IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

KAITY RUILOVA, *et al.*, Plaintiffs, v. YALE-NEW HAVEN HOSPITAL, INC., *et al.*, Defendants.	Civil Action No. 3:22-cv-00111-MPS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs, Kaity Ruilova and Eileen Brannigan (collectively, "Plaintiffs"), on behalf of the proposed Settlement Class and the Yale-New Haven Hospital and Tax Exempt Affiliates Tax Sheltered Annuity Plan (the "Plan"), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Settlement ("Motion"),[1] requesting the Court issue an Order that: (1) preliminarily approves the Class Action Settlement Agreement dated November 17, 2023 ("Settlement Agreement")[2] with Defendants, Yale-New Haven Hospital, Inc., the Board of Trustees of Yale-New Haven Hospital, Inc., the System Investment Committee of Yale New Haven Health Services Corp. and System Affiliates, the Retirement Committee of Yale New Haven Health Services Corp. and System Affiliates (collectively, "Defendants," and together with Plaintiff, the "Parties"); (2) finds that the Class may be maintained through such time as the Court enters an order granting final approval of the Settlement; (3) preliminary approves of the proposed notice plan ("Notice Plan") set forth in the Agreement and proposed Preliminary Approval Order; and (4) schedules a fairness hearing at a date convenient for the Court no sooner than 140 days from the entry of the proposed Preliminary Approval Order.

INTRODUCTION

The Parties have agreed to a proposed settlement (the "Settlement") of this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, for total relief of $1,000,000.00, which will provide a substantial recovery to Class Members in light of

[1]Plaintiffs conferred with Defendants prior to the filing the Motion and confirmed that Defendants do not oppose the Motion.

[2]The Settlement Agreement and its exhibits are attached as Exhibit 1 to the concurrently-filed Declaration of Laurie Rubinow ("Rubinow Declaration"). Terms not otherwise defined herein are also defined in the Agreement.

the relative value and risks associated with the remaining claims at issue as well as the claims dismissed by prior order of the Court. *See* ECF No. 79 (Ruling on Motion to Dismiss), at 2. Specifically, the Court granted Defendants' motion to dismiss Plaintiffs' claims that Defendants failed to appropriately monitor the Plan's investments and retained imprudent investments in the Plan as well as related derivative claims and Plaintiffs' breach of the duty of loyalty claim (collectively, "Dismiss Claims"), and denied Defendants' motion to dismiss Plaintiffs' claims that Defendants caused the Plan to pay excessive recordkeeping and administrative fees. Although Plaintiffs respectfully disagree with the Court's Ruling on Motion to Dismiss insofar as it found the Dismissed Claims insufficiently pled, they respectfully submit the Settlement provides substantial relief based on the Plan's alleged losses with respect to the Dismissed Claims and remaining claims and the likelihood and risks of recovery on each. Accordingly, the Court should find the Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class.

Plaintiffs and Class Counsel vigorously pursued relief on behalf of the Plan, and Defense Counsel vigorously defended against the allegations in the Complaint. The Parties agreed to the Settlement after meaningful motion practice, discovery, and arm's-length negotiations by experienced counsel. Resolving the Class Action at this juncture allows the Parties to avoid continued and costly litigation, which could result in a recovery less than that provided by the Settlement, or none at all. As set forth below, all prerequisites for preliminary approval of the Settlement and certification of the Settlement Class are satisfied. As such, Plaintiffs' Motion should be granted, and notice should be provided to the Settlement Class in accordance with the Notice Plan.

The Court previously certified this action as a class action based upon findings that each

of the prerequisites of Rule 23(a) and 23(b)(1) were met. None of the circumstances that warranted certification at that stage have changed. In fact, the circumstances of the proposed Settlement on behalf of the Plan and its participants and beneficiaries comprising the Settlement Class counsel further for class action treatment, and warrant the entry of an order maintaining certification through the entry of a final judgment.

Since all prerequisites for preliminary approval of the Settlement are satisfied, the Motion should be granted and notice should be provided to members of the Settlement Class in accordance with the proposed Notice Plan. The proposed Notice Plan—which consists of, among other steps: (1) an individual notice to be e-mailed and/or mailed to Settlement Class members at their last known addresses with measures implemented to ensure current addresses are obtained wherever possible; (2) the creation of a dedicated website to share information with Settlement Class members, as well as a toll-free telephone number to which Settlement Class members can direct questions about the Settlement; and (3) reminder notifications to members of the Settlement Class required to submit a claim form[3] who have not done so in advance of the deadline—satisfies the requirements of Rule 23[4] and due process and is consistent with notice plans approved by courts and implemented in similar ERISA action class settlements.

The Court should grant Plaintiffs' Motion, which would enable notice of the Settlement and related applications to be provided to members of the Settlement Class, and schedule a fairness hearing during which the Court may fully and finally determine whether the Settlement and related applications should be finally approved and a final judgment entered.

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[3]As discussed in greater detail below, members of the Settlement Class with active accounts in the Plan will receive settlement proceeds automatically in their Plan accounts, and members of the Settlement Class without active accounts need only submit a short claim form to receive settlement proceeds by way of rollover to another qualified retirement account or by check.

[4]References to a "Rule" refer to the Federal Rules of Civil Procedure, unless otherwise indicated.

BACKGROUND

The Settlement provides that, in exchange for dismissal of the Class Action and a release of claims, Defendants will pay $1,000,000.00 into a Qualified Settlement Fund, to be allocated to Current Participants, Former Participants, Beneficiaries, and Alternate Payees of the Plan pursuant to the Plan of Allocation. *See* Settlement Agreement, §§ 1.37, 4, 5.2–5.4; Rubinow Decl., Ex. B. The Settlement Agreement and the proposed Preliminary Approval Order set forth the Notice Plan and describe Plaintiffs' anticipated requests for payment of Attorneys' Fees and Costs to Class Counsel and for Case Contribution Awards, all of which are subject to the Court's approval. *See* Settlement Agreement, §§ 1.4, 1.9, 6.1; Rubinow Decl., Ex. A. In addition, the Settlement Agreement provides for the approval of the Settlement by an Independent Fiduciary. *See* Settlement Agreement, §§ 1.29, 2.1. The Parties respectfully request that the Court schedule a Fairness Hearing, at or after which the Court will be asked to determine whether the Settlement is fair, reasonable, and adequate, and merits final approval.

Plaintiffs propose the following schedule associated with the Notice Plan and Fairness Hearing:

Event	Reference to [Proposed] Preliminary Approval Order	Proposed Deadline
Preliminary approval hearing		To the extent the Court deems necessary, on a date convenient for the Court within 30 days from the date the motion for preliminary approval is filed
Distribute Settlement Notice and Former Participant Claim Forms	¶ 8	Within 30 calendar days of preliminary approval order
Final approval papers and fee request	¶ 9	45 calendar days before Fairness Hearing

Independent Fiduciary report	Settlement Agreement § 2.1.2	Not later than 45 calendar days before the Fairness Hearing
Deadline for filing of objections	¶ 11	At least 30 calendar days before the Fairness Hearing
Deadline for Parties to respond to objections	¶ 11	Not later than 7 calendar days before Fairness Hearing
Fairness Hearing	¶ 6	On a date convenient for the Court but no sooner than 140 calendar days after the date the motion for entry of the Preliminary Approval Order is filed

ARGUMENT

A. The Settlement Warrants Preliminary Approval

"Courts in this Circuit recognize a strong judicial policy in favor of settlements, particularly in the class action context." *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *6 (D. Conn. Nov. 3, 2016) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A.* ("*Wal-Mart Stores*"), 396 F.3d 96, 116 (2d Cir. 2005)) (internal quotation marks omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.* ("*Prudential*"), 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions."). The Settlement, negotiated by capable and experienced counsel at arm's-length following motion practice on the pleadings and discovery into the claims and defenses at issue, is emblematic of the compromise favored by courts in this District and Circuit.

B. Standard of Review

Rule 23(e) requires judicial approval for the settlement of claims on behalf of a class. Judicial review of a proposed class action settlement consists of a two-step process: (1) preliminary approval; and (2) a subsequent fairness hearing and final approval. *See* Fed. R. Civ.

P. 23(e). In determining whether to grant preliminary approval, the Court must determine whether "giving notice is justified by the parties' showing that the court 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)(i-ii); *In re GSE Bonds Antitrust Litig.* ("*GSE Bonds*"), 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).

Preliminary approval is not a final determination; a full evaluation is made at the final approval stage, following notice of the settlement to class members. *See Prudential*, 163 F.R.D. at 210. Plaintiffs now simply request that the Court take the first step in the settlement approval process and preliminarily approve the Settlement so that notice of the Settlement can be given to the Settlement Class. *See, e.g.*, *Torres v. Gristedes Operating Corp.*, No. 04 Civ. 3316, 2010 WL 2572937, at *2 (S.D.N.Y. June 1, 2010).

C. The Court is Likely to Grant Final Approval of the Proposed Settlement

"To be likely to approve a proposed settlement under Rule 23(e)(2), the Court must find 'that it is fair, reasonable, and adequate.'" *GSE Bonds*, 414 F. Supp. 3d at 692. This inquiry includes four explicit factors enumerated in Rule 23(a)—*i.e.*, (1) adequacy of representation; (2) existence of arm's-length negotiations; (3) adequacy of relief; and (4) equitableness of treatment of class members—as well as the familiar *Grinell* factors.[5] *See id.*; *see also In re IPO Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) ("Where the proposed settlement appears to be the product of

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[5]The *Grinnell* factors are: (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 amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See City of Detroit v. Grinell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.").

1. The Rule 23(e)(2) Factors Weigh in Favor of Preliminary Approval

i. Adequacy of Representation

"Rule 23(e)(2)(A) requires a Court to find that 'the class representatives and class counsel have adequately represented the class' before preliminarily approving a settlement." *GSE Bonds*, 414 F. Supp. 3d at 692. The adequacy determination includes inquiries into both the plaintiff and his or her counsel. *See id*. Plaintiffs and Class Counsel satisfy the requirements of Rule 23(e)(2)(A). First, Plaintiffs' interests are neatly aligned with all other members of the Settlement Class because they all suffered injuries of the same kind as a result of Defendants' alleged Plan-level conduct, and Plaintiffs have actively and vigorously pursued relief on behalf of the Plan and Settlement Class since the investigation that led to the commencement of this action. Second, Class Counsel are "qualified, experienced, and able" to conduct the litigation, as demonstrated by their successful prosecution of numerous complex ERISA actions and the result achieved here. *See id*.

ii. The Settlement is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

Under Rule 23(e)(2)(B), "[i]f a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, [a settlement] will enjoy a presumption of fairness." *GSE Bonds*, 414 F. Supp. 3d at 693; *see also Wal-Mart Stores*, 396 F.3d at 116 (noting strong "presumption of fairness" where settlement is product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery); *In re Flag Telecom Holdings Ltd. Sec. Litig.* ("*Flag Telecom II*"), No. 02-CV-3400, 2010 WL 4537550, at *13 (S.D.N.Y. Nov 8, 2010) (same). The Settlement was

negotiated at arm's-length by adverse parties, each represented by counsel experienced in complex ERISA litigation. As discussed above, the parties engaged in a process in which they communicated their respective positions and conducted independent analyses to support the Settlement. *See* Rubinow Decl., ¶ 7. As demonstrated by the comprehensive motion practice, discovery exchanged, and extensive settlement negotiations, there has been no collusion or complicity of any kind in connection with the Settlement or related negotiations. *Id.*, ¶¶ 6–7.

Moreover, in determining the good faith of the Agreement, the Court should consider the judgment of Class Counsel. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695, 2007 WL 4115809, at *12 (S.D.N.Y. Nov. 7, 2007) (courts should "consider the opinion of experienced counsel with respect to the value of the settlement"); *In re PaineWebber Ltd. P'ships Litig.* ("*PaineWebber P'ships*"), 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Class Counsel have significant experience in similar litigation, and are well-informed as to the specifics of this Action. *See* Rubinow Decl., ¶ 5. Accordingly, their judgment that the Settlement is in the best interest of the Settlement Class should be given considerable weight.

iii. Adequacy of Relief

In assessing the adequacy of relief accorded by a proposed settlement, under Rule 23(e)(2)(C), courts must consider the following:

> (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, if required; (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).

Fed. R. Civ. P. 23(e)(2)(C). The adequacy inquiry under Rule 23(e)(2)(C) overlaps, in significant measure, with several of the *Grinnell* factors, "which help guide the Court's

application of Rule 23(e)(2)(C)(i)." *See GSE Bonds*, 414 F. Supp. 3d at 693.

The costs, risks, and delay of trial and appeal. ERISA breach of fiduciary duty actions are difficult to prosecute and "involve a complex and rapidly evolving area of law." *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08- cv-1432, 2012 WL 1964451, at *5 (D.N.J. May 31, 2012); *In re Wachovia Corp. ERISA Litig.*, No. 09-cv-0262, 2011 WL 7787962, at *4 (W.D.N.C. Oct. 24, 2011). New precedents are frequently issued, and the demands on counsel and courts are complex, requiring the devotion of significant resources. The prosecution of this action and the risks that Plaintiffs faced in establishing liability and damages as well as maintaining a class action through trial overwhelmingly support preliminary approval. Indeed, absent settlement, the Parties would proceed to a complex trial, and even if Plaintiffs prevailed, it could be years before any recovery would be received in light of the likelihood of appeals.[6] Because of "the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class," and "it may be preferable 'to take the bird in the hand instead of the prospective flock in the bush.'" *Prudential*, 163 F.R.D. at 210 (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)). Moreover, because continued litigation increases litigation expenses, it could result in a smaller recovery ultimately to the class, even ignoring the time value of money.

Plaintiffs' pursuit of the Plan's alleged losses resulting from the course of conduct asserted in this Action began with a pre-filing investigation in 2021. Since then, the Parties have acquired extensive knowledge and information about the claims and defenses relevant to this

[6]Demonstrating the risk inherent in ERISA breach of fiduciary duty actions, a recent trial in this District in a similar action resulted in the jury returning a verdict in favor of the defendants on all claims. *See Vellali v. Yale Univ.*, No. 3:16-cv-1345 (AWT), ECF No. 622, at 1 (D. Conn. July 13, 2023).

action, sufficient to evaluate the "the merits of Plaintiff['s] claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiff['s] causes of action for purposes of settlement." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002); *see also In re Global Crossing Sec. & ERISA Litig.* ("*Global Crossing*"), 225 F.R.D. 436, 458 (S.D.N.Y. 2004). Class Counsel's thorough investigation, coupled with the document discovery conducted in this action, has afforded Class Counsel a significant understanding of the merits of the claims asserted, the strength of Defendants' defenses, and the values of theoretical outcomes of the case, which is reflected by, *inter alia*, the rounds of briefing and extensive settlement negotiations. In addition, the Class Counsel's reliance upon expert consultation in assessing the claims, defenses and potential damages supports a finding that the Parties had adequate information in connection their negotiations and evidentiary support for the Settlement. *See GSE Bonds*, 414 F. Supp. 3d at 699; *Plummer v. Chem. Bank*, 668 F.2d 654, 659 (2d Cir. 1982).

The record in these proceedings and the law confirm the risks of establishing liability and damages. In order to succeed on the merits, Plaintiffs would need to establish not only that Defendants' recordkeeping monitoring process was deficient, but Defendants would certainly assert affirmative defenses. Such defenses would have included, *inter alia*, arguments based upon the substantive and procedural prudence of Defendants' monitoring processes. The litigation would likely have featured further dispositive motions, significant competing expert testimony, and other pre-trial motion practice concerning evidentiary and other issues, all of which pose risks to Plaintiffs' ability to establish liability. Moreover, even if Plaintiffs were successful in establishing liability at trial, there is a substantial risk that a factfinder could accept Defendants' damages arguments and award less than the funds secured by the Settlement, or nothing at all.

In addition to the risks of establishing liability and damages, Plaintiffs face a risk of maintaining this Action as a class action through trial. Consistent with ERISA §§ 409 and 502(a)(2), Plaintiffs brings their claims on behalf of the Plan and pleads the same as class claims, and the Court certified a class. *See* 29 U.S.C. §§ 1109, 1132(a)(2); *see also* ECF No. 56 (Amended Class Action Complaint), at ¶¶ 7, 115–27; ECF No. 92. While Plaintiffs are confident this Action would continue to satisfy Rule 23, there is an extant risk that circumstances or the law could change, and the Court could find a reason to decertify the class at a later stage. The Settlement recognizes and alleviates that risk.

The effectiveness of the proposed method of distributing relief. The Settlement Agreement and Plan of Allocation provide for a notice and claims process designed to ensure relief is effectively accorded to Settlement Class members. Since the Settlement Class is comprised of participants, former participants, beneficiaries, and alternate payees of a company benefits plan, much of the data necessary to administer the Settlement is in the possession of the Plan's recordkeepers. Indeed, Participants with active accounts in the Plan need not even submit a claim form to receive the relief to which they are entitled. Administration of the Settlement here will effectively "deter or defeat unjustified claims," without being "unduly demanding." *GSE Bonds*, 414 F. Supp. 3d at 694 (citing Fed. R. Civ. P. 23, Adv. Comm. Note, 2018 amend., sub. (e)(2)(c)). In addition, "while the plan of allocation must be fair and adequate, it need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id*. (internal quotation marks omitted). As discussed in greater detail below, the Plan of Allocation is designed to provide *pro rata* recovery to Settlement Class members according to the average size of their Plan accounts during the Class Period. The Plan of Allocation represents a reasonable method of ensuring "the equitable and timely distribution of a

settlement fund without burdening the process in a way that will unduly waste the fund." *Id*. at 695.

The terms of the proposed award of attorneys' fees. As stated in the proposed long form notice, Class Counsel will request 25% of the Gross Settlement as an award of attorneys' fees, inclusive of reasonable litigation expenses incurred and carried for the duration of the litigation. This anticipated application is subject to Court approval and is consistent with (indeed, less than) amounts regularly awarded in complex litigation of this type. In addition, the independent fiduciary retained on behalf of the Plan will consider this additional anticipated application in connection with its review of the Settlement and approval of releases by the Plan. In addition, Class Counsel are aware of no agreements required to be disclosed under Rule 23(e)(3).

2. The Remaining *Grinell* Adequacy Factors Weigh in Favor of Preliminary Approval

As discussed above, the Second Circuit has traditionally relied upon the nine *Grinell* factors to guide a district court's determination of whether to finally approve a class action settlement. To the extent that they are applicable at this stage, they can be used as guidelines for considering preliminary approval. *See In re Warner Chilcott Ltd. Sec. Litig.* ("*Warner Chilcott*"), No. 06 Civ. 11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008). Complete analysis of these factors is not required for preliminary approval to be granted. *See id*. (citing *Prudential*, 163 F.R.D. at 210). Moreover, because several of these factors are addressed in the analysis under Rule 23(e)(2), the discussion that follows will focus on the relevant non-overlapping factors under *Grinnell*: (i) the reaction of the class to the settlement; (ii) the ability of Defendants to withstand a greater judgment; and (iii) the range of reasonableness of the Settlement in light of the best possible recovery and attendant risks.

i. The Reaction of the Class to the Settlement

"The Court need not consider [this factor], which requires the Court to evaluate the reaction of the settlement class, because consideration of this factor is generally premature at the preliminary approval stage." *GSE Bonds*, 414 F. Supp. 3d at 699 (citing *Warner Chilcott*, 2008 WL 5110904, at *2). Members of the Settlement Class will have the opportunity to share their reactions to the Settlement, including by filing objections, pursuant to the Notice Plan and final approval procedures. In addition, an independent fiduciary will review the Settlement and related applications, as well as any objections or comments regarding the Settlement that may be filed prior to the issuance of its report, before determining whether to approve of the release of claims on behalf of the Plan. Accordingly, this factor is better assessed at the final approval stage.

ii. The Ability of Defendants to Withstand a Great Judgment Does Not Weigh Against Preliminary Approval

While there is no evidence that Defendants could not withstand a greater judgment, courts have regularly held that, "against the weight of the remaining factors, this fact alone does not undermine the reasonableness of [a settlement]." *GSE Bonds*, 414 F. Supp. 3d at 696; *see also In re AOL Time Warner ERISA Litig.* ("*AOL Time Warner*"), 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) (finding "the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair," rather this factor "must be weighed in conjunction with all of the Grinnell factors, most notably the risk of the class prevailing and the reasonableness of the settlement fund") (internal quotation marks omitted). Accordingly, the Court need not find that Defendants could not withstand a greater judgment in order to conclude the Settlement is fair, reasonable, and adequate, and warrants preliminary approval.

iii. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and Attendant Risks support Preliminary Approval

"In considering these facts, the settlement amount's ratio to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement's fairness." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 495 (S.D.N.Y. 2008). In fact, courts in this Circuit have approved of settlements where the plaintiffs did not offer a damages estimate at all. *See id*. This is because "some risks would be attendant upon continuing to litigate." *GSE Bonds*, 414 F. Supp. 3d at 696; *Flag Telecom II*, 2010 WL 4537550, at *20 ("[T]he issue for the Court is not whether the Settlement represents the 'best possible recovery,' but how the Settlement relates to the strengths and weaknesses of the case."). "[I]n any case, there is a range of reasonableness with respect to a settlement." *Id*. (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). In any event, the range of reasonableness "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman*, 464 F.2d at 693.

Plaintiffs estimated the Plan's losses attributable to excessive RK&A fees by comparing the Plan's actual fees to the periodic reasonable market rate throughout the Class Period determined by Plaintiffs' experts based on a benchmark group of comparable plans. *See* Rubinow Decl., ¶ 9. The damages awarded to Plaintiffs in the event they proved liability would be subject to the factfinder's determinations with respect to several significant variables. First, the factfinder must determine the reasonable market rate for the Plan's RK&A fees. Defendants would, of course, argue for more conservative figures, and may offer an alternative comparator group that further reduces the damages calculation. Second, the factfinder must determine the appropriate interest rate to apply, ranging from the conservative 1-year Treasury rate to the more

aggressive S&P 500-return rate. And all of these figures presuppose a finding of liability.

Plaintiffs and their experts have estimated realistically recoverable damages related to the surviving recordkeeping claim range from $881,900 to $1,222,986, and realistically recoverable damages range related to the Dismissed Claims range from $3,205,936 to $8,157,355 (assuming complete reversal of dismissal and proof of total liability), depending upon the methodology and assumptions employed and when brought to present value by applying a reasonable interest rate. Accordingly, the Settlement recovery amounts to approximately 95% of the midpoint of realistically recoverable damages related to the surviving recordkeeping claim and provides meaningful consideration for the Dismissed Claims.[7] *See* Rubinow Decl., ¶ 9. This recovery rate range sits comfortably (if not significantly above) within those accepted by other courts in this Circuit. *See, e.g.*, *GSE Bonds*, 414 F. Supp. 3d at 697 (13-17%); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (10-15%); *In re Interpublic Sec. Litig.*, No. 02 CIV.6527(DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) (10-20%); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293 VLB, 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012) (3.5%); *see also Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590JCH, 2011 WL 2050537, at *13 (D. Conn. May 16, 2011) ("the Second Circuit has long held that even settlements which represent a fraction of the best possible result may be appropriate in light of the risks associated with bringing such claims") (citing *Grinnell*, 495 F.2d at 455 n.2). Detailed calculations and backup information concerning the Plan's losses was exchanged in connection with the settlement process and will be made available to the

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[7]Indeed, the Settlement recovery amounts to approximately 15% of the midpoint of realistically recoverable damages related to the surviving recordkeeping claim and Dismissed Claims together *assuming reversal of dismissal with respect to all the Dismissed Claims and proof of complete liability.*

Independent Fiduciary. In sum, the Court should find that the Settlement falls well within the range of reasonable outcomes.

D. Certification of the Class Should be Maintained for Settlement Purposes

The requirements of Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *In re US FoodService Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013). In certifying the Class for litigation purposes, this Court previously found that each of the prerequisites of Rule 23(a) were satisfied and that the Class should be certified under Rule 23(b)(1). *See* ECF No. 92 (certifying class, appointing Plaintiffs as class representatives, and appointing Plaintiffs' counsel as counsel on behalf of the Class). None of the facts or circumstances supporting the Court's certification order have changed; in fact, the circumstances of a settlement provide even greater support for class certification. This is because, as discussed herein, Plaintiffs assert claims on behalf of the Plan, participants and beneficiaries have uniform theories of liability and relief, and the structure of ERISA requires that participants and beneficiaries bringing actions for breach of fiduciary duty must do so on behalf of a plan as a whole. Moreover, the Settlement would provide relief to the Plan as a whole, which would then be distributed to individual participant accounts pursuant to the Plan of Allocation. The Court should find that certification of the Class should be maintained for settlement purposes.

E. The Proposed Notice Plan Should be Approved

In addition to preliminarily approving the proposed Settlement, the Court must approve the proposed means of notifying Settlement Class members. *See* Fed. R. Civ. Proc. 23(c)(2); *see also Global Crossing*, 225 F.R.D. at 448. "Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *Id*. In order to satisfy due process considerations, notice to Settlement Class members must be

"reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Prudential*, 163 F.R.D. at 368.

The Notice Plan includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Notice will be sent by email and/or first-class mail to the last known address of each Settlement Class member prior to the Final Approval Hearing. Notably, all Settlement Class members had Plan accounts, so the Plan recordkeeper(s) has addresses for them, at least as of the Settlement Class Period, and has their Social Security numbers which can be used to do an address update if Notices are returned as undeliverable. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477–78 (E.D. Pa. 2007). Additionally, the Notice will be posted on a website established by the Settlement Administrator at the direction of Class Counsel, along with other documents related to the litigation such as a list of frequently asked questions and the Agreement with all of its exhibits. The Notice will also provide contact information for Class Counsel. The Settlement Administrator, at the direction of Class Counsel, will also establish and monitor a dedicated, toll-free telephone number for the purpose of fielding any inquiries by member of the Settlement Class.

The Notice Plan agreed upon by the Parties satisfies all due process considerations and meets the requirements of Rule 23. It describes in plain English: (i) the terms and operation of the Settlement; (ii) the nature and extent of the released claims; (iii) the maximum attorneys' fees, expenses, and Plaintiffs' case contribution awards that may be sought; (iv) the procedure and timing for objecting to the settlement; and (v) subject to the Court's schedule, the date and location of the Final Approval Hearing. Numerous district courts across the country have approved as fair similar notices and/or notice plans. *See, e.g.*, *In re Marsh ERISA Litig.*, 265

F.R.D. 128, 145 (S.D.N.Y. 2010) (concluding that "notice forms and methods employed [we]re substantially similar to those successfully used in many previous ERISA class settlements"); *Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 4779017, at *3 (E.D. Mich. July 29, 2013) (adopting a substantially similar notice plan).

F. The Plan of Allocation Should be Approved

To warrant approval, a plan of allocation must be fair and adequate. *In re Facebook, Inc., IPO Secs. and Derivative Litig.*, 343 F. Supp. 3d 394, 414 (Nov. 26, 2018). "The formula established for allocation need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.*; *see also Guevoura Fund Ltd. v. Silverman*, 2019 WL 6889901, at *10 (S.D.N.Y. Dec. 18, 2019) ("Courts have recognized that the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.") (internal quotation marks omitted). "[W]hether the allocation plan is equitable is squarely within the discretion of the district court." *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG) (VVP), 2015 WL 6964973, at *7 (E.D.N.Y. Nov. 10, 2015) (citing *PaineWebber P'ships*, 171 F.R.D. at 132—33 (internal citations and punctuation omitted)).

The Plan of Allocation "was prepared by experienced counsel along with a damages expert—both indicia of reasonableness." *Facebook, Inc.*, 343 F. Supp. 3d at 414. Indeed, the Plan of Allocation provides for *pro rata* distribution of the Qualified Settlement Fund among Settlement Class members according to the average size of each Class Member's account during the Class Period. Agreement, Ex. B, ¶ 1.5. Courts in this District regularly approve plans of allocation where, as here, "[a plan] provides recovery to [c]lass members, net of administrative expenses and attorneys' fees and expenses, on a *pro rata* basis." *In re Marsh ERISA Litig.*, 265

F.R.D. 128 at 145 (emphasis added); *see also AOL Time Warner*, 2006 WL 903236, at *17 (plan of allocation provided "recovery to damaged investors on a pro- rata basis according to their recognized claims of damages.").

As further detailed in the Plan of Allocation, distributions to Settlement Class members who are active participants of the Plan will be made by allocating recovery amounts into their active Plan accounts, while distributions to former Plan participants, beneficiaries, and alternate payees will be made by check or tax-qualified rollover to an individual retirement account or other qualified employer plan. The Plan of Allocation is substantially similar to plans of allocation approved and utilized in similar ERISA actions.[8]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court enter an order that: (1) preliminarily approves the Settlement; (2) maintains certification of the Settlement Class through such time as the Court enters an order granting final approval of the Settlement; (3) preliminarily approves of the Notice Plan; and (4) schedules a fairness hearing at a date convenient for the Court no sooner than 140 days from the entry of the proposed Preliminary Approval Order.

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[8] *See, e.g.*, *Larson v. Allina Health System*, No. 17-cv-03835 (SRN/TNL), 2019 WL 6208648, at *2 (D. Minn. Nov. 21, 2019); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV 15-1614-JLS (JCG), 2018 WL 3000490, at *5 (C.D. Cal. Feb. 6, 2018); *In re Marsh ERISA Litig.*, 265 F.R.D. at 145-46 (approving plan of allocation that provided recovery to class members on *pro rata* basis, such that the amount received by each class member would depend on his or her calculated loss relative to other class members, and payments would be made by crediting accounts of active plan participants and creating or recreating an account for class members who were no longer active participants); *In re AOL Time Warner*, No. 02 Civ. 8853 SWK, 2006 WL 2789862, at *10 (S.D.N.Y. Sept. 27, 2006); *In re Worldcom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at *8 (S.D.N.Y. Oct. 18, 2004).

Dated: November 17, 2023

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