IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Mark Drust individually and as a representative of a class of similarly situated persons, and on behalf of the Southwest Research Institute Retirement Plan Plaintiff, v. Southwest Research Institute, and John Does 1-20, Defendants.	Civil Case No. 5:23-cv-767-XR

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

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INTRODUCTION

Plaintiff Mark Drust ("Plaintiff") submits this Memorandum in support of his Motion for Preliminary Approval of Class Action Settlement with Defendant Southwest Research Institute ("Defendant") relating to the management of the Southwest Research Institute Retirement ("Plan").[1]

The proposed Settlement provides both monetary and non-monetary prospective relief. Specifically, Defendant will pay a Gross Settlement Amount of $500,000 into a common fund for the Settlement Class's benefit. Additionally, within 12 months of the Effective Date of the Settlement, Defendant has agreed to engage and utilize the services of an independent consultant or consultants unaffiliated with TIAA to assist with the monitoring of the Plan's investments for a period of three (3) years. This recovery is fair, reasonable, and adequate given the claims alleged and the risks associated with the litigation.

For the reasons set forth below, the Settlement merits preliminary approval so that notice may be sent to the Settlement Class. Among other things supporting preliminary approval:

- The Settlement was negotiated at arm's length by counsel experienced in similar ERISA class action litigation;
- The Settlement provides for favorable monetary relief and an equitable method of distribution;
- The Settlement provides for automatic distribution of the settlement proceeds to the accounts of Current Participants, and Former Participants who no longer have active accounts will automatically receive their distribution via check;
- The Settlement provides for meaningful prospective relief;
- The release is appropriately tailored to the claims that were asserted in the action;

[1] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as **Exhibit A** to the accompanying Declaration of Brock Specht ("*Specht Decl.*"). Unless otherwise specified herein, all capitalized terms have the meaning assigned to them in Article 2 of the Settlement Agreement.

- The proposed Settlement Class is consistent with the requirements of Rule 23;
- The proposed Settlement Notices provide fulsome information to Class Members about the Settlement, and will be distributed via first-class mail and posted on the Settlement Website; and
- The Settlement provides Class Members the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Settlement Notices and authorizing distribution of the Settlement Notices to the Settlement Class; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the accompanying proposed Preliminary Approval Order. Although Defendant disputes the allegations and denies liability for any alleged violations of ERISA or any other law, they do not oppose the relief sought in this motion.

BACKGROUND

I. THE PLEADINGS AND MOTION TO DISMISS

On June 16, 2023, Plaintiff filed this action alleging that Defendant breached its ERISA fiduciary duties by retaining TIAA as the Plan's sole service provider for a period of at least 14 years, without investigating alternatives, and during that time adopting a lineup of investments solely managed by TIAA while not appropriately monitoring those investments. *ECF No. 1*. ¶¶ *1, 6-8*. On September 15, 2023, Defendant filed a motion to dismiss the Complaint. *ECF No. 18*. The Court held a hearing on Defendant's motion to dismiss on December 20, 2023. *ECF No.35*.

II. DISCOVERY, NEGOTIATIONS, AND SETTLEMENT

While Defendant's motion was pending, the parties exchanged targeted discovery of over 4,800 documents. Specifically, Defendant produced over 3,500 pages of documents and Plaintiff produced over 1,300 pages of documents. *See Specht Decl. ¶ 12*. With the aid of this discovery

and informed by the Court's comments at the motion to dismiss hearing, the parties engaged in settlement negotiations while Defendant's motion was still pending. *Id.* ¶ *13*. The Parties eventually reached a settlement in principle, then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Id.*

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement applies to the following Settlement Class:

> All participants and beneficiaries of the Southwest Research Institute Retirement Plan at any time from June 16, 2017, until March 11, 2024, excluding the members of the Southwest Research Institute Retirement Plan Committee.

Settlement ¶ *2.45*. This Settlement Class includes all participants in the Plan during the Class Period except those with fiduciary responsibilities relating to the Plan. Based on the information provided by Defendant, there are approximately 7,840 Settlement Class Members. *Specht Decl.* ¶ *3.*

B. Monetary Relief

Under the Settlement, Defendant will contribute a Gross Settlement Amount of $500,000 to a common Settlement Fund. *Settlement* ¶¶ *2.29, 5.4-5.5.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶¶ *2.33, 5.9, 6.1.*

The Plan of Allocation provides for the distribution of the Net Settlement Amount to Class Members pro rata based on their Average Account Balance during the Settlement period. To calculate the Average Account Balance, the Settlement Administrator will calculate each Class Member's ending balance during each quarter of the Settlement period and divide the total amount

by the number of quarters during the Settlement period, weighted to account for any partial quarters. *Id.* ¶¶ *6.4.1*. Current Participants' accounts will be automatically credited with their share of the Settlement Fund. *Id.* ¶¶ *6.5-6.5.1.* Former Participants will be sent their distribution by check. *Id.* ¶ *6.2*.[2]

C. Prospective Relief

The Settlement also provides for meaningful prospective relief. Specifically, no later than twelve (12) months following the Effective Date of the Settlement, Defendant will engage an independent consultant or consultants unaffiliated with TIAA to assist with the monitoring of the Plan's investments for a period of three (3) years from the engagement. *Id.*¶ *7.1*.

D. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class will release Defendant and affiliated persons and entities ("Released Parties") from all claims:

- That were asserted in the Action or that arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences that are alleged or asserted in the Action or could have been alleged or asserted based on the same factual predicate;[3] or
- That would be barred by res judicata based on entry by the Court of the Final Approval Order; or
- That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund pursuant to the Plan of Allocation or to any action taken or not taken by the Settlement Administrator in the course of administering the Settlement; or
- That relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone.

Id. ¶¶ *2.39.1; 2.39.2; 2.39.3; 2.39.4.* The Released Claims do not include claims to enforce the

[2] Under no circumstances will any monies revert to Defendant. Any checks that are uncashed will be paid into the Plan for the purpose of defraying future Plan administrative expenses that would otherwise be charged to participants. *Id.* ¶ *6.10.*

[3] The full release language, incorporated by reference, is in the Settlement Agreement, ¶ 2.39.

Settlement Agreement. *Id.* ¶ *9.2*.

E. Class Notice and Settlement Administration

Class Members will receive Short Form Notice of the Settlement via first-class U.S. Mail. *Id.* ¶ *3.3.1; Exs. 1 & 2*. This notice provides general information about the Settlement, including the monetary and prospective relief, what participants must do to receive their payments, where to find more information, how to object to the settlement, and the date of the Fairness Hearing. *Id*. Long Form Notice of the Settlement will be posted on the Settlement Website. *Settlement* ¶ *3.3.1*. The Settlement Notices provide information to the Settlement Class regarding, among other things: (1) the nature of the claims; (2) the scope of the Settlement Class; (3) the terms of the Settlement; (4) Class Members' right to object to the Settlement and the deadline for doing so; (5) the class release; (6) the identity of Class Counsel and the amount of compensation they will seek in connection with the Settlement; (7) the amount of the proposed Class Representative service award; (8) the date, time, and location of the final approval hearing; and (9) Class Members' right to appear at the final approval hearing and object. *Exs. 1-4.*

To the extent that Class Members would like more information, the Settlement Administrator will establish a Settlement Website on which it will post the Settlement Agreement, Settlement Notices, and relevant case documents, including the Complaint and a copy of all Court orders related to the Settlement. *Settlement* ¶ *12.1*. The Settlement Administrator also will establish a toll-free telephone line that will provide the option of speaking with a live operator if callers have questions. *Id.* ¶ *12.2.*

F. Attorneys' Fees and Administrative Expenses

The Settlement requires that Class Counsel file their Motion for Attorneys' Fees and Costs at least 30 days before the deadline for objections to the proposed Settlement. *Id.* ¶ *8.1*. Under the

Settlement, the requested fees may not exceed one-third of the Gross Settlement Amount. *Id.* ¶ *8.2.* In addition, the Settlement provides for recovery of Administrative Expenses related to the Settlement, and for a service award up to $2,500 for the Class Representative. *Id* ¶¶ *8.1-8.2.*

G. Review by Independent Fiduciary

As required under ERISA, Defendant will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. *Id.* ¶¶ *2.30, 3.1*; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830. The Independent Fiduciary will issue its report at least 30 days before the final Fairness Hearing, so it may be considered by the Court. *Id.* ¶ *3.1.2.*

ARGUMENT

I. STANDARD OF REVIEW

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The "gravamen of an approvable proposed settlement is that it be fair, adequate, and reasonable and is not the product of collusion between the parties." *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (internal quotation marks omitted). "Trial court review of a class action settlement is a two-step process: preliminary approval and subsequent final approval after a fairness hearing." *Del Carmen v. R.A. Rogers, Inc.*, 2018 WL 4701824, at *5 (W.D. Tex. Apr. 25, 2018) (citations omitted), *report and recommendation adopted*, 2018 WL 4688774 (W.D. Tex. June 13, 2018).

The preliminary approval stage does not require the court to issue detailed findings regarding the fairness of the settlement. *See* Manual for Complex Litigation (Fourth) § 21.632

(2004); *accord*, *Glover v. Woodbolt Distribution, Ltd.*, 2012 WL 5456361, at *1 (S.D. Tex. Nov. 7, 2012) ("[T]he settlement is within the range of possible final judicial approval sufficient to warrant sending notice to settlement class members."); *In re Chinese-Mfg. Drywall Prods. Liab. Litig.*, 2012 WL 92498, at *7 (E.D. La. Jan. 10, 2012) ("At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval."); *In re OCA, Inc. Securities and Derivative Litig.*, 2008 WL 4681369, at *11 (E.D. La. Oct. 17, 2008) ("As this motion is for preliminary approval of a class action settlement, the standards are not as stringent as those applied to a motion for final approval"). Instead, the Court must make a "'preliminary determination of the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.'" *Del Carmen*, 2018 WL 4701824, at *5 (quoting Manual for Complex Litigation (Fourth) § 21.632 (2004)). "A settlement is fair, reasonable, and adequate when 'the interests of the [settlement class], as a whole, will be better served if the claims against these Defendants are resolved by the [s]ettlement rather than pursued." *Id*. (quoting *In re Granada P'ship Secs. Litig.*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992)).

As explained below, the Settlement meets the standard for preliminary approval.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

The Fifth Circuit has identified six factors to consider when determining whether to approve a settlement. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). The "*Reed* factors" are: (1) whether there is evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of Plaintiff prevailing on the merits; (5) the range of

possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives and absent class members. *Id*. "When considering the *Reed* factors, the court should keep in mind the strong presumption in favor of finding a settlement fair." *Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632, 650 (N.D. Tex. 2010). Additionally, "the court should not decide the merits of the action or attempt to substitute its own judgment for that of the parties." *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983). Here, all six factors favor approval of the Settlement.

A. The Parties Engaged in Arms-Length Negotiations After Conducting Sufficient Discovery

The parties reached this Settlement only after receiving sufficient information to evaluate the merits and using that information to engage in arms-length discussions. In such situations where "a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery[,]" a "'presumption of fairness, adequacy, and reasonableness may attach'" to the Settlement. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 116 (2011) (quoting Manual for Complex Litigation, Third § 30.42 (1995)) (citing *Nat'l Ass'n of Chain Drug Stores vs. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009)). "A presumption of fairness is also indicated" where "counsel for both parties have significant experience in litigating and negotiating the settlement of class actions." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 292 (W.D. Tex. 2007) (citation omitted).

Here, counsel for both parties have significant experience in litigating ERISA class actions, with Plaintiff's counsel litigating numerous ERISA cases through trial and appeals and securing favorable results in ERISA class actions across the country. *Specht Decl.* ¶¶ *15-18*. Indeed, "Class

Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this." *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021). This weighs in favor of approval.

Moreover, the parties reached this Settlement only after considering the merits of the case in light of the arguments made at the motion to dismiss stage and the discovery conducted to date. Specifically, the parties had the benefit of reviewing the opposing party's arguments, responding to those arguments at the motion to dismiss hearing, and listening to the Court's reactions to each party's arguments at the hearing. The parties also exchanged thousands of pages of discovery to evaluate the merits of the case. Plaintiff intentionally requested specific documents detailing Defendant's process for managing the Plan, which is central to Plaintiff's claims.

In sum, the fact that experienced counsel reached this conclusion after sufficient discovery and arms-length negotiations weighs in favor of preliminary approval.

B. Further Litigation Would Be Complex, Costly, and Lengthy

The complexity, expense, and length of further litigation also weighs in favor of preliminary approval. Other courts have recognized that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) *("Krueger II")*; *see also* *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) (ERISA is "an enormously complex and detailed statute[.]"); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERISA cases such as this are "particularly complex"). In ERISA cases like this one, "[t]he facts giving rise to Plaintiff['s] claims are complicated, require the elucidation of experts" to calculate loss and opine on whether Defendant's process was consistent with industry standards, "and are far from certain" *Koerner v. Copenhaver*, 2014 WL 5544051, at *4 (C.D. Ill. Nov. 3, 2014). This

requirement increases the length and cost of litigation compared to many other cases.

Even if Plaintiff ultimately prevailed, any relief to the Class was likely several years away. In part because of their complexity, ERISA 401(k) cases such as this "often lead[] to lengthy litigation." *Krueger II*, 2015 WL 4246879, at *1. Indeed, ERISA class action cases can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951, 954–56 (8th Cir. 2017) ("*Tussey II*") (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007); *Shanechian v. Macy's, Inc.*, 2013 WL 12178108, at *5 (S.D. Ohio June 25, 2013) (finding that ERISA case that had already lasted for six years could last for six more years absent a settlement).[4] Given the risks, cost, and delay of further litigation, it was reasonable and appropriate for Plaintiff to reach a settlement on the terms that were negotiated and secure certain, immediate financial and non-monetary relief. *See* *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways" including gaining the ability to immediately invest the settlement funds immediately).

C. The Recovery Is Strong in Light of the Risks Associated with Plaintiff's Claims

The Settlement provides immediate monetary benefits and non-monetary benefits to the Settlement Class in the face of significant risks. It is important to weigh any recovery in light of

[4] Although this case was settled early, Class Counsel are no strangers to lengthy ERISA litigation. Class Counsel have recently taken three ERISA class cases to trial, and litigated the *Deutsche Bank* ERISA action to the very eve of trial before it was settled. *See Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 321 at 5 (S.D.N.Y. Aug. 14, 2018) *("Moreno II")* ("[T]he parties reached a settlement-in-principle on July 8, 2018 immediately preceding the scheduled start date of trial." (internal parentheses omitted)); *see also Specht Decl. at 17.*

"'the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.'" *DeHoyos*, 240 F.R.D. at 291 (quoting *San Antonio Hispanic Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 458 (W.D. Tex. 1999) (citing *In re Shell Oil Refinery*, 155 F.R.D. 552, 560 (E.D. La. 1993)).

For Plaintiff to prevail, he would likely have needed to (1) defeat Defendant's motion to dismiss; (2) prevail on a contested motion for class certification; (3) survive a dispositive motion leading up to trial; (4) prevail at trial; and (5) defeat any appeal from Defendant. *See id*. Even if Plaintiff prevailed on liability by proving a breach of prudence, Plaintiff would need to prove that the Plan suffered a loss as a result of that breach. This is no small feat. Issues of loss and are highly contested in ERISA class actions. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (determination of losses in breach of fiduciary duty cases is "difficult"); *see also, e.g.*, *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273, 280 (S.D.N.Y. 2018) (finding that "while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result."). Further, this Settlement occurred while Defendant's motion to dismiss was still pending. The Court's comments at the motion to dismiss hearing further illuminated the risks inherent in this type of complex, lengthy litigation. The Settlement must be viewed with those risks in mind.

The Settlement provides meaningful relief in spite of these risks. Defendant will pay $500,000 to a common fund that will be distributed equitably based on the Plan of Allocation. *Settlement* ¶¶ *2.29, 6*. This amount represents approximately 5.3% of the Plan's estimated losses. *Specht Decl.* ¶ *4*. This percentage is in line with other class action settlements approved by district

courts in the Fifth Circuit and across the country. Indeed, "it is common in class action lawsuits for plaintiffs to recover only 'three-to-six cents on the dollar.'" *Welsh v. Navy Fed. Credit Union*, 2018 WL 7283639, at *13 (W.D. Tex. Aug. 20, 2018) (quoting *City of Omaha Police & Fire Ret. Sys. v. LHC Group*, 2015 WL 965696, at *7 (W.D. La. Mar. 3, 2015)); *see also* *Stott v. Capital Fin. Services, Inc.*, 277 F.R.D. 316, 345, n. 19 (N.D. Tex. 2011) (approving class settlement "estimated at about 2 to 3 percent of the each individual class member's total losses" based on the "risks involved in the litigation"); *In re Rite Aid Corp. Sec. 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"). This recovery is comparable.

Further, this Settlement provides significant non-monetary relief to the Settlement Class. Defendant has agreed to utilize the services of an independent consultant or consultants unaffiliated with TIAA to assist with the monitoring of the Plan's investments for a period of three (3) years from the engagement. *Settlement* ¶ *7.1*. This is designed to address the allegations in the complaint and benefit participants on a forward-looking basis. The non-monetary relief further weighs in favor of preliminary approval.

D. Class Counsel and the Class Representative Support the Settlement.

Finally, Class Counsel and the Class Representative support the Settlement. If competent counsel determines that a settlement is in the best interest of a class, "the attorney's views must be accorded great weight." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978). Here, "[t]he endorsement of class counsel is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation[.]" *See* *DeHoyas*, 240 F.R.D. at 292.

Additionally, the Class Representative discussed the risks and strength of the case with Class Counsel and submitted a declaration endorsing the Settlement. *Drust Decl.* ¶ ***4***. These factors support granting preliminary approval.

III. THE CLASS NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

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). "'[A] settlement notice need only satisfy the broad reasonableness standards imposed by due process.'" *Slipchenko v. Brunel Energy, Inc.*, 2015 WL 338538, at *5 (S.D. Tex. Jan. 23, 2015) (quoting *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010)). 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). That is precisely the type of notice proposed here. The Settlement Agreement provides that the Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via first class U.S. Mail. *Settlement* ¶¶ *2.51, 3.3.1*. This type of notice is presumptively reasonable. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Notices is also reasonable. The Short Form Notices include the monetary and prospective relief, what participants must do to receive their payments, where to find more information, how to object to the settlement, and the date of the Fairness Hearing, summarized so that Class Members can understand the general terms of the Settlement, *see supra* at 5, and the Long Form Notices will be posted on the Settlement Website for those who want more information or have questions. *See Slipchenko*, 2015 WL 338358, at *5 (approving notice that informed class members of the nature of the action and general terms of the settlement and directed them to the settlement website for case documents and further information). And the Settlement Notices will be supplemented through the Settlement Website and telephone support line. *See supra* at 6. The

Settlement Notices are reasonable and should be approved.

IV. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

In addition to approving the Settlement and authorizing distribution of the Settlement Notices, this Court should certify the Settlement Class for settlement purposes. To certify the class, Plaintiff must satisfy the requirements of Rule 23(a) and meet one of the prerequisites of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345–46 (2011). In the context of settlement, however, the Court need not inquire whether a trial of the action would be manageable on a class-wide basis because "the proposal is that there be no trial." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

"ERISA breach of fiduciary duty claims are particularly appropriate for class certification" under Rule 23 because these claims are "brought in a representative capacity on behalf of the plan as a whole." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142 (S.D.N.Y. 2010) (quotation omitted); *see also Munro v. Univ. of S. California*, 896 F.3d 1088, 1094 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019) ("[R]ecovery under ERISA § [1109(a)] is recovery singularly for the plan."). That is precisely the nature of this action. *See ECF No. 1 ¶ 9* (citing 29 U.S.C. §§ 1109, 1132(a)(2)). These representative cases are clearly encompassed by the rule. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (noting that a breach of trust action is a "classic example" of a Rule 23(b)(1) class). Accordingly, all of the requirements of Rules 23(a) and 23(b)(1) are met and the Settlement Class should be certified.

A. The Proposed Settlement Class Satisfies Rule 23(a)

Rule 23(a) of the Federal Rules of Civil Procedure sets forth four requirements applicable to all class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem*, 521 U.S. at 620. Each of these requirements is met here for settlement

purposes.

***Numerosity*.** Numerosity requires that the number of persons in the proposed class is so numerous that joinder of all class members would be impracticable. Fed. R. Civ. P. 23(a)(1). At approximately 7,840 Class Members, this standard is clearly met. *See* *Del Carmen*, 2018 WL 4701824, at *3 ("The Fifth Circuit has held that a class of 100 to 150 members" satisfies numerosity.).

***Commonality*.** Commonality requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(1). "As long as class members are allegedly affected by a defendant's general policy" and that policy is "the crux or focus of the litigation, the commonality requirement is satisfied." *DeHoyos*, 240 F.R.D. at 280 (citations omitted). "With respect to a defined-contribution plan like [the Plan], fund participants operate against a common background and allegations that a fiduciary has breached its duties in the selection of investment options describe a problem that operates across the plan rather than at the individual level." *Wachala v. Astellas U.S. LLC*, 2022 WL 408108, at *5 (N.D. Ill. Feb. 10, 2022). Such is the case here.

This lawsuit raises numerous common questions, including: (1) Whether Defendant is a Plan fiduciary; (2) Whether Defendant appropriately managed the Plan and the Plan's investments; (3) The proper form of equitable and injunctive relief; and (4) The proper calculation of monetary relief to the Plan. Accordingly, commonality is satisfied.

***Typicality*.** The typicality requirement "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Like commonality, "there is little doubt that a class representative's breach of fiduciary duty claim is in every respect typical of those of his fellow class members." *Shirk v. Fifth Third Bancorp*, 2008 WL 4425535, at *3 (S.D. Ohio Sept. 30, 2008).

Here, Plaintiff satisfies the typicality requirement because the Plaintiff's Plan-wide claims stem from Defendant's management of the Plan as a whole. *See* *Skinner v. Hunt Mil. Communities Mgmt. LLC*, 2023 WL 6532670, at *1 (W.D. Tex. Jan. 23, 2023) (citing *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002) (typicality present when representative claims arise from the same alleged conduct as class claims)). Similarly, "[e]ach participant's potential recovery, regardless of the fund in which he or she invested, is under the same legal theory – [Defendant's] breach of its fiduciary duty under ERISA in managing the Plan's investment options." *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 134 (3d Cir. 2022). Thus, Plaintiff's claims easily meet the typicality standard.

***Adequacy*.** Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." A plaintiff will adequately represent the class when his interests "align[] him with the interests of the settlement class." *Skinner*, 2023 WL 6532670, at *2 (W.D. Tex. Jan. 23, 2023). Plaintiff submitted a declaration stating that he is not aware of any conflicts between him and the class. *Drust Decl.* ¶ *2*. Further, "the central issue in this case is whether the [Plan] has been lawfully administered. On this fundamental issue, Plaintiff['s] interests in" pursuing a recovery on behalf of the Plan are "coextensive with the interests of the proposed class." *Hurtado v. Rainbow Disposal Co.*, 2019 WL 1771797, at *1 (C.D. Cal. Apr. 22, 2019).

With respect to Class Counsel, "[t]here is no question that [Nichols Kaster] is well-qualified to bring an ERISA class action." *Waldner v. Natixis Inv. Managers, L.P.*, 2023 WL 3466272, at *18 (D. Mass. Mar. 24, 2023), *report and recommendation adopted*, 2023 WL 3467112 (D. Mass. May 15, 2023); *see also* *Falberg v. The Goldman Sachs Grp., Inc.*, 2022 WL 538146, at *12 (S.D.N.Y. Feb. 14, 2022), *leave to appeal denied sub nom.* *Goldman Sachs 401(k)*

Plan Ret. Comm. v. Falberg, 2022 WL 4126112 (2d Cir. June 29, 2022) (the attorneys at Nichols Kaster "have a great deal of experience in handling class actions, particularly in cases alleging breach of fiduciary duty."). Both Class Counsel and the Class Representative satisfy the adequacy requirement.

B. The Proposed Class Satisfies Rule 23(b)(1)

In addition to meeting the requirements of Rule 23(a), the proposed Class also satisfies Rule 23(b)(1). Under Rule 23(b)(1), a class may be certified if prosecution of separate actions by 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). Because these ERISA suits are brought on behalf of the Plan, "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." *Boley*, 36 F.4th at 136.[5] Here, the proposed Settlement Class satisfies both prongs. *See, e.g.*, *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 576–78 (D. Minn. 2014) ("Krueger I") (certifying class under both prongs).

[5] *See also* *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 105 (D. Mass. 2010) ("[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.") (quotation omitted); *Tussey v. ABB, Inc.*, 2007 WL 4289694, at *8 (W.D. Mo. Dec. 3, 2007) ("*Tussey I*") ("Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(l).").

1. Rule 23(b)(1)(A)

Certification of the class under Rule 23(b)(1)(A) is proper because prosecution of individual actions would create incompatible standards of conduct for Defendant. The fiduciary duties imposed by ERISA are "duties with respect to a plan" that are intended to protect the "interest of the participants and beneficiaries" collectively. *See* 29 U.S.C. § 1104(a). Accordingly, "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible standards to govern Defendants' conduct, such as ... determinations of differing 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Krueger I*, 304 F.R.D. at 577; *see also Shanehchian v. Macy's*, 2011 WL 883659, *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible."). This prong is satisfied.

2. Rule 23(b)(1)(B)

Likewise, because an adjudication on behalf of one participant of the Plan would effectively be dispositive of the claims of the other class members, class certification is also appropriate under Rule 23(b)(l)(B). *See Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *8 (S.D.N.Y Sept. 5, 2017) *("Moreno I")*. The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) 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, Advisory Committee Note (1966). "[T]his case falls squarely within the meaning articulated by the Advisory

Committee as Plaintiffs allege breaches of fiduciary duties affecting the Plan[] and the thousands of participants in the Plan[].” *Shanehchian,* 2011 WL 883659, at *10. Numerous courts have granted certification under Rule 23(b)(1)(B) in similar cases.[6]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) preliminarily approve the Parties’ Class Action Settlement Agreement; (2) approve the proposed Settlement Notices and authorize distribution of the Settlement Notices to the proposed Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

[6] *See, e.g.*, *Karg v. Transamerica Corp.*, 2020 WL 3400199 (N.D. Iowa Mar. 25, 2020); *Vellali v. Yale Univ.*, 333 F.R.D. 10 (D. Conn. Sept. 24, 2019); *Stevens v. SEI Investments Co.*, No. 2:18-cv-04205-NIQA, ECF No. 40 (E.D. Pa. July 31, 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 University in the City of New York et al*, 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); *Tracey v. MIT*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Sacerdote v. New York Univ.*, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Moreno I*, 2017 WL 3868803, at *8; *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678, at *8 (C.D. Cal. June 15, 2017); *Krueger I*, 304 F.R.D. at 577; *Hochstadt*, 708 F. Supp. 2d at 105; *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 88 (D. Mass. Dec. 13, 2016) (text order); *Shanehchian*, 2011 WL 883659, at *10; *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012); *In re Northrup Grumman Corp. ERISA Litig.*, 2011 WL 3505264 (C.D. Cal. Mar. 29, 2011); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 174 (E.D. Pa. 2009); *In re Norte/Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *15 (M.D. Tenn. 2009); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102 (N.D. Cal. 2008); *Tussey I*, 2007 WL 4289694; *In re Tyco, Int’l, Ltd. Multidistrict Litig.*, 2006 WL 2349338, at *7 (D.N.H. Aug. 15, 2006); *In re Williams Co. ERISA Litig.*, 231 F.R.D. 416, 425 (N.D. Okla. 2005); *In re WorldCom ERISA Litigation*, 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004); *Koch v. Dwyer*, 2001 WL 289972, at *5 (S.D.N.Y. Mar. 23, 2001); *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the Court's ECF/CM e-filing system to all counsel of record who are deemed to have consented to electronic service on this 11th day of March 2024.

/s/ Brock J. Specht