**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

JANE DOE, on her own behalf, on behalf of her husband, John Doe, JANE SMITH, JANE ROE, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

UNITEDHEALTH GROUP INCORPORATED, et al.,

Defendants.

Civil Action No. 1:17-cv-4160
Civil Action No. 21-cv-2791
(consolidated)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND SERVICE AWARDS FOR CLASS REPRESENTATIVES**

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Plaintiffs and Class Representatives Jane Doe, Jane Smith, and Jane Roe (collectively, "Plaintiffs" or "Class Representatives"), by their undersigned counsel, submit this Memorandum in Support of their Unopposed Motion for Attorneys' Fees and Costs and for Service Awards for Class Representatives.

## INTRODUCTION

Class Counsel Zuckerman Spaeder LLP, Psych-Appeal, Inc., and Buttaci Leardi & Werner LLC (together, "Class Counsel") diligently prosecuted these consolidated actions to achieve an exceptional result for the conditionally certified settlement class ("Settlement Class"). In fact, the litigation achieved exactly what the Plaintiffs sought—(i) a change in United's[1] Tiered Reimbursement Policy, under which reimbursement for certain out-of-network behavioral health services provided by psychologists or masters' level counselors/social workers were reduced by 25% or 35%; and (ii) significant monetary relief for people whose benefit claims were improperly reduced pursuant to this Policy.

During the litigation, United stopped applying the Tiered Reimbursement Policy and has committed, as part of this Settlement, not to reinstate it for United and Oxford plans. Moreover, Class Counsel secured significant monetary relief for the Settlement Class—$10 million—which according to United's claim records is 55%–70% of the estimated financial impact that the Tiered Reimbursement Policy had on Settlement Class members' claims. Unsurprisingly, this extraordinary result is at the high end of the range of ERISA class-action recoveries in health insurance cases. Given the substantial risks Plaintiffs faced in every phase of this case, the results Class Counsel achieved are exceptional by any measure.

[1] As used throughout this brief, "United" refers to Defendants UnitedHealth Group Inc., United HealthCare Insurance Co., Oxford Health Plans, LLC, Oxford Health Plans (NY), Inc., Oxford Health Insurance, Inc., and United Behavioral Health.

On August 24, 2021, the Court preliminarily approved the Settlement. Dkt. No. 106. Plaintiffs now ask the Court to award a total of $3.35 million in attorneys' fees and expenses to Class Counsel and service awards to each of the Class Representatives. Importantly, the settlement that Class Counsel negotiated requires United to pay such an award ***separate and apart from the common fund***, so the full settlement amount will be available for distribution to eligible Settlement Class members.[2]

This fee and expense motion easily satisfies this Circuit's applicable legal standards. Indeed, since these consolidated cases were filed in 2017 and 2018, Class Counsel has already invested over 7,500 hours and about $4.8 million in time in the cases collectively. After accounting for expenses and the anticipated service awards for the Class Representatives, the requested fee amount is only about 65% of Class Counsel's lodestar. Thus, although Class Counsel assumed significant risk by litigating the cases on full contingency, the requested award will result in Class Counsel receiving substantially less than their lodestar. Such an award is more than reasonable.

## BACKGROUND

### A. Procedural History of This Action

After extensive pre-litigation investigation and review of documents, on July 13, 2017, Class Counsel filed a putative class action in this Court on behalf of Plaintiff Jane Doe against UnitedHealth Group Incorporated; UnitedHealthcare Insurance Company; Oxford Health Plans, LLC; Oxford Health Plans (NY), Inc.; and Oxford Health Insurance, Inc., captioned *Jane Doe v. UnitedHealth Group Incorporated, et al.*, Case No. 1:17-cv-4160 (E.D.N.Y.) ("*Doe* Action"). The central allegation in the case was that United violated ERISA and the Mental Health Parity and

[2] As explained in Plaintiffs' motion for preliminary approval, a tiny fraction of the $10 million—about $278,000—will be allocated to members of non-ERISA plans in New York pursuant to United's related settlement with the New York Attorney General.

Addiction Equity Act of 2008 ("Federal Parity Law") by imposing the Tiered Reimbuursement Policy, which artificially reduced reimbursement rates for services provided by out-of-network psychologists and masters' level counselors—two types of providers that provide the lion's share of outpatient mental health services to United's members. Based on United's application of the Tiered Reimbursement Policy, Doe sought relief under 29 U.S.C. § 1132(a)(1)(B) for wrongfully denied benefits and under 29 U.S.C. § 1132(a)(3), which entitles her to injunctive and equitable relief. United moved to dismiss the case, which Doe opposed. On August 20, 2018, this Court granted in part and denied in part that motion.

On October 16, 2018, Class Counsel filed a separate action on behalf of Plaintiff Smith in the Northern District of California against defendants United Behavioral Health and UnitedHealthcare Insurance Company, captioned *Jane Smith v. UnitedHealthcare Insurance Company, et al.*, Case No. 3:18-cv-06336 (N.D. Cal.) ("*Smith* Action"). The *Smith* Action alleged the same type of violations of ERISA, including alleged violations of the Federal Parity Law. Plaintiffs in both cases sought to require United to stop applying the Tiered Reimbursement Policy—a change United made during the course of the litigation. United also moved to dismiss the *Smith* Action. After briefing and oral argument by Class Counsel, the *Smith* Court granted in part and denied in part the motion to dismiss on July 18, 2019.

After substantively defeating United's motions to dismiss in both the *Doe* and *Smith* Actions, Class Counsel conducted extensive class- and merits-related discovery. Between the two cases, Class Counsel served over eight sets of document requests and five sets of interrogatories. Class Counsel also worked with United to litigate efficiently by coordinating overlapping discovery between the two cases where possible. Collectively, the parties produced and reviewed thousands of documents. Goldfarb Decl. ¶ 26. The parties also worked together to resolve multiple

discovery-related disputes, exchanging dozens of letters and attending multiple meet-and-confers. While the parties invested significant time in resolving these disputes on their own, there were a few issues that required judicial intervention. As such, Class Counsel successfully filed and opposed numerous letter motions to compel in both Actions. Class Counsel also prepared for an anticipated fifteen separate depositions (both offensive and defensive). *Id*. During this period, the parties simulteneously engaged in settlement negotiations.

In March 2020, just as depositions were set to begin, the courts in the two Actions granted stays to allow the parties to pursue settlement. Class Counsel engaged in substantial negotiations to try to resolve the matters during the stays, without success. The stays expired on December 15, 2020, after which the parties resumed discovery.

### B. Settlement Negotiations

While active litigation restarted in December 2020, Class Counsel continued to engage United in arms-length settlement discussions. The negotiations were made more complex because they also addressed potential settlement of substantively related investigations and potential enforcement actions by the New York State Attorney General ("NYAG") and the Department of Labor ("DOL"). The NYAG and DOL participated actively in these negotiations. In early 2021, the parties, including the NYAG and DOL, reached an agreement in principle to resolve the *Doe* and *Smith* Actions as well as the NYAG and DOL actions. On April 30, 2021, the parties (including the DOL and NYAG) agreed to a term sheet reflecting their agreement on the material terms of a settlement. *See* Dkt. 106-03 at ¶ 5. Thus, on joint motion of the parties, on May 17, 2021, the *Smith* Action was transferred to this Court. It was assigned case number 21-cv-2791. By docket entry of May 28, 2021, this Court consolidated the *Doe* and *Smith* Actions for purposes of settlement

approval proceedings. Class Counsel then proceeded to negotiate the Settlement Agreement with Defendants.

During discovery, as well as the period during which the Settlement Agreement was being negotiated and drafted, Class Counsel demanded that United provide extensive data about the size and composition of the Settlement Class for the full class period. *See* Dkt. 106-03 at Exhibit 1, ¶¶ 3–4. The data, which was ultimately provided, included all of the claims for Settlement Class members to which United applied the Tiered Reimbursement Policy during the class period. This information enabled Plaintiffs to analyze the claim-by-claim and collective impact of the Tiered Reimbursement Policy on the Settlement Class. *Id.* Plaintiffs requested and received additional information from United about the data. *See* Dkt. 106-03 at ¶ 7. Taken together, the data allowed Class Counsel to evaluate the information that underlies the terms of the Settlement, assess the risks of continuing to litigate and the benefits of the proposed Settlement, and confirm Plaintiffs' conclusion that the Settlement is a reasonable and highly favorable one for the Settlement Class. *Id.*

On August 24, 2021, after a telephonic hearing, the Court granted preliminary approval of the Settlement. Dkt. No. 106. By docket entry of August 30, 2021, the Court confirmed entry of the written order granting preliminary approval.

### C. Class Counsel

Class Counsel are Zuckerman Spaeder LLP ("Zuckerman"), Psych-Appeal, Inc. ("Psych-Appeal"), and Buttaci Leardi & Werner LLC ("BLW"). The firms have considerable experience in the factual and legal subject matter of this case. They have litigated, both separately and together, numerous ERISA cases related to behavioral health care and reimbursement of benefits, including those alleging Federal Parity Law violations.

## SUMMARY OF THE SETTLEMENT

### A. Main Provisions—Settlement Payment, Injunctive Relief, and Release

As described more fully in the motion for preliminary approval, Class Counsel's efforts resulted in a Settlement that provides significant relief to Settlement Class members. The proposed Settlement has three major components: (1) payment by United of the $10 million settlement amount, (2) prospective relief for the Settlement Class, and (3) a reasonable release by Settlement Class members of certain claims against United related to the Tiered Reimbursement Policy.

First, under the Settlement Agreement, United will pay the $10 million settlement amount (*see* Settlement Agmt. §§ 1.26, 2.11) into an account administered by Rust Consulting, the third-party administrator approved by the Court (the "Settlement Administrator"). The Settlement Administrator will distribute the settlement amount to members of the Settlement Class according to the Plan of Allocation (Ex. E to the Settlement Agreement) developed by Class Counsel. *Id.* § 2.12. The Plan of Allocation is straightforward. It provides pro rata distributions to Settlement Class members whose pro rata share exceeds the de minimis threshold of $15. The Plan of Allocation methodology is designed to efficiently provide monetary relief for eligible Settlement Class members for the injury common to every member of the Settlement Class—the application of the Tiered Reimbursement Policy that resulted in the reduction of the allowed amount for reimbursement of certain covered out-of-network behavioral health services. Importantly, the Plan of Allocation does not require Class members to file claims. Money will be distributed to eligible Settlement Class members automatically.

Second, as part of the Settlement, United agreed not to reinstate the challenged Tiered Reimbursement Policy. When they dropped the Tiered Reimbursement Policy in July 2019, United and Oxford instituted a different policy, the "License-Level Reimbursement Policy," for certain self- and fully-insured Oxford and United plans. United has agreed not to apply any tiered

reimbursement policy, including the License-Level Reimbursement Policy, to fully-insured ERISA Oxford and United plans sitused in New York and NY Non-ERISA plans, for a minimum of two years after the Settlement receives final approval from the Court. Plaintiffs did not challenge the License-Level Reimbursement Policy, and the Settlement neither prohibits nor condones its continued use by United. Settlement Agmt. § 2.18.

Third, Class Counsel negotiated a reasonable, limited release of claims against United by the Settlement Class that covers challenges to the Tiered Reimbursement Policy and claims of Settlement Class members to which United applied the Tiered Reimbursement Policy. (*Id.* §§ 1.7, 5.1).

### B. Payment of a Portion of Class Counsel's Fees and Expenses

After reaching agreement on the principal terms of the Settlement, Class Counsel negotiated for a separate payment by United of up to $3.35 million to Class Counsel for attorneys' fees and expenses, subject to Court approval. *Id.* §§ 1.4, 6.1. (That amount includes any service awards for the Class Representatives that the Court may award.) United has agreed not to oppose this fee request of up to $3.35 million, and to pay the fee request, separate and apart from the $10 million common fund. *Id.* § 6.1. After payment of $158,662.55 in expenses, and accounting for anticipated Class Representative service awards, the negotiated fee amount equals about 65% of Class Counsel's lodestar.

To be clear, the attorneys' fees in this case will not be awarded from the $10 million common fund created for the Settlement Class. Thus, regardless of the size of the fee award, Settlement Class members who receive monetary recovery under the terms of the Settlement will receive the same benefit; the fee award does not reduce the recovery to the Settlement Class members.

### C. Incentive Award for Named Plaintiffs

The Settlement also provides for incentive awards to the Class Representatives of up to $20,000 each in recognition of their important contributions to the *Doe* and *Smith* Actions. *Id.* §§ 1.4, 6.1. The Class Representatives participated actively in this long-running litigation, including keeping abreast of developments in the case, and overseeing and meaningfully assisting Class Counsel's efforts both during litigation and during the settlement negotiations, in order to promote and protect the Class's interests. Goldfarb Decl. ¶¶ 36–38. Collectively, the Class Representatives spent well over 100 hours and partook in dozens of phone calls with Class Counsel in all stages of these Actions—specifically, from assisting in the development of the factual allegations, to preparing documents for production and responses to interrogatories, preparing for depositions, and assisting in settlement negotiations. Notably, even before the commencement of the litigation, each of the Class Representatives contacted her respective state regulators to inform them of United's Tiered Reimbursement Policy and to seek the regulators' assistance in vindicating United insureds' ERISA rights. These Class Representatives have fought long and hard for what they and Class Counsel ultimately achieved in the Settlement.

## ARGUMENT

## I. LEGAL STANDARD FOR FEE AND EXPENSE REQUEST

Rule 23 gives the Court authority to award reasonable attorneys' fees and costs to Plaintiffs. *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"). The Settlement Agreement authorizes Plaintiffs to seek up to $3.35 million in attorneys' fees and expenses and Class Representative service awards, all to be paid separately by United rather than out of the common fund. *Id.* §§ 1.4, 6.1.

In cases such as this one, where the parties agree to a fee that is to be paid separately by the Defendant, rather than one that comes out of, and therefore reduces, the Settlement fund available to the class, "the Court's fiduciary role in overseeing the award is greatly reduced" because "the danger of conflicts of interest between attorneys and class members is diminished." *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (citing *Jermyn v. Best Buy Stores, L.P.*, No. 08-CIV-214 CM, 2012 WL 2505644, at *9 (S.D.N.Y. June 27, 2012)).

However, the Court must still assess reasonableness of the fee award. *Id*. In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit set out the factors for the Court to consider in evaluating a proposed fee: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." 209 F.3d at 50 (alterations omitted). Determination of a reasonable fee is committed to the sound discretion of the district court. *Goldberger*, 209 F.3d at 47.

## II. THE REQUESTED AMOUNT FOR FEES AND EXPENSES IS REASONABLE

The Settlement provides the relief that Plaintiffs sought through the litigation. It both provides eligible Settlement Class members with a pro rata payment out of a $10 million common fund and ensures that United will stop applying its Tiered Reimbursement Policy to Settlement Class members' benefit claims going forward for at least two years.

### A. The Requested Fee Is Much Smaller Than Class Counsel's Lodestar and Reasonably Reflects the Time and Labor Invested by Class Counsel (*Goldberger* Factor 1).

Under the lodestar method, the fee and expense request of $3.35 million is eminently reasonable. After payment of expenses of $158,662.55 and the Class Representative service awards approved by the Court, Class Counsel will receive only about 65% of their lodestar.

Goldfarb Decl. ¶¶ 31–32. As shown below, such a "negative multiplier"—a multiplier less than one—strongly supports the conclusion that the requested fee is reasonable.

1. Class Counsel invested significant time and labor in the case.

The relief obtained results directly from Class Counsel's expertise and its investment of significant time and effort in this case. As the attached declarations show, as of this filing Zuckerman lawyers have invested 7,392 hours in the case, Psych-Appeal invested 124.3 hours, and BLW invested 49.4 hours. Goldfarb Decl. ¶¶ 28–30, 34; Bendat Decl. ¶ 18; Leardi Decl. ¶ 6. This investment was necessary to litigate zealously against a well-funded adversary with sophisticated counsel. Among other activities, Class Counsel researched the factual and legal theories; prepared the complaints and amended complaints in both Actions; defeated motions to dismiss in both Actions; aggressively pursued class and merits discovery; analyzed claims data produced by United going back to 2011 for over 110,000 Class Members; litigated numerous discovery disputes both with and without judicial intervention; digested and analyzed thousands of documents; prepared for depositions; and conducted lengthy, arms-length settlement negotiations among four parties (Plaintiffs, United, NYAG, and DOL), which involved extensive analysis of a substantial volume of claims data to evaluate and confirm the scope of the Settlement Class and the risks and benefits of proceeding to trial or negotiating a resolution. Goldfarb Decl. ¶ 26.

In addition, Class Counsel litigated this case efficiently: two Zuckerman associates, Mr. Kumar and Ms. Peyser, were primarily responsible for the day-to-day management of both cases and accounted for most of the total hours expended up until the stay in March 2020. *Id.* ¶ 32.[3]

[3] After one of the associates left Zuckerman and the other went on maternity leave, this matter was primarily handled by one partner, Mr. Goldfarb, and one associate, Mr. Amzallag. *Id.* ¶ 12.

These associates have lower billing rates than partners. Their work was overseen by partners, including the heads of Zuckerman's healthcare practice group, Messrs. Hufford and Cowart.

Given the amount of work necessary to investigate, litigate aggressively for four years, and then negotiate the successful Settlement, Class Counsel's expenditure of time on the case was reasonable. Notably, in approving prior fee awards in different ERISA class cases to Zuckerman, Psych-Appeal, and BLW, many courts—including courts in the Second Circuit—have approved fee awards to these firms. *See, e.g., DeMaria v. Horizon Healthcare Svces., Inc.*, No. 2:11-cv-07298 (WJM), 2016 WL 6089713, *5 n.1 (D.N.J. Oct. 18, 2016) (approving fee award with lodestar multiplier of 4.3 to Zuckerman and BLW); Revised Order Granting Final Approval of Class Settlement, *Meidl v. Aetna Inc.*, 3:15-cv-1319 (JCH) (D. Conn. July 16, 2019), ECF No. 221 (approving fee award to Zuckerman and Psych-Appeal); *Integrated Orthopedics, Inc. v. UnitedHealth Group, et al.*, No. 11-cv-425 (ES) (CLW) (Mar. 4, 2021 D.N.J.) (ECF No. 436) (approving fee request of Zuckerman and BLW, inter alia).

2. Class Counsel's hourly rates are appropriate.

As described above, this case involved complex issues under ERISA, the relatively untested Federal Parity Law, and Rule 23. It was far from a "run-of-the-mill" ERISA benefits case, or even an ordinary class action, and warranted the use of sophisticated counsel with extensive ERISA expertise and experience. Indeed, such expertise was essential to Plaintiffs' success in the matter because Class Counsel developed the legal theories to achieve the sought relief, and then developed and implemented a discovery strategy to obtain the evidence to substantiate those theories. Goldfarb Decl. ¶ 26.

Upon consideration of the geographical area, nature of the services provided, and experience of the lawyers, Class Counsel's rates are appropriate.

Zuckerman. Messrs. Hufford and Cowart, who were principally responsible for developing and overseeing the case, are national leaders in the field of ERISA health care litigation, including class actions, on behalf of patients and providers, and others. Zuckerman has successfully litigated through trial, or settled, significant class actions on behalf of patients and providers that involve behavioral health coverage and reimbursement policies. *Id.* ¶¶ 7–19.

Zuckerman's rates are the same it establishes for its hourly billing arrangements, which account for about 90% of the firm's legal services. The firm sets its rates annually to be competitive nationwide in complex litigation matters. The hourly rates of all of its personnel, including the primary timekeepers—Messrs. Hufford, Cowart, Kumar, and Ms. Peyser in New York City, and Messrs. Goldfarb and Amzallag in Washington, DC—are consistent with rates at peer firms in those markets. Indeed, hundreds of Zuckerman clients regularly pay these rates each month in ongoing matters. *Id.* ¶¶ 8–11. In short, Zuckerman's rates are not "artificial" or inflated in any way, nor are they adjusted to reflect the risks inherent in contingency-based class action work. *Id*.

In addition, in *DeMaria*, *Integrated Orthopedics*, and other cases, courts have approved as reasonable fee applications that take into account Class Counsel's rates. *See, e.g.*, *Weil v. Cigna Health & Life Ins. Co.*, 2:15-cv-07074-MWF-JPR, 2017 WL 3737851, at *4 (¶ 17) (C.D. Cal. Aug. 29, 2017) (approving fee request using Zuckerman rates of Messrs. Hufford, Cowart, and Goldfarb); Final Order and Judgment Approving Settlement and Dismissing Action With Prejudice at ¶ 12, *Craft v. Health Care Serv. Corp.*, 1:14-cv-05853-VMK (N.D. Ill. Feb. 26, 2018), ECF No. 170; *see also* Amended Final Order and Judgment Approving Settlement and Dismissing Action With Prejudice at ¶ 12, *Doe v. Health Care Serv. Corp.*, No. 1:16-cv-04571-VMK (N.D. Ill. Oct. 19, 2018), ECF No. 85; *Des Roches v. California Physicians' Serv.*, Case No. 5:16-cv-

2848 (N.D. Cal.) (ECF No. 272) (approving Zuckerman rates, including those of Messrs. Hufford and Cowart, and Ms. Peyser).

Psych-Appeal. Psych-Appeal is the country's first private law firm exclusively dedicated to mental health insurance advocacy. Psych-Appeal was established in 2011 by Meiram Bendat, who is both an attorney and psychotherapist with an extensive background in mental health parity and advocacy. Psych-Appeal is a small firm, and its contributions to the case primarily concerned the clinical considerations it revolved around and the way those considerations informed the legal strategy and analysis. Psych-Appeal uses hourly billing arrangements for a significant portion of its legal services, which reflect its unique legal-clinical specialty. Bendat Decl. ¶¶ 15–17. Those are the same rates used to calculate the lodestar here.

BLW. BLW, which regularly litigates complex ERISA cases, played a more limited but helpful role in the case. BLW's substantive experience, particularly related to the day-to-day manner in which outpatient treatment occurs and is billed, contributed to Plaintiffs' success in the litigation. Leardi Decl. ¶¶ 3–5, 7. Most of the revenue generated by BLW comes from hourly fee paying clients, not contingent fee litigation. *Id.* at ¶¶ 5, 7. Those are the same rates used to calculate the lodestar here.

3. The lodestar check confirms the reasonableness of the fee request.

The reasonableness of Plaintiffs' request is underscored by the fact that the requested fee represents a "negative" multiplier—that is, the requested fee is less than Class Counsel's lodestar.[4]

[4] As a result, any comparison to the percentage awards in other cases must take into account that those awards generally reflect a significant positive multiplier *over* counsel's lodestar, in addition to the fact that—unlike here—the fees were taken directly from the common fund. *See In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (approving multiplier of 5 in an ERISA class action settlement and finding a median multiplier of 2.1 in 53 ERISA cases). Indeed, "[a] negative lodestar suggests the fees requested are reasonable." *Haas v. Burlington Cty.*, No. 08-cv-1102 (NLH/JS), 2019 WL 413530, at *9 (D.N.J. Jan. 31 2019)

When performing a lodestar check, "current rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998). Using current rates, Class Counsel's lodestar is approximately $4.8 million as of October 2021—an amount substantially greater than the requested fee. Thus, even without analyzing whether a lodestar enhancement is warranted in this case due to the exceptional results obtained and the risks overcome, and ignoring the additional work that Class Counsel will do in this case to pursue final approval of the Settlement and settlement administration, the requested fee will be about 35% *less* than Class Counsel's lodestar incurred to date. Accounting for that ongoing and future work—including drafting the motion for final approval; preparing for and participating in the final approval hearing; and monitoring the implementation of the Settlement—will only decrease the already negative multiplier further.

### B. The Magnitude and Complexities of the Litigation, and Fee Request in Relation to the Settlement, Support the Requested Fee (*Goldberger* Factors 2 and 5).

Courts in this Circuit have consistently recognized that "ERISA concerns a highly specialized area of law" and that "a higher fee is warranted in ERISA cases as compared with some other types of cases." *Colgate-Palmolive*, 36 F. Supp. 3d at 350 (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 147 (S.D.N.Y. 2010) (noting that ERISA law is "still developing" and unsettled compared other bodies of law, increasing risks for plaintiffs' counsel).

(approving negotiated fee amount that was less than 40% of the raw lodestar); *In re Sterling Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002) (supporting a fee of 25% of the recovery where "any reasonable fee would necessarily represent a negative multiplier of the lodestar") (quotation and citation omitted); *In re Initial Public Offering Securities Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (finding "no danger of overcompensation" where the fee request is less than the lodestar).

Where, as here, the attorneys' fees are paid separate and apart from the common fund, courts still consider the reasonableness of the fee award based on what percentage it is of the common fund. *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (finding percentage of the fund method to be the trend in the Second Circuit). Under this approach, the Court assesses whether the fee is a reasonable percentage of the total value of the settlement created for the class. *Goldberger*, 209 F.3d at 47. Here, after the deduction of expenses and requested Class Representative service awards, the requested fee is approximately 31% of the $10 million common fund. This is decidedly reasonable in this Circuit based on fee awards in settlements of a comparable size. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) (approving 33% fee for first $10 million of common settlement fund); *Zeltser v. Merrill Lynch & Co.*, No. 13 Civ. 1531 (FM), 2014 WL 4816134, at *8 (S.D.N.Y. Sept. 23, 2014) (awarding class counsel one-third of $6.9 million common fund, a 5.1 multiplier); *Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (PAC), 2010 WL 1948198, at *8-9 (S.D.N.Y. May 11, 2010) (awarding 33% of $6 million settlement fund); *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143 (ENV) (RER), 2011 WL 754862, at *6 (E.D.N.Y. Feb. 18, 2011) (awarding one-third of $7.675 million settlement fund).

Courts have also found a higher percentage fee award to be appropriate where, as here, the case is actively litigated and discovery is hard-fought. *See Fleisher v. Phoenix Life Ins. Co.*, Civil Action Nos. 11-cv-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *17 (S.D.N.Y. Sept. 9, 2015) (citing Oral Arg. Tr. at 4, *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (S.D.N.Y. May 15, 2014), ECF No. 68) (where court awarded one-third fee for extensively litigated case); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (awarding 33.3% fee and citing other

ERISA cases with fee awards of one-third of a common fund "in appropriate circumstances, and especially when, as here, the fund is not a 'mega' recovery").

Application of these factors in the particular circumstances of this case—the complexities inherent to an ERISA class action, the size of the Settlement fund, the years of hard-fought litigation that preceded the Settlement, the fact that the requested fee is less than Class Counsel's lodestar and will not diminish Settlement Class members' recovery, and the fact that Settlement Class members will receive 55%–70% of the estimated financial impact that the Tiered Reimbursement Policy had on their benefit claims, plus the non-monetary relief obtained for the Settlement Class—strongly supports the fee request. Class Counsel aggressively litigated this case, bringing two separate Actions, developing novel legal theories under a statute that has not been actively litigated (the Federal Parity Law), and marshalling aggressive discovery strategies to obtain the evidence necessary to substantiate those theories. As noted above, Class Counsel issued over a dozen sets of document requests and interrogatories between the two Actions; extensively negotiated the scope of documents and information United would produce in response to the voluminous discovery requests; ultimately received significant information about the Tiered Reimbursement Policy, as well as medical/surgical reimbursement policies; negotiated a comprehensive claims sampling protocol; served well over thirty letters regarding discovery-related matters and disputes; and filed motions to compel in both Actions. Goldfarb Decl. ¶ 26. Such a fulsome and extensive discovery process enabled Class Counsel to evaluate the strength of Plaintiffs' ERISA and Federal Parity Law claims on the merits, as well as analyze the membership and common characteristics of the putative class.

In sum, the facts that the requested fee award: (i) will be paid separately from the common fund; (ii) will be less than 65% of Class Counsel's lodestar; and (iii) will not provide any windfall to Class Counsel, make Plaintiffs' fee request eminently reasonable.

### C. Class Counsel Faced Substantial Risks To Prevail in the Litigation (*Goldberger* Factor 3).

"[L]itigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. At the outset of the case, Class Counsel faced numerous, substantial risks to a successful outcome. First, Class Counsel took the case as a full contingency matter, and thus faced total nonpayment in the event of an unsuccessful outcome. Second, given the novel legal theories in the case, Class Counsel took on significant risk as to whether the evidence would bear out their theory that United's application of its Tiered Reimbursement Policy was sufficiently uniform such that the case was susceptible to class treatment, and whether they would be able to prove on the merits that United violated ERISA and the Federal Parity Law by developing and applying the Tiered Reimbursement Policy. The only way to succeed was to invest the time and resources in discovery on both issues. While Plaintiffs believe that they elicited sufficient evidence to prevail at class certification and at trial, United is represented by highly sophisticated counsel with considerable experience defending class actions and ERISA cases and would have mounted strong opposition both at class certification and on the merits.

Moreover, even if Plaintiffs prevailed at class certification, summary judgment, and ultimately at trial, the Settlement Class would face both procedural and substantive obstacles to obtain either a monetary or reprocessing remedy. United would have opposed class certification, sought immediate review of a certified class by the Court of Appeals under Rule 23(f), and moved for summary judgment by asserting a slew of defenses to support the lawfulness of the Tiered Reimbursement Policy. Then, Plaintiffs would, of course, have to prevail at trial. Assuming a

decision for Plaintiffs on liability, the parties would then litigate the precise form of the remedies sought. Plaintiffs would also have to defeat United's post-trial appeals, which would likely include further attempts to decertify the class and to reverse any judgment or remedy ordered by the Court. Plaintiffs estimate it would take at least an additional two years to obtain a final judgment. Only thereafter, and assuming Plaintiffs continued to prevail on all issues, would Settlement Class members have any chance of obtaining any of the benefits allegedly wrongly withheld because of the Tiered Reimbursement Policy, or any other relief.

Put simply, Class Counsel faced numerous and substantial risks in this litigation, any one of which could deprive Settlement Class members of any relief (and Class Counsel of any fee). These risks further support the reasonableness of the fee request. Moreover, by taking on the case and investing significant time in a matter with an uncertain outcome, Class Counsel forewent the opportunity to apply that time in hourly cases with regular payment at its hourly rates. *Id.* ¶¶ 8–11.

### D. Class Counsel Provided the Class with High Quality Representation (*Goldberger* Factor 4).

"[T]he quality of representation is best measured by results, and . . . such results may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55 (internal quotation marks and citation omitted). Here, through the litigation and Settlement, Class Counsel—who are national leaders in the field of ERISA litigation, including class actions, on behalf of plaintiffs, providers, and others, *see* Goldfarb Decl. ¶¶ 7–19; Bendat Decl. ¶¶ 8–14; Leardi Decl. ¶¶ 3–5—achieved for the more than 110,000 members of the Settlement Class the two primary goals Plaintiffs had at the outset of the case: (i) halting United's use of its Tiered Reimbursement Policy to behavioral health claims; and (ii) significant monetary relief for beneficiaries of United-administered ERISA plans who were subject to the reimbursement reductions caused by the Policy.

1. Discontinuation of United's Tiered Reimbursement Policy is a substantial benefit to Class members.

By bringing and prosecuting this action, Class Counsel pressured United to abandon the Tiered Reimbursement Policy, which it did in July 2019. As part of the Settlement, United has agreed not to reinstate the Tiered Reimbursement Policy for United and Oxford Plans. This is a valuable benefit for Settlement Class members. Their claims for services provided by psychologists and masters' level counselors/social workers—*i.e.*, outpatient psychotherapy services, which make up the vast majority of behavioral health services sought in this country—will no longer be reduced by the percentages set forth in the Tiered Reimbursement Policy. Class Counsel's ability to secure this change is particularly important for this large patient population in the United States who seek outpatient psychotherapy services as part of their behavioral health treatment and may not be well-equipped to challenge this practice on their own. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (recognizing significant value that non-monetary relief added to the settlement).

2. The Settlement also provides significant monetary relief to Class members.

Class Counsel also obtained exceptional monetary relief for Settlement Class members. According to the information in United's records, the Settlement amount of $10 million is, in total, 55%–70% of the estimated financial impact that the Tiered Reimbursement Policy had on Settlement Class members' claims. Goldfarb Decl. ¶ 25. This recovery is particular favorable for the Settlement Class because (i) amounts will be sent to eligible Settlement Class members without them having to do anything, and (ii) any attorneys' fees and expenses and incentive awards approved by the Court, as well as the costs of notice and settlement administration, will *not* come out of the common fund, but will be separately borne by United. The recovery far exceeds approved recoveries of other approved ERISA class action settlements. *See, e.g.*, *In re WorldCom,*

*Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (7% of maximum damages); *In re Syncor ERISA Litig.*, No. 03-2446, ECF No. 309 (C.D. Cal. Oct. 22, 2008) & Dkt. 300 at 9 (8.7% of maximum damages); *In re Fremont Corp. Litig.*, No. 07-2693, ECF No. 277 at 10 & ECF No. 286 (C.D. Cal. Aug. 10, 2011) (10.8% of maximum losses); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (3.2% of maximum damages); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011(24.3% of maximum damages); *Mehling v. N.Y. Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (20% recovery).

Moreover, the Settlement gives Settlement Class members both certainty of recovery and the benefit of the time value of money—by receiving money sooner, Class members can earn interest on, invest, or spend the money, rather than being forced to wait until resolution of the litigation, which would take years, to receive an amount that might well be less or nothing at all. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

3. The scope of the release provided by Class members is reasonable.

As part of the Settlement, Class Counsel also negotiated a reasonable release, pursuant to which Class members will release United from "Released Claims," as that term is defined in the Settlement Agreement. Settlement Agmt. § 5.1. In consideration for the substantial benefits to Settlement Class members, the Settlement will allow United to eliminate legal risks arising from or relating to its Tiered Reimbursement Policy during the class period (except from those who opt out of the Settlement).

### E. Public Policy Considerations Support the Requested Fee (*Goldberger* Factor 6).

"Counsel's fees should reflect the important public policy goal of 'providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.'" *Colgate-*

*Palmolive*, 36 F. Supp. 3d at 352 (quoting *Goldberger*, 209 F.3d at 51). Here, public policy considerations strongly support the fee request. Plaintiffs and Class Counsel brought this case to vindicate the rights of people receiving outpatient psychotherapy who have long been under-reimbursed by United for such services. Office-based psychotherapy is a mainstay of mental health treatment that constitutes 84% of outpatient, office-based mental health claims. Thus, coverage of these services at the proper reimbursement rate helps to ensure that United's members have access to one of the most commonly-sought treatment options for mental health disorders, without being responsible for a larger portion of the out-of-network therapists' billed charges. Accordingly, Class Counsel's four years of work to hold United to ERISA's requirements to reimburse these mental health services properly has resulted in greater access to affordable treatment and recovery of millions of dollars for people whose outpatient psychotherapy claims were under-reimbursed.

This case indisputably served the public interest. Given that the fee request is already a significant discount off of Class Counsel's lodestar, and that Class Counsel's time in this case could have been spent on matters for its billable clients, denying the motion could create a disincentive for Class Counsel, and other similar lawyers and law firms, to invest their time and resources on this type of valuable work. This factor also strongly supports the motion.

### F. Class Members Have Ample Opportunity To Assess This Fee Request.

Courts can also consider the reaction of the class when assessing the reasonableness of a fee requested by class counsel. *Amara v. Cigna Corp.*, Civil No. 3:01-CV-2361 (JBA), 2018 WL 6242496, at *3 (D. Conn. Nov. 29, 2018) (citing cases for proposition that absence of objections by class members to a fee request weighs in favor of approving the request). Consistent with Rule 23(h), this fee petition will be filed and posted to the Settlement-related website well in advance of the deadline for opt-outs and objections. Class Counsel will be prepared to address the reaction

of Settlement Class members to the fee request in the motion for final approval and at the Final Approval Hearing. The notice sent to the Settlement Class, and the information and long-form request posted to the Settlement website, also describe the fee to be requested by Plaintiffs for Class Counsel.

### G. The Fee Request Does Not Benefit Class Counsel at the Expense of the Class.

As the fee will not be awarded from the common fund, this fee request does not present typical concerns about protecting the interest of absent class members because money is not being taken from the Settlement Class. *See McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). When "money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *Id*. Thus, there is no concern here that the fee and expense award constitutes a windfall for Class Counsel at the expense of relief for the Settlement Class. Indeed, the full negotiated request represents only about 65% of Class Counsel's lodestar, and thus cannot constitute a "windfall" under any circumstances.

It also bears mentioning that the fee was negotiated only *after* agreement had been reached on the principle substantive terms of the Settlement. "This tends to eliminate any danger of the amount of attorneys' fees affecting the amount of the class recovery." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 CIV. 5173 (RPP), 2008 WL 1956267, at *15 (S.D.N.Y. May 1, 2008). And here, the recovery by the Settlement Class of 55%–70% of the total amount of underpaid benefits means that the Settlement Class will receive about as much as, if not more than, Class Counsel will receive as a percentage of their lodestar.

## III. THE COURT SHOULD AWARD CLASS COUNSEL THEIR FULL EXPENSES

Counsel for a class action is entitled to reasonable reimbursement of litigation expenses that were incurred in the prosecution of the class action. *Kemp-DeLisser*, 2016 WL 6542707 at *18; *see also* Fed. R. Civ. P. 23(h).

Here, Class Counsel incurred $158,662.55 in expenses as a result of this litigation. *See* Goldfarb Decl. ¶¶ 34–35. As described in the accompanying declarations, these expenses consisted of filing fees, legal research, travel, copying, mailing, and other case administration expenses. There were no exceptional expenditures, but only normal litigation costs. *Id.* ¶ 34.

The negotiated amount United has agreed to pay Class Counsel under the Settlement, $3.35 million, is inclusive of Class Counsel's expenses incurred in litigating the case. The Court should award the full fee request, so that Class Counsel may be reimbursed in full for their out-of-pocket expenditures.

## IV. THE COURT SHOULD GRANT THE REQUESTED SERVICE AWARD FOR THE CLASS REPRESENTATIVES

Incentive awards are designed to compensate named plaintiffs "'for bearing the[] risks of [bringing an action], as well as for as any time [] spent … participating in the litigation as any plaintiff must do.'" *Amara,* 2018 WL 6242496, at *3 (quoting *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012).

The three Class Representatives (Ms. Doe, Ms. Smith, and Ms. Roe) have been diligent, attentive, and unwavering advocates for the interests of the Settlement Class throughout the case. Cases about mental health parity cannot succeed without individuals like the Class Representatives here. Each has dedicated substantial time to the case—collecting and producing documents, preparing responses to interrogatories, preparing for depositions, reviewing pleadings, following case developments, and receiving briefings from counsel to keep abreast of factual and legal

developments so that they could oversee counsel and protect and advance the interests of the putative Class. Collectively, the Class Representatives spent well over 100 hours and participated in dozens of phone calls with Class Counsel in all stages of the case. Notably, even before the commencement of the litigation, each of the Class Representatives contacted their respective state regulators to inform them of United's Tiered Reimbursement Policy and to seek the regulators' assistance in vindicating United insureds' ERISA rights. Most recently, during the settlement negotiations Ms. Doe actively participated in frequent discussions with Class Counsel about the strengths and weaknesses of the claims and the proposed settlement terms. *See* Goldfarb Decl. ¶¶ 36–38. Overall, these Class Representatives have fought long and hard for what they and Class Counsel ultimately achieved in the Settlement.

The Settlement Agreement provides that Class Counsel may seek an award of $20,000 for each Class Representative. Because these Actions and the exceptional outcome for the Settlement Class would not have been possible without their efforts, this is an appropriate award in this case. The negotiated amount United has agreed to pay Class Counsel under the Settlement, $3.35 million, is inclusive of the service awards to the Class Representatives, and thus these amounts will not reduce the amount in the common fund to be allocated to the Settlement Class members who are eligible for a monetary recovery under the Plan of Allocation. The Court should award the full requested amount, so that Class Counsel may give these incentive awards to the Class Representatives for their relentless work.

## CONCLUSION

For the foregoing reasons, the Court should: (i) grant Plaintiffs' request for fees and expenses of $3.35 million as provided in the Settlement Agreement; and (ii) approve an incentive award of $20,000 for each of the Class Representatives, which amounts would also be paid out of the approved fee request.

Respectfully submitted,

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