documents Defendants requested I produce. Among other things, I located and produced to my counsel emails between me and my friends about this litigation and time at BlackRock; emails BlackRock had sent to me about my 401(k) account; and other records about my 401(k) account.

9. I also sat for an in-person deposition. I participated in two calls to prepare for being

deposed and responded to questions in deposition for five hours on November 6, 2018 in San Francisco.

10. I reviewed and approved affidavits and declarations submitted in this case, including an affidavit opposing Defendants' motion to dismiss the complaint and a declaration in support of class certification.

11. I participated in numerous telephone and email communications with Class Counsel over the past four years. These calls concerned my discovery obligations; my duties as a Class Representative; case events and strategy; trial preparation; and possible settlements.

12. Class Counsel conferred with me before, during, and after the February 7, 2020 mediation about the possible outcomes in this case and a potential settlement.

13. Similarly, Class Counsel conferred with me before the February 5, 2021 settlement conference to prepare me for what to expect during mediation.

14. I attended the parties' seven-hour settlement conference with Judge Donna M. Ryu on February 5, 2021. Having been present at and actively participated in the settlement conference, I understand the risks involved in this litigation and possible outcomes if we proceeded to trial.

15. I support the proposed Settlement, and I believe that it is fair, reasonable and adequate and is a good, favorable result for the Class.

16. Based on the risks of continuing litigation compared to accepting the proposed Settlement, I believe the proposed Settlement provides a better outcome for the Class, which I represent, because it achieves a significant recovery and eliminates risks, inc1uding the risk of achieving no recovery at trial.

17. I understand that Class Counsel seek an award of their attorneys' fees of 29% of the $9.65 million Settlement, reimbursement of the expenses they advanced to litigate the case, and Service Awards in the amount of $15,000 each for the two Class Representatives, including myself.

18. While I understand that a decision on the motion for an award of attorneys' fees and expenses and Service Awards is left to the Court, in my role as a Class Representative, I have considered and support that motion.

19. I recognize that Class Counsel took risks in litigating this case, and I believe that Class Counsel represented the Class well. Class Counsel communicated the basis of major litigation decisions to me and answered my questions about the litigation. I believe that the Class Counsel carefully considered what was in the Class's best interest throughout the lawsuit including when they recommended settlement.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed this 19 day of August 2021.

Lauren Slayton

Lauren Slayton

San Jose, California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Charles Baird, *et al.*,

Plaintiffs,

vs.

BlackRock Institutional Trust Co. N.A., *et al.*,

Defendants.

Case No: 4:17-cv-01892-HSG

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

Having reviewed Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, and Class Representative Service awards, and good cause appearing therefore, the Court hereby ORDERS as follows:

Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, and Class Representative Service awards is GRANTED.

IT IS SO ORDERED.

Dated: _____

_____
U.S. District Judge Haywood S. Gilliam, Jr.
U.S. District Court for the
Northern District of California