UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CHRISTIAN HARDING, PATRICIA GIRAMMA, RONALD WELCH and LISA HARBOUR, individually and on behalf of all others similarly situated,	)	**CIVIL ACTION NO.: 1:20-cv-12216-LTS**
Plaintiffs,	)	
v.	)	
SOUTHCOAST HOSPITALS GROUP, INC., THE BOARD OF DIRECTORS OF SOUTHCOAST HOSPITALS GROUP, INC., THE INVESTMENT COMMITTEE OF SOUTHCOAST HOSPITALS GROUP and JOHN DOES 1-30.	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS CHRISTIAN HARDING, PATRICIA GIRAMMA, RONALD WELCH, AND LISA HARBOUR'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF CLASS NOTICE, APPROVAL OF PLAN OF ALLOCATION, AND SCHEDULING OF A FAIRNESS HEARING

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I. INTRODUCTION

Christian Harding, Patricia Giramma, Ronald Welch, and Lisa Harbour (together, "Named Plaintiffs" or "Plaintiffs"), participants in the Southcoast Health System Partnership Plan (the "Plan"), commenced this action against Defendants[1] (together with Plaintiffs, the "Parties") on December 14, 2020 with a filing of the Complaint (ECF No. 1).[2] The Complaint alleged Defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by failing to prudently manage the Plan. Defendants strongly dispute Plaintiffs' allegations, maintain that the Plan has been prudently managed throughout the relevant period, and deny liability for the alleged ERISA violations.

On August 12, 2021, the Parties participated in a mediation via Zoom videoconference before David Geronemus, a neutral, third-party private mediator with extensive experience mediating ERISA class actions. The Parties agreed to a Settlement of $2,000,000.00. Over the last few weeks, the Parties have negotiated the specific terms of the Settlement Agreement and present it now for the Court's preliminary approval.[3]

Plaintiffs respectfully move this Court for an Order (1) granting preliminary approval to the proposed Settlement Agreement, (2) preliminarily certifying the Settlement Class, (3) approving the form and manner of providing notice of the Settlement to the proposed Settlement Class (the "Notice Plan"), and (4) scheduling of a Fairness Hearing.

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[1] "Defendants" herein refers to Southcoast Hospital Group, Inc. ("Southcoast"), The Board of Directors of Southcoast Hospitals Group, Inc. and its members (the "Board"), and The Investment Committee of Southcoast Hospitals Group and its members (the "Committee").

[2] The full procedural history of this matter is recounted in the Declaration of Mark K. Gyandoh ("Gyandoh Decl."), filed contemporaneously with this memorandum, at ¶¶ 3-9.

[3] The Settlement Agreement itself, attached to the Gyandoh Decl. as Exhibit 1, has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); D (Final Order); and E (CAFA Notice). Undefined terms herein shall have the meaning ascribed to them in the Settlement Agreement.

II. THE PROPOSED SETTLEMENT

The Settlement covers a Settlement Class defined as:

> all persons who participated in the Plan at any time during the Class Period [December 14, 2014 through the date of the Preliminary Approval Order], 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 Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

Settlement Agreement, ¶ 1.42.

The Settlement provides Defendants and/or their insurer will pay $2,000,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation.[4] *See* Gyandoh Decl., ¶ 19. In exchange, Plaintiffs and the Plan will dismiss their claims, as set forth more fully in the Settlement Agreement. The Settlement Agreement also provides for the payment of attorneys' fees of no more than $666,666.67, which is 33 1/3% of the Gross Settlement Amount and Plaintiffs' Case Contribution Awards of no more than $10,000 per Plaintiff, both of which are subject to Court approval. *See* Gyandoh Decl., ¶ 23.

III. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. Legal Standard

Settlement approval involves two stages: "First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 106-07 (D. Mass. 2010) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 13.14 (2004)). At the preliminary approval stage, courts "examine the proposed settlement for

[4] The Plan of Allocation, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Plan participant's pro rata distribution based upon the individual's balances in the Plan during the Class Period. *See also* Gyandoh Decl., ¶ 22.

obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). "Approval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard.

Further, Rule 23(e) states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." FED. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval state in determining whether a settlement is "fair, reasonable, and adequate":

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3) [5]; and

[5] Rule 23(e)(3) requires that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3). There are no agreements, other than the Settlement itself, in this case.

> (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2).

B. The Settlement Is Within the Range of Fairness, Reasonableness, and Adequacy and Also Satisfies FED. R. CIV. P. 23(e)(2)

As discussed below: (1) the settlement was negotiated at arm's length by experienced counsel with the assistance of an experienced mediator after significant litigation, (2) the class was adequately represented by the Named Plaintiffs and Class Counsel, and (3) the relief provided is adequate and equitable to all class members. Accordingly, this Court should grant preliminary approval of the Settlement and authorize notice to the Settlement Class.

1. The Settlement Is the Product of Arm's-Length Negotiations Between Experienced Counsel

A proposed class action settlement enjoys a "presumption in favor of the settlement" if "sufficient discovery has been provided and the parties have bargained at arms-length." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). The proposed Settlement here is the result of lengthy and complex arms-length negotiations between the Parties under the auspices of David Geronemus, Esquire, a neutral, third-party private mediator with extensive experience mediating ERISA class actions. *See Briana Wright v. S. New Hampshire Univ.*, 2021 WL 1617145, at *7 (D.N.H. Apr. 26, 2021) ("The court notes, first, that the presumption of reasonableness applies here. The record establishes that counsel for the parties negotiated the Agreement at arm's length, at times with the assistance of an experienced and neutral mediator, following a thorough investigation and mutual exchange of evidence."); *Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) ("[T]he participation of an experienced mediator . . . also supports the Court's finding that the Settlement is fair, reasonable, and adequate.").

Plaintiffs also had sufficient information to make an informed decision prior to settling. On August 7, 2020, before filing suit, Plaintiffs requested numerous documents and information from Defendants pursuant to Section 104(b)(4) of ERISA. Gyandoh Decl. ¶ 10. Additionally, the Parties exchanged mediation statements and additional documents, setting forth the evidence assembled by the Parties as part of the mediation process. Gyandoh Decl. ¶ 12. In light of the forgoing, the Parties were clearly able "to make an intelligent judgment about settlement." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015).[6]

2. The Proposed Class Was Adequately Represented By the Named Plaintiffs and Class Counsel

To appoint Class Counsel, Rule 23(g) directs consideration of: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class." FED. R. CIV. P. 23(g)(1)(A)(i)-(iv). "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." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000).

Proposed Class Counsel Capozzi Adler, P.C. has done substantial work, has experience litigating ERISA class actions and complex matters, and has committed ample resources to

[6] Courts in the First Circuit have approved settlements at similar stages. *See Price v. Eaton Vance Corp.*, No. 18-12098, (ECF No. 32), at 21 (D. Mass. May 6, 2019) (memorandum supporting successful preliminary approval motion, noting that motion to dismiss was pending at the time of settlement); *Curtis v. Scholarship Storage Inc.*, 2016 WL 3072247, at *2 (D. Me. May 31, 2016) (approving settlement entered into 16 months after filing of complaint, "before many of the complex issues were raised"); *In re P.R. Cabotage Antitrust Litig.*, 269 F.R.D. 125, 141 (D.P.R. 2010) (noting that the parties were sufficiently informed by "limited discovery" that occurred prior to settlement).

prosecute this matter. *See* Gyandoh Decl. ¶¶ 26-34. Accordingly, they are well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement. Thus, Plaintiffs retained highly qualified and experienced attorneys in satisfaction of Rules 23(a) and 23(g).

Additionally, the Settlement Class Members also have been adequately represented by the Named Plaintiffs. Each of the Named Plaintiffs was a former employee of Southcoast and participant in the Plan. *See* Declaration of Christian Harding ("Harding Decl."), ¶ 4; Declaration of Patricia Giramma ("Giramma Decl."), ¶ 4; Declaration of Ronald Welch ("Welch Decl."), ¶ 4; Declaration of Lisa Harbour ("Harbour Decl."), ¶ 4. Throughout the course of this litigation, each of the Named Plaintiffs has regularly conferred with their attorneys at Capozzi Adler regarding litigation updates and the events surrounding the settlement negotiations, and will continue to discuss in more detail the proposed Settlement. Harding Decl., ¶ 6; Giramma Decl., ¶ 6; Welch Decl., ¶ 6; Harbour Decl., ¶ 6. The Named Plaintiffs have also gathered relevant documents and provided them to their attorneys throughout the litigation. *Id.* Each of the Named Plaintiffs was fully prepared to present and testify at a deposition and trial, if necessary. *Id.*

3. The Settlement Provides Significant Relief to Class Members Through An Effective Distribution Method, and Treats Class Members Equitably

The Settlement Agreement fashions significant relief for the Class. In this action, Plaintiffs alleged three main theories of liability against Defendants. The first theory is that from 2014 to 2018, several of the funds in the Plan had identical lower-cost share counterparts that were never selected by the Plan's fiduciaries. Complaint, ¶¶ 90-100. The second theory is that Defendants caused Plan participants to over-pay for recordkeeping and administrative services. *Id.* at ¶¶ 101-118. The third theory is that many of the Plan's funds had expense ratios that were more expensive by multiples of comparable alternative funds in the same investment style. *Id.* at ¶¶ 119-125.

While Plaintiffs were confident in all three theories of liability, they acknowledge the third theory (the alternative fund theory) has gained only limited traction in the last few years. *See, e.g., Khan et al. v. PTC, Inc. et al*., No. 1:20-cv-11710-WGY, ECF 34 (D. Mass. Mar. 31, 2021) (granting motion to dismiss excessive fee claim with respect to alternative fund allegations). When compared to the likely potential outcomes in this case, the $2 million Settlement is outstanding at this early stage in the litigation.

The settlement represents approximately 45% of the total estimated likely damages of $4.4 million based on Plaintiffs' allegation of Defendants' failure to utilize the lowest cost share classes of funds in the Plan as well as failure to pay per participant recordkeeping costs of no more than $35 per participant. Gyandoh Decl., ¶ 17. Total potential damages inclusive of all three theories would be $9.8 million. Gyandoh Decl., ¶ 15. The Settlement represents 20.4% of this "best-case" but unlikely scenario (at least in this district). *Id.* Any way the Settlement is viewed, it falls squarely within amounts district courts have approved. *See Medoff v. CVS Caremark Corp.*, No. 09-CV-554-JNL, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (noting that 5.33% is "well above the median percentage of settlement recoveries in comparable securities class action cases."); *see also Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (recovery representing 20% of estimated damages in ERISA class action approved); *Brotherston v. Putnam Invs, LLC*, No. 15-13825-WGY (ECF No. 220) (D. Mass. April 29, 2020) (preliminarily approved approximately 28% recovery).[7]

[7] *See, e.g., Hochstadt*, 708 F.Supp.2d at 109 (D. Mass. 2010) (recovery of approximately 27% of conservatively estimated damages was "plainly reasonable"); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614 (ECF No. 185) (C.D. Cal. July 30, 2018) (approving $12 million ERISA 401(k) settlement that represented approximately 25% of estimated total damages of $47 million); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *In re Rite Aid Corp. Sec.*

The recovery as a percentage of damages is particularly substantial as "[a] high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 73 (D. Mass. 2005) (quoting *Reynolds v. Beneficial Nat. Bank*, 288 F.2d 277, 285 (7th Cir. 2002)). Plaintiffs have designed an allocation methodology that fairly and effectively apportions the relief between class members. Gyandoh Decl., ¶ 22. All eligible Settlement Class Members will receive a pro rata share of the Settlement Fund based on their annual account balances. To minimize costs, each current participant's settlement award will be deposited directly into their 403(b) account. The former participants will receive a direct payment by check.

4. The Merits of the Plaintiffs' Case and Complexity and Expense of Further Litigation Weighed In Favor of the Settlement

The costs and risks of litigating this action further favor approval of the Settlement. This case involves factually complex claims involving breach of ERISA's fiduciary duty of prudence. See *Brotherston*, 2016 WL 1397427, at *1. The First Circuit has described ERISA jurisprudence as an "important and complex area of law" that "is neither mature nor uniform. . ." *LaLonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004).

Litig., 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *Medoff v. CVS Caremark Corp*., 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (settlement providing recovery of 5.33% of maximum recoverable damages was well above the median percentage of settlement recoveries in comparable securities class action cases); *Baker v. John Hancock Life Ins. Co.*, No. 1:20-cv-10397-RGS (ECF No. 67) (D. Mass. June 2, 2021) (preliminarily approving $14 million recovery therefore representing estimated 23% of the investment damage); *Eaton Vance*, No. 18-12098 (ECF No. 32), at 12 (May 6, 2019) (recovery represented 23% of calculated likely damages); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (average settlement amounts in securities class actions over the past decade "have ranged from 3% to 7% of the class members' estimated losses") (internal citations and quotations omitted); *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-cv-11249-RWZ (ECF No. 95) (D. Mass. June 25, 2019) (granting preliminary approval in ERISA class action where $6.875 million recovery represented approximately 30% of estimated damages).

Although Plaintiffs believe there is strong support for their claims, there is risk "inherent in taking any litigation to completion." *Turner v. Murphy Oil USA, Inc*., 472 F.Supp.2d 830, 849 (E.D. La. 2007). To prevail on the breach of prudence claims, Plaintiff must prove that Defendants' process for monitoring Plan options was "tainted by failure of effort, competence or loyalty." *Braden v. Wal Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). Plaintiffs would proffer their liability and damages experts, which would undoubtedly be countered by Defendants' proffered experts. Ultimately, a battle of experts presenting differing damages calculations would ensue, and the factfinder "would therefore be faced with competing expert opinions representing very different damage estimates[,] . . . adding further uncertainty." *In re: Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003). If Plaintiffs are unsuccessful in proving any of their claims at trial, the recovery could be diminished or lost. Even if Plaintiffs can establish a fiduciary breach, calculation of ERISA damages is "complex, time-consuming and expensive." *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 460 (S.D.N.Y. 2004). The process can have unexpected results, and the Parties' assessments of the damages would no doubt vary greatly.[8] This complexity favors settlement.

Further, this case is far from trial. Absent a settlement, the Parties would have to incur additional costs and risks associated with trial. Significant discovery, including expert discovery, would be required for both Parties. Any summary judgment or trial judgment would present significant legal questions and lead to costly and time-consuming appeals. Indeed, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an

[8] *See In re Warner Commcns Sec. Litig.*, 618 F.Supp. 735, 744 (S.D.N.Y. 1985); *Milken & Assoc. Sec. Lit.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement and noting that damage calculations are often a "battle of experts at trial, with no guarantee of the outcome"); *Bonime v. Doyle*, 416 F. Supp. 1372 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 555 (2d Cir. 1977) (difficulty in determining damages a factor supporting settlement).

analogous case to an unfavorable verdict for plaintiffs in *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009).

5. The Terms of the Proposed Attorneys' Fees, Including Timing of Payment is Reasonable

The Settlement provides for a proposed maximum of 33 1/3% of the Gross Settlement Amount in attorneys' fees to be paid after the Settlement becomes final. Gyandoh Decl., ¶ 23. This amount is in line with analogous awards in ERISA class action cases and will likely be approved by the Court, so the requirement of Rule 23(e)(2)(C)(ii) will likely be met. *See, e.g., Brotherston, et al. v. Putnam Investments, LLC, et al.*, No. 1:15-cv-13825-WGY (ECF No. 237) (D. Mass. April 6, 2021) (affirming judgment that awarded the class counsel attorneys' fees of 1/3 of the settlement fund); *McDonald v. Edward Jones*, 791 Fed.Appx. 638, 640 (8th Cir. 2020) (affirming judgment that awarded the class counsel attorneys' fees of 1/3 of the settlement fund); *see also Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *6 (M.D.N.C. Sept. 29, 2016); *Spano v. The Boeing Co.*, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015); *Krueger v. Ameriprise Fin.*, 2015 WL 4246879, at *4 (D. Minn. July 13, 2015); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014).

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

In addition to reviewing the substance of the Parties' Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. FED. R. CIV. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. FED.R.CIV. P. 23(c)(2)(B). The Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via U.S. Mail and electronic mail to the extent e-mails are

available. *See* Settlement Agreement at ¶ 2.2.2. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Notices is also reasonable. The Notices include, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions regarding payment to former participants; (6) instructions as to how to object to the Settlement and a date by which Settlement Class Members must object; (7) the date, time, and location of the Final Fairness Hearing; (8) contact information for the Settlement Administrator; (9) information regarding Class Counsel and the amount that Class Counsel will seek in Attorneys' Fees; and (10) information regarding the amount of Case Contribution Awards to be paid from the Gross Settlement Amount. *See* Settlement Agreement, Exhibit A. The Notice is clearly reasonable as it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Hill v. State Street Corp.*, 2015 WL 127728, at *15 (D. Mass. Jan. 8, 2015) (quoting *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir.1974)) (internal citations omitted).

V. CLASS CERTIFICATION IS APPROPRIATE

At the preliminary approval stage, when the court has not previously certified a class, it may preliminarily certify a class for purposes of providing notice, leaving the final certification decision for the subsequent final Fairness Hearing. "To obtain class certification, the plaintiff must establish the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation and demonstrate the action may be maintained under Rule 23(b)(1), (2), or (3)." *Hochstadt*, 708 F.Supp.2d at 102 (citing *Smilow*, 323 F.3d at 38). In this matter, the proposed Settlement Class (identified in the Settlement Agreement and Section II *supra*) satisfies each of the prerequisites of Rule 23(a) as well as at least one of the alternate requirements of Rule 23(b).

A. The Proposed Class Satisfies the Requirement of Rule 23(a)

1. The Class is Sufficiently Numerous

The proposed class "is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This is a "low threshold" that is generally met if the number of class members "exceeds 40[.]" *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (citation omitted); *Glynn v. Maine Oxy-Acetylene Supply Co.*, 2020 WL 6528072, at *3 (D. Me. Nov. 5, 2020) (numerosity prerequisite met when proposed class exceeded 100 members). This threshold is easily met, as the Plan had between 5,000 and 10,000 participants by the end of the Class Period. Gyandoh Decl., ¶ 35.

2. Common Questions of Law and Fact Abound

Plaintiffs must also demonstrate the existence of common questions of law or fact. FED. R. CIV. P. 23(a)(2). Commonality involves "the capacity of a class[-]wide proceeding to generate common *answers* apt to drive resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations omitted). "ERISA actions have sufficient commonality when class members share questions of 'whether Defendants acted as fiduciaries, whether they breached their duties of prudence and loyalty, [and] whether they violated ERISA, as well as whether and to what extent the Plan was injured as a result.'" *Karg et al. v. Transamerica Corp.*, 2020 WL 3400199, at * 2 (N.D. Iowa Mar. 25, 2020). In contrast to the predominance requirement of Rule 23(b)(3), the commonality requirement is a "low hurdle." *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 388 (D. Mass. 2011) (citing *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 258 (D. Mass. 2005)). "It can be met by even a single common legal or factual issue." *Id.*; *Wal-Mart Stores, Inc.*, 564 U.S. at 359) ("[E]ven a single common question will do.") (alteration and quotation marks omitted).

"In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *Cunningham et al. v. Cornell Univ. et al.*, 2019 WL 275827, at *5 (S.D.N.Y. Jan. 22, 2019)(citing *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004)); *Tracey v. Mass. Inst. Tech.*, 2018 WL 5114167, at * 4 (D. Mass. Oct. 19, 2018) ("ERISA breach of fiduciary duty actions relate to the duties owed to the Plan as a whole, commonality is quite likely to be satisfied."); *Hochstadt*, 708 F.Supp.2d at 102-03 (same).

Here, Defendants owed duties to the Plan, and Plaintiffs' claims all concern Plan-level decisions regarding administrative fees and investment options. Moreover, all Plan participants were subject to the Committee's decisions about selection of Plan investments. *See Wal-Mart*, 564 U.S. at 355; *Hochstadt*, 708 F.Supp.2d at 102-03 (commonality requirement satisfied in ERISA action where "there are a number of common issues of fact and law that the Settlement Class members bear upon in establishing the Defendants' liability, as well as Plaintiffs' entitlement to damages"); *Glynn*, 2020 WL 6528072, at *3 (same).

3. Plaintiffs' Claims are Typical of the Class

Typicality is met where the representative's claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory." *Garcia-Rubiera*, 570 F.3d at 460 (citation omitted). "The primary focus of the typicality analysis is the functional 'question of whether the putative class representative can fairly and adequately pursue the interests of the absent class members without being sidetracked by her own particular concerns.'" *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008) (quoting *Swack*, 230 F.R.D. at 264). "Typicality, as with commonality, does not require that all putative class members share identical claims." *Garcia v. E.J. Amusements of N.H., Inc.*, 98 F.

Supp. 3d 277, 289 (D. Mass. 2015)(citation omitted). Variation in damages among class members "is of little consequence to the typicality determination when the common issue of liability is shared." *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 78 (D. Mass. 2005) (quoting *In re Lorazepam & Clorazepate Antitrust Litig*., 202 F.R.D. 12, 28 (D.D.C. 2001)).

Because ERISA § 502(a)(2) claims are inherently representative claims, any participant's claim is necessarily typical of the claims of the class, since every participant is asserting *the Plan's* claim. Courts routinely find a participant's fiduciary breach claim to be typical of the claims of all participants in a plan. *See Velazquez,* No. 1:17-cv-11249 (ECF No. 94), at *2 (Plaintiffs are typical of other class members, as they participated in the plans during the relevant class period and were treated consistently with other class members); *Moitoso, et al. v. FMR LLC, et al*., No. 1:18-cv-12122-WGY, ECF No. 83 at * 3 (D. Mass. May 7, 2019) (same); *In re Tyco Intern., LTD.*, 2006 WL 2349338 at * 5 (D. Mass. Aug. 15, 2006) ("the class representatives' claims are based on the same legal theory that members of the putative class will use […] This supports a finding of typicality."); *Tracey*, 2018 WL 5114167, at *4 (finding typicality requirement is met when "plaintiffs have shown that their claims relate to defendants' conduct of the Plan").[9] Here, Plaintiffs' allegations of fiduciary breaches arising out of Defendants' management and administration of the Plan are no exception.

4. Plaintiffs and Class Counsel Will Adequately Protect the Interests of the Class

[9] Because the commonality and typicality requirements "tend to merge," *Wal-Mart,* 564 U.S. at 349 n.5, Plaintiff's claims are typical for many of the same reasons that commonality is satisfied. In short, because Defendants' actions were directed to and affected the Plan as a whole, without distinction among individual participants, the claims of all members of the proposed Class arise out of the same conduct. Likewise, Plaintiffs and all members of the proposed Class are bringing the same claims under the same legal and remedial theory.

"[T]he representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). This element is satisfied if "1) there exists no conflict between the interests of the Named Plaintiffs and the class members and 2) counsel chosen by the Named Plaintiffs are qualified and able to litigate the claims vigorously." *S. States Police Benevolent Ass'n v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 88 (D. Mass. 2007)(Gorton, J.)(citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).

i. Plaintiffs Have No Conflicts With Other Members of the Class and Will Vigorously Prosecute This Action On Behalf of the Class

Plaintiffs' interests are tightly aligned with all other members of the proposed Class because of the very nature of the claims that Plaintiffs bring. Plaintiffs, acting in a representative capacity, seek to enforce the duties that Defendants owed to the Plan and to recover damages and equitable relief due. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).

An adequate representative needs only a basic understanding of the claims and a willingness to participate in the case. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Here, all of the Plaintiffs understand the nature of their claims and duties as class representatives to vigorously prosecute this case through its conclusion. *See* Harding Decl. ¶¶ 5-6; Giramma Decl. ¶¶ 5-6; Welch Decl. ¶¶ 5-6; Harbour Decl. ¶¶ 5-6. As explained above in Section III.B.2, to date, Plaintiffs have met and exceeded that duty by, *inter alia*: (a) providing information to counsel prior to the initiation of the action and reviewing of the Complaint; (b) providing documents and assisting counsel in discovery matters; and (c) maintaining communication with counsel and monitoring the progress of the litigation. *See* Harding Decl. ¶ 6; Giramma Decl. ¶ 6; Welch Decl. ¶ 6; Harbour Decl. ¶¶ 6. Moreover, had this litigation continued, Plaintiffs were committed to seeing this action through to the end and undertaking any responsibilities required of them as class

representatives, including continuing to assist counsel in discovery matters, participating in any mediation or other proceedings, and testifying at depositions and at trial. *See* Harding Decl. ¶ 6; Giramma Decl. ¶ 6; Welch Decl. ¶ 6; Harbour Decl. ¶¶ 6. Accordingly, Plaintiffs are adequate representatives of the proposed Class.

ii. Plaintiffs' Counsel Have No Conflicts With the Class, Are Qualified and Experienced, and Will Vigorously Prosecute This Action for the Class

Rule 23(g) complements the requirement of Rule 23(a) that class representatives adequately represent the interests of class members by focusing on the qualifications of class counsel. Rule 23(g)(1)(A) instructs the court to consider, among other things: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A). Rule 23(g) notes a 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).

Indeed, here Capozzi Adler satisfies all prerequisites. *First*, Capozzi Adler has done significant work identifying, investigating, and prosecuting potential claims in this action. Gyandoh Decl., ¶¶ 3-5. It began its investigation of claims several months before filing suit. *Id.* at ¶ 3. This work included requesting documents from the Company pursuant to ERISA § 104(b)(4) and engaging consulting experts. *Id.* at ¶¶ 10. *Second*, Capozzi Adler and the undersigned counsel have significant experience handling ERISA matters and have knowledge of the applicable law. *Id.* at ¶¶ 25-33. The undersigned is the chair of the Fiduciary Practice Group at Capozzi Adler and has lead the litigation of this action. *Id.* at ¶ 26. He has been litigating

ERISA fiduciary breach lawsuits for 16 plus years and he and Capozzi Adler currently serve as counsel in over two dozen fiduciary breach actions across the country. *Id*. at ¶¶ 26, 30. Capozzi Adler was recently appointed interim or co-lead counsel in several actions pending across the country and has defeated numerous motions to dismiss and settled analogous cases across the country. *Id*. at ¶¶ 30. Based on the foregoing, Capozzi Adler has the requisite qualifications to lead this litigation. *Third*, Capozzi Adler will commit the necessary resources to represent the class. With three office locations, the firm has been successfully serving clients for over 23 years offering a full range of legal services. *Id.* at ¶ 34.

Accordingly, appointment of Capozzi Adler as Class Counsel is warranted. *See Karg*, 2020 WL 3400199, at * 3 (appointing class counsel where "plaintiffs' counsel submitted documentation of their own qualifications and commitment.")

B. The Class May Be Properly Certified Under Rule 23(b)(1)

Rule 23(b)(1) states that certification is appropriate if "prosecuting separate actions by or against individual class members would create a risk of:"

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) 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). "Most ERISA class action cases are certified under Rule 23(b)(1)." *Sacerdote v. New York Univ.*, 2018 WL 840364, *6 (S.D.N.Y. Feb. 13, 2018); *Hochstadt*, 708 F.Supp.2d at 105 ("Rule 23(b)(1) is appropriate in this case because the ERISA Actions involve

Defendants' Plan-wide conduct and relief is sought on behalf of the Plan as a whole under ERISA § 502(a)(2).").[10]

1. Certification Under Rule 23(b)(1)(B) Is Appropriate

Many courts have relied upon Rule 23(b)(1)(B) in certifying classes in analogous cases because it is particularly suited for cases alleging the breach of fiduciary obligations to plaintiffs.[11] Indeed, the Advisory Committee Notes to Rule 23 explicitly instruct that certification under Rule 23(b)(1)(B) is appropriate in "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." FED. R. CIV. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment); *see also Clark v. Duke Univ.*, 2018 WL 1801946, at *9 (M.D.N.C. April 13, 2018) (class certified under Rule 23(b)(1)(B) when plaintiffs "established that individual adjudications would be dispositive of the interests of the other participants not parties to the individual adjudications, because the claims

[10] Plaintiffs only address certification under Rule 23(b)(1) because certification is proper under that subpart of Rule 23, and Rule 23(b)(3) is intended to address "situations in which class action treatment is not as clearly called for as it is in Rule 23(b)(1)..." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Because the class may be certified under Rule 23(b)(1), however, the Court need not reach the propriety of certification under any other subpart of Rule 23.

[11] *See e.g.*, *Tracey v. Mass. Inst. Tech.*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825, ECF No. 88 (D. Mass. Dec. 13, 2016); *Vellali v. Yale Univ.*, 2019 WL 5204456 (D. Conn. Sept. 24, 2019); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Cunningham v. Cornell Univ.*, 1:16-cv-6525, ECF No. 219 (S.D.N.Y. Jan. 22, 2019); *Cates v. The Trustees of Columbia Univ.*, 1:16-cv-06524, ECF No. 210 (S.D.N.Y. Nov. 13, 2018); *Cassell v. Vanderbilt Univ.*, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Fuller v. SunTrust Banks, Inc.*, 2018 WL 3949698, at *1 (N.D. Ga. June 27, 2018); *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *Moreno v. Deutsche Bank Am. Holding Corp.*, 2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017); *Bowers v. BB&T Corp.*, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017); *Cryer v. Franklin Templeton Res., Inc.*, 2017 WL 4023149 (N.D. Cal. July 26, 2017); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678 (C.D. Cal. June 15, 2017); *Rozo v. Principal Life Ins. Co.*, 2017 WL 2292834 (S.D. Iowa May 12, 2017); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145 (S.D.N.Y. 2017).

concern the same actions in managing the Plan and because damages are owed to the Plan as a whole and not individual plaintiffs").

Here, the Complaint alleges breaches of fiduciary duties under ERISA. Therefore, the only remedy available to participants in the Plan is Plan-wide relief, including the restoration of losses. *See Mass. Mut. Life Ins. Co.*, 473 U.S. at 139-40. Thus, the proposed Class meets the requirements of FED. R. CIV. P. 23(b)(1), given the nature of this action and the relief sought on behalf of the Class. Accordingly, class certification should be granted under Rule 23(b)(1)(B), consistent with the Advisory Committee Notes to Rule 23 and the overwhelming weight of case law.[12]

2. Certification is Also Appropriate Under Section 23(b)(1)(A)

Rule 23(b)(1)(A) "takes in cases where the party is obligated by law to treat the members of the class alike . . . or where the [defendant] must treat all alike as a matter of practical necessity." *Amchem*, 521 U.S. at 614 (citation omitted). In discharging their duties to the Plan, Defendants, as fiduciaries, were obligated to treat all participants (and all class members) alike.

However, once a court determines that a class of participants and beneficiaries seeking recovery from an ERISA fiduciary satisfies subsection (b)(1)(B) of Rule 23, it is not necessary to consider the alternative subsections of Rule 23(b). *See, e.g.*, *Koch v. Dwyer*, No. 98-CV-5519, 2001 WL 289972, at *5 n.2 (S.D.N.Y. Mar. 23, 2001) ("Since class certification is proper under Rule 23(b)(1)(B), it need not be determined whether Plaintiff has also satisfied the requirements of Rule 23(b)(1)(A) or 23(b)(2)."); *Tyco*, 2006 WL 2349338, at *7, n. 1 ("decline[d] to certify the proposed class under either Rule 23(b)(1)(A) or 23(b)(2)").

VI. CONCLUSION

[12] *See* Gyandoh Decl., Exhibit 6 (listing decisions certifying Rule 23(b)(1)(B) classes).

Plaintiffs propose the Fairness Hearing be scheduled at least 120 days after entry of the Preliminary Approval Order in order to provide the Settlement Class with fair notice and the opportunity to be heard, as well as to provide notice to appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711-1715. The submitted proposed preliminary approval order sets forth the proposed schedule of events which are subject to the Court's approval. For the reasons set forth above, the Settlement meets the standard for preliminary approval under Rule 23.

Dated: November 19, 2021

Respectfully submitted,

CAPOZZI ADLER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 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.

By: *Mark K. Gyandoh*
Mark K. Gyandoh, Esq.