UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WESTERN OKLAHOMA

BRIAN LOOMIS, JASON BOYER and DANIEL W. KILDAY, individually and on behalf of all others similarly situated,	)	Civil Action No.: 5:21-cv-00199-HE
Plaintiffs,	)	Honorable Joe Heaton
v.	)	
NEXTEP, INC., THE BOARD OF DIRECTORS OF NEXTEP, INC., THE INVESTMENT COMMITTEE OF NEXTEP, INC. and JOHN DOES 1-30.	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS BRIAN LOOMIS, JASON BOYER, AND DANIEL W. KILDAY'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 FAIRNESS HEARING

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I. INTRODUCTION

Plaintiffs Brian Loomis, Jason Boyer, and Daniel W. Kilday (together, "Plaintiffs"), participants in the Nextep 401(k) Retirement Savings Plan (the "Plan"), commenced this action against Defendants[1] (together with the Plaintiffs, the "Parties") on March 10, 2021 with the filing of the Class Action Complaint (ECF No. 1) followed by an Amended Complaint on May 12, 2021.[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.

After nearly a year of negotiations, the Parties agreed to a settlement of $1,100,000 in principal on May 5, 2022. Over the last several months, the Parties have negotiated the specific terms of the Settlement Agreement and present it now for the Court's preliminary approval.[3]

II. THE PROPOSED SETTLEMENT

[1] "Defendants" refers collectively to Nextep, Inc. ("Nextep"), The Board of Directors of Nextep, Inc. ("Board"), The Investment Committee of Nextep, Inc. ("Committee"), and John Does 1-30.

[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 ¶¶ 3-17.

[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). Capitalized terms herein shall have the meaning ascribed to them in the Settlement Agreement.

The Settlement provides Nextep (or its insurers) will pay $1,100,000.00 – the Gross Settlement Amount – to be allocated to participants on a pro-rata basis pursuant to the proposed Plan of Allocation (*see* Exhibit B to Settlement Agreement) in exchange for releases and dismissal of this action (described in Article 7 of the Settlement Agreement). Gyandoh Decl., ¶ 26. The Gross Settlement Fund will be used to pay the participants' recoveries, administrative expenses to facilitate the Settlement, and Plaintiffs' counsel's attorneys' fees and costs, and Class Representatives' Compensation if awarded by the Court. Gyandoh Decl., ¶ 27. The Class Members include all individuals in the Settlement Class, or:

> all persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period.

Gyandoh Decl., ¶ 28 (citing Settlement Agreement, Section 1.43). Class Period means the period from March 10, 2015 through the date of the Preliminary Approval Order. Gyandoh Decl., ¶ 29 (citing *Id*., Section 1.13).

Class Counsel intends to seek to recover their attorneys' fees not to exceed 33 1/3% of the Gross Settlement Amount (a maximum amount of $366,630.00). Gyandoh Decl., ¶ 30 (citing Settlement Agreement, Section 1.4). Class Counsel also intends to seek to recover litigation costs and expenses advanced and carried by Class Counsel for the duration of this litigation, not to exceed $50,000.00. *Id.* Additionally, Class Counsel intends to seek Class Representatives' Case Contribution Awards in an amount not to

exceed $5,000 each for Class Representatives Brian Loomis, Jason Boyer, and Daniel W. Kilday. Gyandoh Decl., ¶ 32 (citing *Id.*, Section 1.9). Defendants also intend to retain an Independent Fiduciary to approve and authorize the settlement on behalf of the Plan. Gyandoh Decl., ¶ 33 (citing Settlement Agreement, Sections 1.26, Article 2). The fees and expenses of the Independent Fiduciary, not to exceed $15,000, will be paid as an Administrative Expense from the Settlement Fund. Gyandoh Decl., ¶ 34 (citing *Id.*, Section 2.1.3).

III. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. Legal Standard

When "assessing whether a proposed settlement is fair, reasonable and adequate," the Tenth Circuit instructs district courts to consider the following four factors:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002). The function of the court is to ascertain whether "the proposed settlement agreement is sufficiently reasonable, adequate, fair, and consistent with the requirements of Rule 23 of the Federal Rules of Civil Procedure, to warrant notice thereof to the class members and a fairness hearing thereon." *Marcus v. State of Kansas*, 206 F.R.D. 509, 513 (D. Kan. 2022).

The is an overriding public interest in settling litigation, particularly in class actions. *See, e.g., In re Integra Realty Resources, Inc. v. Fidelity Capital Appreciate Fund*, 263 F.3d 1089, 1102 (10th Cir. 2001) (referring to "the policy of encouraging the voluntary settlement of lawsuits.") (internal citations omitted); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985) (noting there is a general public policy favoring voluntary settlements of class action disputes).

B. The Settlement Satisfies the Tenth Circuit's *Rutter* Factors Underscoring Its Fairness, Reasonableness, and Adequacy

1. The Proposed Settlement was Fairly and Honestly Negotiated

The proposed settlement was fairly and honestly negotiated satisfying the first prong of the *Rutter* test. The Parties settled this matter only after almost a full year of settlement negotiations by experienced counsel. During this time, the Parties kept the Court abreast of the progression of their settlement negotiations. The Parties first notified the Court of their intent to engage in settlement discussions on May 19, 2021 with the filing of a Joint Motion to Stay Proceedings (ECF No. 21). On May 19, 2021, the Court entered an Order granting the joint request to stay the proceedings for 60-days (ECF No. 22). The Parties filed joint status reports advising the Court of the status of the settlement negotiations and renewed joint motions to continue the stay of proceedings on July 16, 2021 (ECF No. 27), September 17, 2021 (ECF No. 29), January 14, 2022 (ECF No. 32), and March 18, 2022 (ECF No. 24). After each motion, the Court entered Orders continuing the stay (ECF Nos. 28, 30, 33, 35). On May 10, 2022, almost one year since the Parties commenced settlement negotiations, the Parties filed a Notice of Settlement (ECF No. 36). During their

negotiations, the Parties exchanged settlement demands and counter-offers, numerous emails and phone calls, and consulted with experts regarding the extent of damages the Plan sustained as a result of Defendants' alleged breaches of fiduciary duty. Gyandoh Decl.__ . Counsel for the Parties also held an in-person settlement discussion on April 13, 2022, in St. Louis, Mo. After reviewing all factors and considering the risks associated with further litigation, Plaintiffs' counsel utilized their experience and expertise in this area of law to negotiate a fair settlement for the Class. *See, e.g.*, *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1260 (D. Kan. 2006) (finding settlement was fairly and honestly negotiated when "counsel litigated this case during its early phases aggressively and in a manner that demonstrated legal expertise in this area of the law […] once the opportunity for settlement came about, plaintiffs' counsel pushed for creative settlement possibilities that worked to maximize the settlement value for the class as a whole as well as for the various categories of class members.").

2. Serious Questions of Law and Fact Exist, Placing the Ultimate Outcome of the Litigation in Doubt

The proposed settlement is fair, reasonable, and adequate in this case in light of the risks of further litigation and the likely maximum amount of recovery if the case was litigated to its conclusion on the merits. The Parties reached this settlement prior to Defendants filing a motion to dismiss and motion for summary judgment. Even if Plaintiffs could have survived defendants' motions to dismiss and summary judgment, "additional serious questions of law and fact also would have placed in doubt the value of the recovery plaintiffs might have been able to obtain." *Sprint*, 443 F.Supp.2d at 1261. Regarding

establishing liability, in this complex ERISA Action, 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).

Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions, the risk is even more considerable. Applicable here too is that "plaintiffs are faring well under the terms of the settlement compared to what the outcome of this case probably would have been in the absence of the settlement given the developing state of the law and the facts on issues that likely would have predominated this case in determining both liability and damages." *Sprint*, 443 F.Supp.2d at 1261. Indeed, one legal commentator recently observed the developing law in stating that a recent decision in an analogous breach of fiduciary duty case, *Smith v. Commonspirit Health et al.*, 2022 WL 2207557 (6th Cir. 2022) "presents a boundary in one circuit, [while] other judges have indicated more generous consideration of these kinds of claims at the pleading stage, including the Ninth and Seventh circuits." [4] Lastly, the undersigned is particularly qualified to realistically evaluate the risks of continued

[4] *See* htttps://www.law360.com/benefits/articles/1507690?cn_pk=d43891bd-aab3-46c2-81ef-43c800e76ab4&utm_source=newsletter&utm_medium=email&utm_campaign=custom&utm_content=2022-07-06?copied=1

litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009). Gyandoh Decl, ¶47.

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief After Protracted and Expensive Litigation

The Court must consider "whether the value of an immediate recovery outweighs the possibility of future relief after protracted and expensive litigation." *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993). "The value of the settlement must be weighed against 'the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation.'" *Sprint*, 443 F.Supp.2d at 1261 (citing *Gottlieb*, 11 F.3d at 1015). Here, the probable costs of continued litigation with respect to both time and money are high. Considerable additional discovery, both paper and testimonial, would be required before the case would be trial ready, and there would be voluminous briefing ahead in the absence of the proposed Settlement. The Settlement in this Action comes at an opportune time given, if the litigation continues, there would be substantial expense to the Parties associated with necessary factual and expert discovery, assorted motion practice, and trial expenses.

4. The Parties Deem the Settlement is Fair and Reasonable

Both Plaintiffs' counsel and Defendants' counsel are experienced in ERISA class actions of this type and approve of the Settlement. As discussed in greater detail *infra*, Section V.A.4.ii, the vast experience of Class Counsel in analogous actions weighs strongly in favor of the fairness of the proposed Settlement, a Settlement which Class Counsel firmly stands behind. Gyandoh Decl., ¶¶ 41. Counsel for Defendants, Jackson Lewis, PC,

who have agreed to the Settlement, are also one of the preeminent firms in the country defending analogous ERISA class actions. *See* *https://www.jacksonlewis.com/practice/erisa-complex-litigation*. Courts within the Tenth Circuit have similarly found this factor met when counsel on both sides believe the settlement is fair and reasonable. *Sprint*, 443 F.Supp.2d at 1261 ("the court is satisfied that the attorneys on both sides of this case genuinely believe the settlement is fair and reasonable" as "[t]hey believe it provides significant benefits to the class members, particularly when measured against the significant risks to any recover if the action were to proceed to summary judgment and/or trial.")

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. The Proposed Notice Plan Meets the Requirements of Due Process

In addition to preliminarily approving the Settlement Agreement, the Court must also approve the proposed means of notifying class members. FED. R. CIV. P. 23(c)(2). "Notice is adequate where the Class Member is notified of the formula of allocation." *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 429-30 (S.D. Tex. 1999).

"Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *Harry M. v. Penn. Dept. of Public Welfare*, 2013 WL 1386286, at *2 (M.D. Pa. April 4, 2013). 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) (internal citations omitted).

As set forth below, Plaintiffs' proposed means of providing Notice to the Settlement Class readily satisfies this standard as well as the mandates of due process. The combination of direct mail and publication of the Settlement Notice on a dedicated website should cause actual notice to reach a very high percentage of affected Plan participants and beneficiaries.

B. Description of the Notice Plan

As an initial matter, Class Counsel has asked the Court to approve the selection of Analytics Consulting LLC as the Settlement Administrator for the Settlement. *See* Preliminary Approval Order, ¶ 8. Analytics is an industry leader in class action settlement administration and has successfully handled dozens of class settlements. *See* *https://www.analyticsllc.com/*.

The Settlement Notice plan includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Settlement Class Notice will be sent via First Class mail, postage prepaid, to the last known address of each Settlement Class Member within (30) days of the Court's order granting preliminary approval of the Settlement. Settlement Agreement, Art. 2, §§ 1.45, 2.2.4, and 2.4. Additionally, by the same date, the Settlement Class Notice, along with other litigation-related documents such as a list of frequently asked questions and the Settlement Agreement with all of its Exhibits, will be posted on a dedicated Settlement website established by Plaintiffs' counsel. The Class Notice also provides contact information for Class Counsel. Class Notice, p. 2. Class Counsel also will establish and monitor a dedicated, toll-free Settlement telephone number with an Interactive Voice Response

system which will have answers to frequently asked questions and also provide to Settlement Class Members the opportunity to leave a voicemail for Class Counsel should they have any additional questions regarding the Settlement.

The Settlement Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23(e).[5]

V. CLASS CERTIFICATION IS APPROPRIATE

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

"A party seeking class action certification must demonstrate, under a strict burden of proof, that all of the requirements of 23(a) are clearly met." *Rex v. Owens ex rel. State of Okl.*, 585 F.2d 432, 435 (10th Cir. 1978) (internal citations omitted). Under Rule 23(a), "a class will be certified only: if the class is so numerous that joinder is impracticable; there are common factual or legal questions; the claims of the representative are typical of the claims of the class; and the representative will fairly and adequately protect the interest of the class." *Id.*

1. The Class is Sufficiently Numerous

Rule 23(a)(1) calls for certification if "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "The Tenth Circuit has not adopted a set number as presumptively sufficient to meet this burden, and there is 'not set formula

[5] Indeed, individual notice by First Class mail alone has been recognized by the Tenth Circuit as a manner of delivery of notice which comport with due process. *See Fager v. CenturyLink Comm., LLC*, 854 F.3d 1167, 1174 (10th Cir. 2016). Plaintiffs' proposed Settlement Notice plan goes well beyond individual notice by First Class mail, further underscoring its fairness and appropriateness.

to determine if the class is so numerous that it should be so certified." *McKnight Realty Co. v. Bravo Arkoma, LLC*, 2022 WL 1768860, at *2 (E.D. Okla. Apr. 12, 2022) (internal citations omitted) (finding settlement class consisting of thousands of individuals satisfied numerosity prerequisite). Here, numerosity is clearly satisfied because there were at least 5,386 Plan "participants with accounts balances as of the end of the plan year" in 2019. *See* 2019 Form 5500 at 2.

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). "A finding of commonality requires only a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Davaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010) (citing *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999). This Action presents many common questions of law and fact, applicable to all members of the Settlement Class, including: (1) whether Defendants were fiduciaries of the Plan; (2) whether the Plan and the Participants were injured by such breaches; and (3) whether the Class is entitled to damages. "All of these questions are sufficient to satisfy plaintiffs' burden under Rule 23(a)(2) because they all address common issues of owed fiduciary responsibility to the plan participants." *Moore v. Simpson*, 1997 WL 570769, at *4 (N.D. Ill. Sept. 10, 1997). Consequently, Plaintiffs demonstrate a "level of commonality more than sufficient under Rule 23(a)(2)." *In re: Honeywell Int'l Sec. Litig.*, 211 F.R.D. 255, 260 (D.N.J. 2002); *See also Karg et al.*

v. Transamerica Corp., 2020 WL 3400199, at * 2 (N.D. Iowa Mar. 25, 2020) ("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.'"); *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.").

3. Plaintiffs' Claims are Typical of the Class

Here, Plaintiffs easily satisfy the typicality prong of Rule 23 because "[a]s common investors in the Challenged Funds, plaintiffs and proposed class members allege similar harm resulting from defendants' alleged fiduciary breaches. In fact, the harm may be identical." *Karg*, 2020 WL 3400199, at * 3; *see also Stanford*, 263 F.R.D. at 167 (finding typicality requirement satisfied "because plaintiff challenges the same conduct that affects both the plaintiff and the absent class members"); *Sims v. BB&T Corp.*, 2017 WL 3730552, at*4 (M.D.N.C. Aug. 28, 2017) (finding typicality where "each named plaintiff's claim and each class member's claim is based on the same events and legal theory—a breach of fiduciary duty stemming from the defendants' alleged disloyal and imprudent process for selecting, administering, and monitoring the [p]lan's investments" and where "the remedial theory . . . is identical for the named plaintiffs and the class members.") (citations omitted). "[E]very member of the class need not be in a situation identical to that of the named plaintiff." *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982). In fact, "[f]actual

difference between class members' claims do not defeat certification where common questions of law exist." *Stricklin*, 594 F.3d at 1195 (internal citations omitted).

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

Under Rule 23(a)(4), the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously and on behalf of the class?" *Rutter*, 314 F.3d at 1187-88 (internal quotations omitted).

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

Here, all Plaintiffs understand the nature of their claims and duties as class representatives to vigorously prosecute this case through its conclusion. *See* Loomis Decl. ¶¶ 5-6; Boyer Decl. ¶¶ 5-6; Kilday Decl. ¶¶ 5-6; *see also Stanford*, 263 F.R.D. at 171 ("Because Stanford is challenging the same course of conduct and seeking the same relief as the rest of the absent class members, the court finds that Stanford's interests are sufficiently aligned with the those of the class.") 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* Loomis Decl. ¶¶ 5-6; Boyer Decl. ¶¶ 5-6; Kilday Decl. ¶¶ 5-6. 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, presenting for a deposition, participating in any mediation or other proceedings, and testifying at trial. *See* Loomis Decl. ¶¶ 5-6; Boyer Decl. ¶¶ 5-6; Kilday Decl. ¶¶ 5-6. 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

The inquiry into the adequacy of class counsel is now decoupled from the Rule 23(a)(4) inquiry into the adequacy of the class representatives and is analyzed under factors set forth in Rule 23(g). *Karg*, 2020 WL 3400199, at *5 (citing FED. R. CIV. P. 23) ("If the motion includes a proposal for the appointment of class counsel, set forth with particularity the information the court must consider in assessing proposed class counsel's ability to represent the interests of the class fairly and adequately, as set forth in Federal Rules of Civil Procedure 23(g)(1)(A) and (B).") 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).

Here, Capozzi Adler satisfies all prerequisites. *First*, Capozzi Adler has done significant work identifying and investigating potential claims in this action. It began its investigation of claims several months before filing suit. Gyandoh Decl., ¶ 3. This work included requesting documents from the Company pursuant to ERISA § 104(b)(4) and engaging consulting experts. Gyandoh Decl., ¶ 3. *Second*, Capozzi Adler and the undersigned counsel have significant experience handling ERISA matters and have knowledge of the applicable law. *Id*. at ¶¶ 36-44. Capozzi Adler was recently appointed interim or co-lead counsel in several actions pending across the country and have defeated numerous motions to dismiss, won appeals, and settled analogous cases across the country. *Id*. at ¶ 45. 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 24 years offering a full range of legal services. *Id.* at ¶ 46.

Accordingly, appointment of Capozzi Adler as Class Counsel is warranted. *See Boley, et al. v. Universal Health Servs., Inc., et al.*, 2021 WL 859399 (E.D. Pa. Mar. 8, 2021) (appointing Capozzi Adler as co-lead counsel in analogous breach of fiduciary duty action); *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) [6]

The proposed Class may be certified under Rule 23(b)(1)(A) and/or (B), as numerous courts have done in similar cases. *See* Gyandoh Decl., ¶ 54, Exhibit 5.

1. Certification Under Rule 23(b)(1) is Most 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. 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 In re Schering-Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (finding certification of a Rule 23(b)(1)(B) class is appropriate where plaintiff's "proofs regarding defendants' conduct will, as a practical matter, significantly impact the claims of other Plan participants and of employees who invested in the Stock Fund. [Plaintiff's] claims are based on defendants' conduct, not, as defendants urge, on unique facts and individual relationships"); *Moore*, 268 F.R.D. at 538 (certifying 23(b)(1)(B) class); *Clark v. Duke Univ.*, 2018 WL 1801946, at *9 (M.D.N.C.

[6] 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.

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 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. 134, 139-40 (1985). 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.[7]

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

If the Court determines that certification is appropriate under Rule 23(b)(1)(B), the inquiry need go no further. *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)."). Nevertheless, it is not uncommon for courts to certify ERISA class actions under both subsections 23(b)(1)(B) and 23(b)(1)(A). *See*, *e.g.*, *Stanford*, 263 F.R.D. at 173-174; *Merck*, 2009 WL 331426, at *10-11; *In re: Nortel*

[7] *See* Gyandoh Decl. ¶ 54, Exhibit 5 (listing decisions certifying Rule 23(b)(1)(B) classes).

Networks Corp. ERISA Litig., 2009 WL 3294827, at *16 (M.D. Tenn. Sept. 2, 2009); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 193-194 (W.D. Mo. 2009); *see also* Gyandoh Decl., ¶ 54, Exhibit 5.

VI. CONCLUSION

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: July 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2022, 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: */s/ Mark K. Gyandoh*
Mark K. Gyandoh, Esq.