UNITED STATES DISTRICT COURT
DISTRICT OF PENNSYLVANIA

ADAM CRAWFORD, LUCIA DEPRETTO and MEGAN WAIER BENNETT, Individually and on behalf of the CDI CORPORATION 401(k) Plan,	CIVIL ACTION NO.: 2:20-cv-3317
Plaintiffs,	
v.	
CDI CORPORATION, BOARD OF DIRECTORS OF CDI CORPORATION, CDI CORPORATION 401(K) SAVINGS PLAN COMMITTEE and JOHN DOES 1-30,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR AN ORDER: PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT; CERTIFYING THE PROPOSED SETTLEMENT CLASS; APPOINTING CLASS COUNSEL; APPROVING THE FORM AND MANNER OF CLASS NOTICE; APPOINTING A SETTLEMENT ADMINISTRATOR; AND SCHEDULING A FINAL SETTLEMENT HEARING AND HEARING ON PLAINTIFF'S INCENTIVE AWARD AND ATTORNEY'S FEES AND EXPENSES

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I. INTRODUCTION

After vigorous advocacy and negotiation, Plaintiffs Adam Crawford, Lucia DePretto, and Megan Waier Bennett (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, and Defendants CDI Corporation, Board of Directors of CDI Corporation and CDI Corporation 401(k) Savings Plan Committee (collectively "Defendants) entered into a Class Action Settlement (the "Settlement") to resolve the claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1000 *et seq.* ("ERISA") that Plaintiffs alleged in their Complaint. Defendants agreed to pay $1.8 million in cash to resolve Plaintiffs' claims. The Settlement Agreement, with exhibits, is submitted separately herewith. As required by Prohibited Transaction Exemption 2003-39, 68 FR 75632 (Dec. 31, 2003), an independent fiduciary will review the terms of the proposed Settlement and determine whether to authorize the proposed Settlement on behalf of the Plan, including the release of the Defendants and the Plan fiduciaries from the Released Claims, as that term is defined in the Settlement Agreement.

Plaintiffs respectfully submit this Memorandum of Law in support of their unopposed motion for entry of an Order that will: (i) preliminarily approve the proposed Settlement, which provides on behalf of the Class the $1.8 million Settlement Amount[1]; (ii) certify the proposed Class for settlement purposes; (iii) establish a plan for providing notice of the Settlement to Class Members; (iv) appoint Class Counsel; (v) approve the Settling Parties' selection of a Settlement Administrator; and (vi) set a hearing for consideration of final approval of the Settlement and consideration of Lead Counsel's motion for a Case Contribution Award to Plaintiffs and an award of attorney's fees and reimbursement of litigation expenses.

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[1] All capitalized terms used herein shall have the meaning ascribed to them in the Settlement Agreement dated June 7, 2021 (the "Settlement Agreement") entered between Plaintiffs and Defendants.

The proposed Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class. It provides a substantial and immediate benefit to them in the form of a $1.8 million cash payment. It is the product of vigorous litigation, which included motion practice, exchange and review of key documents, expert damages analyses, and arm's-length negotiations between experienced counsel directed by a seasoned and respected Magistrate Judge. The benefit of the proposed Settlement must be considered in the context of the risk that, in its absence, protracted litigation might lead to little or even no recovery on behalf of the proposed Settlement Class. Defendants mounted a vigorous defense at the early stages of the litigation, and Plaintiffs expect that Defendant would have continued to do so during discovery, trial and, potentially, through appeal.

In negotiating and finalizing the terms of the Settlement Agreement, Class Counsel have concluded that the Settlement is in the best interests of the Settlement Class in light of, among other considerations: (1) the substantial monetary relief afforded to the Settlement Class; (2) the risks and uncertainties of complex litigation such as this action; (3) the expense and length of time necessary to prosecute this action through trial and any subsequent appeals; and (4) the desirability of consummating the Settlement Agreement promptly in order to provide effective relief to the Settlement Class. In light of these factors, and as discussed further below, Plaintiffs believe that the proposed Settlement is fair and reasonable, and thus, merits preliminary approval.

II. LITIGATION AND SETTLEMENT HISTORY

A. Description of the Action

On July 7, 2020, Plaintiffs commenced this action by filing a class action complaint in this Court. (ECF No. 1.) Plaintiffs filed an Amended Complaint on November 17, 2020. (ECF No. 16) Plaintiffs are participants in the CDI Corporation 401(k) Savings Plan (the "Plan"). The Plan has hundreds of millions in assets under management for their thousands of participants, and they

provide the primary source of retirement income for many employees of CDI Corporation. (Amended Complaint at ¶¶ 2, 6, 67.) Defendants serve as the Plan's administrator and/or named fiduciaries pursuant to 29 U.S.C. § 1002(16)(A)(i). (*Id.* ¶ 13.) Defendants have all discretionary authority to administer the Plan, including the discretionary authority to select the Plan's investment options and service providers. (*Id.* ¶ 14, 15.)

Defendants retained Great-West Trust Company, LLC ("Great-West") to assist Defendants in their role in selecting and monitoring the Plan's investment options. (*Id.* ¶ 36.) Great-West is also responsible to invest cash received, interest, and dividend income. (*Id.*) Various funds were available to Plan participants for investment during the Class Period, including funds from American Funds, Blackrock, Inc., Columbia Threadneedle Investments, Great-West Funds, Inc., Invesco, John Hancock Investment Management, J.P. Morgan Funds, Franklin Templeton Investments, Putnam Investments, and The Vanguard Group. (*Id.* ¶ 41.)

Plaintiffs allege that Defendants breached fiduciary duties owed to the Plan and the Plan's participants under ERISA by failing to objectively and adequately review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost and performance, and maintaining certain funds in the Plan despite the availability of identical or similar investment options with lower costs and/or better performance histories. Additionally, Plaintiffs allege that Defendants failed to select the lowest-cost share class for many of the funds within the Plan. (*Id.* ¶7). The Amended Complaint sought equitable and compensatory relief pursuant to ERISA §§ 409 and 502, specifically the restoration by Defendants to the Plan of losses caused by Defendant's alleged breaches of fiduciary duties. The Amended Complaint also sought costs and attorneys' fees pursuant to ERISA § 502(g) and the common fund doctrine.

On September 28, 2020, Defendants filed their Motion to Dismiss for Lack of Jurisdiction. (ECF No. 8) On October 27, 2020, Plaintiffs filed their Response in Opposition to Motion to Dismiss for Lack of Jurisdiction in Part for Lack of Standing (ECF No. 11). On November 5, 2020, the Court issued an Order that denied Defendants' motion for partial dismissal of Plaintiffs' claims. (ECF No. 13) On December 7, 2020, Defendants filed an answer to the Amended Complaint with Affirmative Defenses. (ECF No. 18) On December 16, 2020, Defendants filed their second Motion for Partial Dismissal of Plaintiffs' Claims. (ECF No. 22) The Settling Parties subsequently entered into a stay of proceedings in an attempt to resolve the matter. (ECF No. 31).

B. Discovery

Following Defendants' Answer, Defendants provided Plaintiffs with extensive relevant documentation, including meeting minutes and materials considered by the benefit of the investment committees, and copies of information made available to the Plan's participants concerning investment options. Plaintiffs retained an expert who meticulously reviewed the materials and calculated a damage estimate based on Plaintiffs' claims in the case.

C. Settlement Negotiations

After Plaintiffs and their expert prepared detailed damage analysis and the parties submitted detailed settlement conference statements, which included arguments and analyses of the strengths and weaknesses of their respective positions, the parties participated in a settlement conference with Judge Rice remotely on March 1, 2021. The Parties also exchanged mediation statements.

The parties reached an agreement on all material terms of the Settlement at the conclusion of the Settlement Conference. Thereafter, the Settling Parties negotiated the detailed terms of the Settlement Agreement and exhibits thereto, which are presented to the Court with this motion,

memorializing the terms of the class action Settlement for which Plaintiffs now seek preliminary approval. At that time, the Settling Parties also negotiated the Notice plan.

Prior to agreeing to the Settlement, Plaintiffs fully developed the legal and factual record as a result of thorough pre-Complaint investigation; briefing the motions for partial to dismissal, reviewing thousands of pages of documents produced by Defendants, and negotiations with Defendants.

The proposed Settlement was agreed upon after extensive arm's-length negotiations between experienced counsel, including a remote mediation conducted by a seasoned and well-respected Magistrate Judge. If approved, the Settlement will provide a substantial monetary benefit to the Settlement Class totaling $1,800,000.

D. The Settlement Agreement

1. Benefits to the Settlement Class

The Settlement Agreement establishes a Settlement Amount of $1.8 million as compensation to the Settlement Class to compensate them for the Defendants' alleged fiduciary breaches.

Under the terms of the Settlement Agreement, within twenty-one (21) calendar days after the later of (a) the date the Court enters a Preliminary Approval Order, or (b) the date the Qualified Settlement Fund is established and the Settlement Administrator (or Class Counsel) has furnished to Defendants and/or Defense Counsel in writing the Qualified Settlement Fund name, IRS W-9 Form, and all necessary wiring instructions, then the Transferor shall deposit or cause the insurer(s) to deposit $100,000 into the Qualified Settlement Fund as the first installment of the Gross Settlement Amount. (Settlement Agreement ¶ 4.4). Within ten (10) business days after the Settlement Effective Date, the Transferor shall deposit or cause its insurer(s) to deposit the

remainder of the Gross Settlement Amount, which is one million, seven hundred thousand dollars ($1,700,00), into the Qualified Settlement Fund. (*Id.* ¶ 4.5).

The Settlement Amount will be used to cover all the administrative costs associated with providing notice to the Class and implementing the Settlement; attorney's fees and costs as approved by the Court; the Case Contribution Awards for Plaintiffs as approved by the Court; the Independent Fiduciary's fees; and any applicable taxes. *Id.* ¶ 5.2. Less these amounts, the Net Settlement Amount will be distributed to members of the Settlement Class pursuant to the terms of the Settlement Agreement and the proposed Plan of Allocation, or such other allocation plan as may be ordered by the Court. *Id.* ¶ 5.3. The Settlement Amount will be administered by the Court-approved Settlement Administrator. *Id*. The Settlement Administrator will be responsible for calculating the amounts payable to Members of the Settlement Class pursuant to the Plan of Allocation based on information to be provided by the Plans' Recordkeepers or fiduciaries. *Id.*

For Members of the Settlement Class who have an open account in the Plan as of the date of entry of the Final Approval Order, the distribution will be made directly into his or her account. *Id*. ¶ 5.3. For those Members of the Settlement Class who no longer have an account in the Plan as of the time of distribution, the distribution will be made via a tax-qualified distribution process, which will transfer such funds to the Settlement Administrator, to be deposited into a safe-harbor automatic rollover individual retirement accounts as described in 29 C.F.R § 2550.404a-2.

Pursuant to the terms of the Settlement Agreement, the cash payment will be made to Members of the Settlement Class who meet the Class definition, without the need for submitting a claim form or other request for payment. The Settlement Agreement does not provide for a "claims made" Settlement, or for any "reversion" of the Settlement Fund to Defendants or any of their affiliates.

2. Retention of an Independent Fiduciary

Defendants will select an Independent Fiduciary to review and consider the Settlement on behalf of the Plan and determine if the Settlement is reasonable and fair. *Id.* ¶ 2. All costs of the Independent Fiduciary shall be borne by and paid from the Settlement Fund. *Id.* The Settlement Agreement provides that the Independent Fiduciary must provide a report authorizing the Settlement at least 30 days prior to the Fairness Hearing. *Id.* ¶ 2.1.2.

Accordingly, the Settlement will be evaluated by a fiduciary whose sole loyalty is the Settlement Class, and that fiduciary will evaluate the Settlement as to whether it is: (1) reasonable and fair in the light of the litigation risk and the value of the claims; (2) consistent with an arm's length agreement; and (3) not part of an agreement or arrangement to benefit a party in interest. The Independent Fiduciary will also review the Settlement to ensure it is in accordance with Prohibited Transaction Class Exception 2003-39 and to evaluate whether the Settlement does not constitute a prohibited transaction under ERISA § 406(a).

3. Attorney's Fees, Costs and Service Award for Plaintiffs

Plaintiffs' Counsel's fees, litigation costs, and Plaintiffs' Case Contribution Awards will be paid from the Settlement Amount, as the Court may so order. *Id*. ¶ 6.1. Class Counsel will petition the Court for an award of attorney's fees not to exceed thirty percent (30%) of the Settlement Amount, plus costs. *Id.* Class Counsel also will petition the Court for a Case Contribution Award not to exceed $10,000.00 per Plaintiff in recognition of the service of Plaintiffs. *Id*. All requests will be subject to Court approval. *Id.* ¶ 6.2.

4. Release of Claims

Under the terms of the Settlement Agreement, Plaintiffs, the Members of the Settlement Class, and the Plan (by and through the Independent Fiduciary) shall release any and all claims, including all claims asserted in the Amended Complaint, for losses suffered by the Plan, the Plan's

participants and/or beneficiaries, in connection with the Released Claims. *Id.* ¶ 7.1. The full scope of the Settling Parties releases is set forth in the Settlement Agreement at ¶¶ 7.1-7.6.

5. Notice and Objections

Pursuant to Fed. R. Civ. P. 23(e)(1) and (e)(5), the Settlement Agreement provides for notice to the Settlement Class and an opportunity for Members of the Settlement Class to object to approval of the Settlement. (Settlement Agreement at ¶ 2.2.7) The Settling Parties have agreed, subject to Court approval, to a notice plan that will provide the Settlement Class with sufficient information to make an informed decision about whether to object to the proposed Settlement. *Id.* The proposed Settlement Notice procedure includes direct mailing of the Settlement Notice (attached as Exhibit A to the Settlement Agreement), to the last known mailing address of each Member of the Settlement Class, which will be supplied by Defendants. The Notice will inform the Settlement Class of the nature of the action, the litigation background and the terms of the Settlement Agreement, including the definition of the Settlement Class, the relief provided, the intent of Class Counsel to seek fees and costs, the proposed Case Contribution Awards payable to Plaintiffs, and the scope of the release and binding nature of the Settlement on Members of the Settlement Class. It also describes the procedure for objecting to the Settlement and states the date, time and place of the final approval hearing. *Id*. The Settlement Agreement also provides that the Settlement Administrator shall establish a Settlement Website that will contain the Notice, the Settlement Agreement and its exhibits.

III. ARGUMENT

A. The Settlement Class Meets All Requirements of 23(a) and (b)(1) and Should Be Certified

In connection with preliminary approval of the Settlement, Plaintiffs seek class certification for settlement purposes only, and Defendants do not object to, certification of the Settlement Class defined as follows:

> All persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

The "Class Period" is defined as July 7, 2014 through July 7, 2020.

In order to certify the Settlement Class, Plaintiffs must satisfy each of the four elements of Rule 23(a), and one or more of the requirements of Rule 23(b).

1. Rule 23(a) Requirements Are Satisfied Here

In order to certify a class under Rule 23, a named plaintiff must establish that the class meets each of the four requirements of subsection (a) of the Rule which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R Civ. P. 23(a); *see also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140-41 (3d Cir. 1998); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308-09 (3d Cir. 1998) ("*Prudential II*"). These four elements are referred to in the short-hand as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See In re Constar Int'l Inc.*

Sec. Litig., 585 F.3d 774, 780 (3d Cir. 2009). Here, all four elements are satisfied for purposes of certifying the proposed settlement class.

a. 23(a)(1) – "Numerosity"

The proposed Settlement Class is sufficiently numerous. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R Civ. P. 23. In the Third Circuit, where the number of potential class members exceeds forty, the numerosity requirement is generally met. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). Here, according to the 2019 Form 5500 for the Plan, there were more than 4,100 participants in the Plan, making joinder impracticable, and satisfying the numerosity requirement.

b. Rule 23(a)(2) – "Commonality"

The Settlement Class satisfies the commonality requirement. *See generally Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-2551 (2011). Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart*, 131 S. Ct. at 2548, 2551; *see also Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). The commonality inquiry focuses on the defendant's conduct. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"). "Commonality exists when proposed class members challenge the same conduct of the defendants." *Schwartz v. Dana Corp.*, 196 F.R.D. 275, 279 (E.D. Pa. 2000). Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *See Baby Neal*, 43 F.3d at 56; *see also* 1 A. Conte & H. Newberg, *Newberg on Class Actions (Fourth)*, § 3.10 at 272-74 (2002).

In this case, the commonality requirement is readily satisfied because Plaintiffs' allegations arise from the same common nucleus of operative facts, and all members of the proposed Settlement Class will cite the same common evidence to prove their identical claims. Thus, in this case, a "classwide proceeding [will] generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. 338.

Under these circumstances, commonality is easily satisfied. The legal and factual questions linking Members of the Settlement Class are unquestionably related to the resolution of the litigation of every Class Member's claims. Common questions of law and fact are presented about whether Defendant breached its fiduciary duties concerning the Plan's investment options. The many questions of law and fact common to the Class (and the nature of the common evidence used to prove these elements of the claims) include:

(a) Whether Defendants are fiduciaries of the Plan;

(b) Whether Defendants breached their fiduciary duties of loyalty and prudence by engaging in the conduct described in the Amended Complaint;

(c) Whether the Board Defendants failed to adequately monitor the Plan Committee and other fiduciaries to ensure the Plan was being managed in compliance with ERISA;

(d) Whether Defendant's actions proximately caused losses to the Plan and, if so, the appropriate equitable, injunctive and monetary relief to which the Plan is entitled.

These are the core issues in this case and the alleged bases for the harms that unify all Members of the Settlement Class. Defendants' alleged conduct impacted Members of the Settlement Class in precisely the same way. Classes consisting of ERISA plan participants are routinely certified in this and other courts. *See*, *e.g.*, *Glass Dimensions, Inc. v. State St. Bank & Tr. Co.*, 285 F.R.D. 169, 178 (D. Mass. 2012) (commonality requirement satisfied and class certified

where there existed a common question as to whether managers reasonably charged each of the plans a fee of 50% of the income earned from funds' securities lending).

Thus, the commonality requirement is readily satisfied for the Class.

c. Rule 23(a)(3) – "Typicality"

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R Civ. P. 23. Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiffs as representatives of the class. *Baby Neal*, 43 F.3d at 57. A plaintiff's claim is typical of class claims if it challenges the same conduct that would be challenged by the class. *See In re Centocor Secs. Litig. III.*, 1999 WL 54530, at *2 (E.D. Pa. Jan. 27, 1999) (noting that typicality requirement of Rule 23(a)(3) is satisfied where "litigation of the named plaintiffs' claims can reasonably be expected to advance the interests of absent class members"). "This investigation properly focuses on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597-98 (3d Cir. 2009). In other words, typicality is demonstrated where a plaintiff can "show that two issues of law or fact he or she shares in common with the class occupy the same degree of centrality to his or her claims as those of the unnamed class members." *Weiss v. York Hosp.*, 745 F.2d 786, n. 36 (3d Cir. 1984).

Here, Plaintiffs have the same claims for breach of fiduciary duties under ERISA as the other members of the Class. Like other members of the Class, Plaintiffs: (1) seek relief for the same losses, (2) caused by the same alleged breaches of fiduciary duties, (3) affecting the same Plan. Thus, the typicality requirement is satisfied.

d. Rule 23(a)(4) – "Adequacy"

The final requirement of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R Civ. P. 23. To evaluate adequacy, the Court considers whether the named plaintiff has "the ability and the incentive to represent the claims of the class vigorously, that [she has] obtained adequate counsel, and there is no conflict between the [named plaintiff's] claims and those asserted on behalf of the class." *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012).

The core analysis for a plaintiff's conduct is whether the plaintiff has diligently pursued the action and whether the plaintiff has interests antagonistic to those of the Settlement Class. The capabilities and performance of Class Counsel under Rule 23(a)(4) is evaluated based upon factors set forth in Rule 23(g). *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007); *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). Here, adequacy is readily met.

First, Plaintiffs have no interests adverse or "antagonistic" to absent Class Members. Plaintiffs are participants in the Plan and allegedly suffered a *pro rata* loss as a result of Defendants' alleged fiduciary breaches with regard to: (1) failing to objectively and adequately review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost and performance; (2) maintaining certain funds in the Plan despite the availability of identical or similar investment options with lower costs and/or better performance histories; and (3) incurring excessive recordkeeping fees. Like other members of the Class, the proposed Class Representatives seek to maximize the recovery to the Class through this litigation.

As such, Plaintiffs' interests are perfectly aligned with the interests of the absent Class Members, thereby meeting the first adequacy prong.

Second, as discussed below, the proposed Class Representatives have retained counsel with significant experience in federal class actions, and in particular, ERISA cases. *See Bredbenner v. Liberty Travel, Inc.*, No. 09-CV-905, 2010 WL 11693610, at *4 (D.N.J. Nov. 19, 2010) ("Plaintiffs' attorneys are qualified, experienced, and generally able to conduct the proposed litigation…"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 519 (D.N.J. 1997) ("Plaintiffs' team of legal counsel is comprised of preeminent class action attorneys from throughout the country, many of whom have been qualified as lead counsel in other nationwide class actions.") In sum, Plaintiffs are adequate representatives of the proposed Settlement Class.

2. <u>The Proposed Settlement Class Should Be Certified Under Rule 23(b)</u>

Fed. R. Civ. P. 23(b)(1)(B) provides that a class may be certified where "prosecuting separate actions by … individual class members would create a risk of … adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). As the Supreme Court has explained, Rule 23(b)(1)(B) applies where "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). "Classic examples" of suits appropriate for class resolution under Rule 23(b)(1)(B) classes include "actions charging a breach of trust by a … fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust." *Id.*

Not surprisingly, therefore, "[i]n light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *See Hochstadt*, 708 F. Supp. 2d at 105–06 ("Given that the present case involves an ERISA § 502(a)(2) claim brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class member, I find that Rule 23(b)(1)(B) is clearly satisfied."); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (same); *Evans v. Akers*, No. 04–11380–WGY, slip op. at 4 (D. Mass. Oct. 7, 2009) (finding class certification appropriate under Rule 23(b)(1)(B) because "[g]iven the Plan-representative nature of Named Plaintiffs' breach of fiduciary duty claims, there is a risk that failure to certify the Settlement Class would leave future plaintiffs without relief"); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 174 (E.D. Pa. 2009) ("because of the unique and representative nature of an ERISA § 502(a)(2) suit, numerous courts have held class certification proper pursuant to Rule 23(b)(1)(B)"); *In re Nortel Networks Corp. ERISA Litig.*, No. 3:03-MD-01537, 2009 WL 3294827, at *15 (M.D. Tenn. Sept. 2, 2009) (finding class certification appropriate under Rule 23(b)(1)(B) because "[i]f individual adjudications would be dispositive of the interests of other Plan Participants, it would be better for those Plan Participants to be members of a class"); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009) (certifying a class under Rule 23(b)(1)(B) because "[g]iven that [named plaintiff]'s claim seeks 'Plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief' "); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. CIV.A. 05-1151SRC, 2009 WL 331426, at *10 (D.N.J. Feb. 10, 2009) (finding class certification appropriate under Rule 23(b)(1)(B) because "[i]f the prudence claims proceeded individually, and one court removed a Plan fiduciary, this would be,

as a practical matter, dispositive of the interests of the other Plan members in that particular regard"); *In re Tyco Int'l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *7 (D.N.H. Aug. 15, 2006) ("the majority of courts have concluded that certification under 23(b)(1)(B) is proper" for ERISA fiduciary class actions).

As the above-cited cases show, the instant ERISA class action is precisely the type of case that Rule 23(b)(1) envisioned. Plaintiffs allege that the Defendants breached its fiduciary duties to the Plan and that the breach similarly affected all Plan participant and beneficiaries. The proposed Class therefore satisfies Rule 23(B)(1)(B).

B. The Settlement Agreement Should Be Preliminarily Approved By the Court

"Compromises of disputed claims are favored by the courts." *Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997) (citing *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910)). Settlement spares the litigants the uncertainty, delay and expense of a trial, while simultaneously reducing the burden on judicial resources. This is particularly true "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Parks v. Portnoff Law Assocs.*, 243 F. Supp. 2d 244, 249 (E.D. Pa. 2003) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("*GM Trucks*")); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (the court "encourage[s] settlement of complex litigation 'that otherwise could linger for years'"). In class actions, the "court plays the important role of protector of the [absentee members'] interests, in a sort of fiduciary capacity." *GM Trucks*, 55 F.3d at 784. The ultimate determination whether a proposed class action settlement warrants approval resides in the Court's discretion. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Here, as discussed more fully below, the proposed

Settlement Agreement is well within the range of reasonableness, comports with Rule 23 and due process considerations, and thus, should be preliminarily approved by the Court.

1. Standards and Procedures for Preliminary Approval

Rule 23(e) provides the following mechanism for settling class actions, including, as here, through a class certified for settlement purposes:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

The Third Circuit has adopted the following four-factor test to determine the preliminary fairness of a class action settlement: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.[2] *GM Trucks*, 55 F.3d at 785.[3] If such factors are

[2] The fourth factor, percentage of the class who object, cannot be assessed until after the Court grants preliminary approval and notice of the Settlement is provided to the Class.
[3] At the final approval stage, courts in the Third Circuit apply a more rigorous nine factor analysis to assess the fairness, adequacy, and reasonableness of the proposed class action settlement. Specifically, the Court would review the settlement in light of the factors established by *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975): (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the

satisfied, the settlement is presumed to be fair. *Id.* Preliminary approval of a proposed settlement is granted unless the proposed settlement is obviously deficient. *See Jones v. Commerce Bancorp, Inc.*, No. 05-5600, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007). Here, as demonstrated below, the Settlement meets all four factors, and the Court should exercise its discretion to preliminarily approve the Settlement.

2. There is a Strong Basis to Conclude That the Settlement is Fair, Reasonable, and Adequate

Plaintiffs' Counsel negotiated the Settlement to meet all the requirements of the class action provisions of Rule 23.

a. <u>Negotiations Occurred at Arm's Length</u>

The Settlement was the result of extensive arm's length negotiations, conducted before a federal Magistrate Judge and by experienced counsel for all the parties, following specific claims-related discovery and contentious litigation. The parties' negotiations included a full day of remote mediation facilitated by an experienced Magistrate Judge, and the exchange of information. A presumption of fairness exists where parties negotiate at arm's length with the assistance of a mediator. *See In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007).

Through the course of negotiations, Class Members were represented by attorneys who have considerable experience and success in prosecuting and settling class actions, have been vigorously prosecuting this and other cases for similar claims for several years, and therefore, were

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amount of discovery completed; (4) the risks of establishing liability; (5) the risk of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005).

well versed in the issues and how to evaluate the claims. Defendants were similarly represented by skilled counsel experienced in class action litigation. Courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. *See*, *e.g.*, *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Alliance to End Repression v. City of Chi.*, 561 F. Supp. 537, 548 (N.D. Ill. 1982) ("Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."). Here, proposed Lead Class Counsel – a law firm that is a nationwide leader in class action litigation, including ERISA litigation– have made a considered judgment based on adequate information derived from meaningful discovery that the Settlement is not only fair and reasonable, but a favorable result for the Class. Class Counsel's beliefs are based on their deep familiarity with the factual and legal issues in this case and the risks associated with continued litigation. This further weighs in favor of the fairness of the settlement. *See* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 11:41 (4th ed. 2010) (noting that courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval").

b. There Has Been Sufficient Discovery

Proposed Class Counsel obtained sufficient discovery to enter into the proposed Settlement on a fully informed basis. Following the Court's denial of Defendants' Motion for Partial Dismissal, the parties entered into settlement discussions, and Plaintiffs requested and obtained significant information from Defendants, which Plaintiffs carefully reviewed. Plaintiffs' counsel's analysis reflected the input of expert consultants, including with respect to losses suffered by the Plan and the Class Members.

Based on this discovery, Class Counsel gained an understanding of both the strengths and weaknesses of Plaintiffs' claims. In particular, liability in this case is contested, and both sides would face considerable risks were the litigation to proceed. In contrast to the complexity, delay, risk, and expense of continued litigation, the proposed Settlement will produce certain, and substantial, recovery for the Settlement Class.

Plaintiffs faced a risk that they would be unable to establish the Defendants' liability, and, if able to do so, they faced the further risk that a trier of fact would find no damages or damages that were less than the $1.8 million achieved by means of the Settlement. In light of these risks, Plaintiffs and their counsel believe the Settlement represents a favorable outcome for the Settlement Class. The Settlement will avoid the cost and expense of continued litigation and will achieve immediate relief for the Settlement Class.

While it is important to remember that "settlement is a compromise," the proposed Settlement is reasonable and confers a substantial benefit on the Settlement Class, particularly given the inherent risks of continued litigation. *See*, *e.g.*, *GM Trucks*, 55 F. 3d at 806. As described above, each Class Member will receive a portion of the Settlement Amount. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 259 (3d Cir. 2009) (noting that a settlement that would eliminate delay and expenses and provides immediate benefit to the settlement class strongly militates in favor of settlement approval).

c. <u>The Proponents of the Settlement Are Experienced in Similar Litigation</u>

As set forth in greater detail below and in the declaration appended to this motion, proposed Class Counsel are highly experienced and skilled in handling complex class actions, and in particular, ERISA class actions. Proposed Class Counsel have served in leadership positions in numerous ERISA class actions and have successfully obtained meaningful recoveries for

retirement plan participants through class litigation. Accordingly, this factor strongly supports granting preliminary approval.

Accordingly, this Circuit's standards for preliminary approval of the settlement have been established. Namely, the Settlement was negotiated at arm's length by counsel highly experienced in similar litigation and following sufficient discovery. Thus, this Court should grant preliminary approval so the proposed Class may be certified for Settlement purposes, Class Counsel may be appointed, and the Class Notice may be mailed. Once the Class Notice process is complete, the Court can then fully evaluate the fairness and adequacy of the Settlement at a Final Approval hearing.

C. The Court Should Appoint Plaintiffs' Counsel as Class Counsel

Fed. R. Civ. P. 23(g) requires a court to appoint class counsel. In appointing class counsel, the Court "must" consider:

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- counsel's knowledge of the applicable law; and
- the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The court "may" also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Proposed Class Counsel, Edelson Lechtzin LLP, satisfy these criteria. This firm's lawyers expended a great deal of time, effort and expense investigating the Defendants' documents, practices, and actions prior to and since filing this action. Further, as set forth in the declaration for Plaintiffs' firm submitted herewith, the proposed firm is highly experienced in ERISA and

other complex class action litigation. *See* Declaration of Eric Lechtzin ("Lechtzin Decl."). It is clear from the firm's track record of success that proposed Class Counsel are highly skilled and knowledgeable concerning ERISA law and class action practice.

As can be seen by their commitment to prosecuting this case thus far as well as their track record, Class Counsel have made the investment and have the experience to represent the Class vigorously. Accordingly, the appointment of the proposed Class Counsel under Rule 23(g) is warranted.

D. The Proposed Class Notice Program Should Be Approved

Under the Settlement Agreement, the Settlement Administrator will send individualized Class Notices to Class Members. Courts have considerable discretion in approving an appropriate notice plan. *See Manual for Complex Litig.* § 21.311 ("Determination of whether a given notification is reasonable under the circumstances of the case is discretionary.") The manner in which these Class Notices are disseminated, as well as their content, must satisfy Rule 23(c)(2) (governing class certification notice), Rule 23(e)(1) (governing settlement notice), and due process. *See Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90-91 (3d Cir. 1985); *Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 (E.D. Pa. 2006). These requirements are adequately satisfied here.

As set forth in the proposed Preliminary Approval Order (attached as Exhibit C to the Settlement Agreement), Class Counsel and the Settlement Administrator will cause the Settlement Class to be notified of the pendency of the Action and the proposed Settlement by mailing the Settlement Notice to all Members of the Settlement Class identified by Defendants based on their records. The Settlement Administrator will also establish a website related to the Settlement in this case and the Notice shall be featured on it. This procedure is designed to reach as many Members

of the Settlement Class as reasonably practicable. The Settlement Notice informs the Settlement Class of the Nature of the Action, the definition of the Class, a detailed summary of the terms of the Settlement (including the relief provided and the scope of the Release), a summary of the proposed Plan of Allocation, the binding nature of the Settlement on Members of the Settlement Class, and the intent of Class Counsel to seek an award of attorney's fees and reimbursement for their litigation expenses. It also informs Members of the Settlement Class how and when to file objections[4] to the proposed Settlement, the motion for attorney's fees and expenses, and/or the request for Plaintiff Case Contribution Awards, and it states the date, time and place of the Settlement hearing.

The form and manner of providing notice to the Class satisfies all the requirements of Rule 23 and due process. A settlement must provide adequate notice to the Settlement Class so that each Member can make an informed choice about whether to object or participate without objection. Rule 23(e)(1) provides that, in the event of a class settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" the proposed settlement. Fed. R. Civ. P. 23(e)(1). To satisfy due process, the notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The notice program set forth in the proposed Preliminary Approval Order meets these standards: it provides the best practicable notice under the circumstances and is reasonably

[4] The Notice does not discuss procedures for submitting a claim, as a claim form is not required. Each Class Member's share of the Net Settlement Fund will be determined by the Settlement Administrator on the basis of records supplied by the Plan's recordkeepers. In addition, as this is a 12(b)(1) class action, there is no provision for opting out of the proposed Class.

calculated to reach substantially all members of the Class. Settlement Notices will be directly mailed to all Members of the Settlement Class identified from Defendants' records and that mailing will be supplemented by publication on the Settlement website. The Proposed Class Notice is clear, accurate, and satisfies due process.

Accordingly, the proposed Class Notice complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See, e.g.*, *Prudential II*, 148 F.3d at 328; 4 Newberg on Class Actions (Fourth) §§ 8.21, 8.39; *Manual for Complex Litig. (Fourth)* §§ 21.311-21.312. The proposed Class Notice should be approved for dissemination to the Class Members.

In addition, Plaintiffs requests that the Court approve Angeion Group, which has extensive experience administering ERISA and other class action settlements, as Settlement Administrator.

E. <u>Proposed Schedule of Events</u>

The schedule of events under the terms of the Settlement Agreement and proposed Preliminary Approval Order is set forth in the table below:

EVENT	DATE	SETTLEMENT AGREEMENT OR ORDER IF APPLICABLE
Motion for Preliminary Approval	June 7, 2021	
Class Counsel to provide Defendant name of financial institution and W-9 for Settlement Account	No later than 10 calendar days after the Preliminary Approval Order is issued	¶ 4.1
Defendant to send CAFA notices	10 calendar days after the filing of Plaintiff's Motion for Preliminary approval	¶ 2.5
Entry of Preliminary Approval Order	To be determined by Court	N/A
Defendant to provide information needed for Class Notice to Settlement Administrator	Within a reasonable time after the Preliminary Approval Order is issued	¶ 8.2

Defendant to pay $100,000 to Class Counsel for initial Settlement Administration Expenses	Within 21 calendar days after the later of the date the Preliminary Approval Order is entered or the date the Qualified Settlement Fund is established with the Settlement Administrator	¶ 4.4
Mailing of Notice to the Settlement Class	By date established in the Preliminary Approval Order Preliminary Approval Order	¶ 2.4
Deadline for Settlement Class Members to Object	14 calendar days prior to the Fairness Hearing	Preliminary Approval Order
Deadline for Settlement Class Members to Request to Appear at Fairness Hearing	14 calendar days prior to the Fairness Hearing	Preliminary Approval Order
Plaintiff's Motion for Final Approval	45 calendar days before the Final Fairness Hearing	¶ 3.1
Plaintiff's Motion for Approval of Fees and Expenses	30 calendar days before the deadline set in the Preliminary Approval Order for Objections to the Settlement	¶ 6.2
Plaintiff's Application for Service Awards	30 calendar days before the deadline set in the Preliminary Approval order for Objections to the Settlement	¶ 6.2
Independent Fiduciary to provide report authorizing the Settlement	30 calendar days prior to the Final Fairness Hearing	¶ 2.1.2
Final Fairness Hearing	At least 120 days after entry of the Preliminary Approval Order	¶ 2.2.6
Entry of Final Approval Order	To be determined by Court	N/A
Complete Settlement Approval	Expiration of applicable appeals period for Final Approval Order	¶ 3.2
Defendant to deposit remaining Settlement Fund of $1,700,000 into the Settlement Account	Within 10 business days after the Settlement Effective Date	¶ 4.5

F. <u>A Final Approval Hearing Should Be Scheduled</u>

Plaintiffs' Counsel moves the Court to schedule a Final Approval Hearing, as contemplated by Rule 23, to determine that final approval of the Settlement is warranted and proper. *See* Fed. R Civ. P. 23. Such hearing will provide a forum to explain, describe or challenge the terms and conditions of the Settlement, including the fairness, adequacy, and reasonableness of the Settlement Agreement. Additionally, Class Counsel will present their application for their fees and reasonable expenses pursuant to Rule 23(h), as well as the Plaintiffs' Case Contribution Awards. To ensure ample time for Class Notices to be mailed and considered by Class Members, the Court should schedule such hearing for a date no earlier than one hundred and twenty (120) days from the date the Court enters an Order granting preliminary approval.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of the Settlement and enter the proposed Preliminary Approval Order.

Respectfully submitted,

Dated: June 7, 2021

EDELSON LECHTZIN LLP

/s/ Eric Lechtzin
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Eric Lechtzin
Eric Lechtzin