UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Stuart Krohnengold, Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, Rafael Musni, Thomas Lantz, Sandra Scanni, and Claudia Gonzalez, as representatives of a class of similarly situated persons, and on behalf of the New York Life Insurance Employee Progress Sharing Investment Plan, and the New York Life Insurance Company Agents Progress Sharing Plan,

Plaintiffs,

v.

New York Life Insurance Company; the Fiduciary Investment Committee; the Board of Trustees; Katherine O'Brien; Anthony R. Malloy; Yie-Hsin Hung; Arthur A. Seter; Scott L. Lenz; Robert J. Hynes; and John and Jane Does 1-20,

Defendants.

Case No. 1:21-cv-01778 - JMF

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

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INTRODUCTION

Plaintiffs Amy Laurence,[1] Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, Rafael Musni, Thomas Lantz, Sandra Scanni, and Claudia Gonzalez submit this memorandum in support of their motion for preliminary approval of their class action settlement with Defendants New York Life Insurance Company ("New York Life"), the Fiduciary Investment Committee, the Board of Trustees, Katherine O'Brien, Anthony R. Malloy, Yie-Hsin Hung, Arthur A. Seter, Scott L. Lenz, and Robert J. Hynes (collectively, "Defendants") relating to the management of the New York Life Insurance Company Employee Progress-Sharing Investment Plan ("Employee Plan") and the New York Life Insurance Company Agents Progress-Sharing Investment Plan ("Agent Plan") (collectively, the "Plans").[2]

Under the proposed Settlement, New York Life or its insurers will pay a Gross Settlement Amount of $19,000,000 into a common fund for the benefit of the Settlement Class. This is a significant recovery in connection with the claims that were alleged, and falls well within the range of negotiated settlements in similar ERISA cases. For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that notice may be sent to the Settlement Class. Among other things:

- The Settlement Agreement is modeled after one previously approved by this Court in *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, another case involving alleged fiduciary breaches in connection with proprietary investments in a 401(k) plan;
- The Settlement was negotiated at arm's length by experienced and capable counsel, with the assistance of a respected neutral mediator;
- The Settlement followed contested motion practice and significant discovery including 21 fact witness depositions, multiple rounds of expert reports, four expert depositions, and the production of over a quarter million pages of documents;

[1] Ms. Laurence was substituted for her late husband Stuart Krohnengold following his passing. *See* ECF 173.

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

- The Settlement provides for significant monetary relief and an equitable method of distribution to Class Members;
- The settlement proceeds will be automatically distributed to all eligible Class Members, without requiring them to submit a claim form;[3]
- The proposed Settlement Class is consistent with the requirements of Rule 23;
- The release is appropriately tailored to the claims asserted in the action; and
- The proposed Notice of Settlement provides fulsome information to Class Members about the Settlement, and allows Class Members the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) certifying the proposed Settlement Class for purposes of Settlement; (3) approving the proposed Notice of Settlement and authorizing distribution of the Notice to the 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 Defendants dispute the allegations in the Action and deny any liability for the alleged violations of ERISA, they do not oppose the relief sought in this motion as Parties to the Settlement.

BACKGROUND

I. Pleadings and Motions Practice

Plaintiff Stuart Krohnengold filed this Action as a putative class action on March 2, 2021, *see* ECF 1, and an Amended Complaint was subsequently filed on June 15, 2021 adding several additional Plaintiffs, *see* ECF 38. In summary, Plaintiffs alleged that (1) the fiduciary Committee for each of the Plans (and its predecessor Board of Trustees)[4] breached its fiduciary duties by retaining certain MainStay mutual funds affiliated with New York Life as investment options in the Plans;

[3] Current participants in the Plans will receive their share of the Settlement via a deposit to their Plan account, and Former Participants will receive their settlement payment by check or via a rollover to another retirement account if they so elect.

[4] The Committee for each of the Plans and its predecessor Board of Trustees (and the individual members of the same) are collectively referred to herein as the "Committee."

(2) the Committee also breached its fiduciary duties by retaining a Fixed Dollar Account ("FDA"), affiliated with New York Life, as the Plans' default investment; (3) Defendants committed prohibited transactions with respect to the Plans' investment in these proprietary funds affiliated with New York Life; (4) New York Life was liable as a monitoring co-fiduciary for the alleged fiduciary breaches of the Committee; and (5) Defendants violated ERISA's anti-inurement rule with respect to the at-issue proprietary investments. *Id*., Counts I-V.

Defendants moved to dismiss the Amended Complaint on July 16, 2021. *See* ECF 41. On August 10, 2022, the Court granted in part and denied in part Defendants' motion to dismiss. ECF 58. The Court (1) dismissed the claims of four Plaintiffs regarding the FDA on standing grounds; (2) dismissed the breach of fiduciary duty claims (but not prohibited transaction claims) of the other Plaintiffs regarding the FDA on statute of limitations grounds; (3) dismissed all Plaintiffs' breach of fiduciary duty claims based on the MainStay MacKay International Equity Fund; and (4) dismissed Plaintiffs' anti-inurement claim. *Id.* at 26. The Court otherwise denied the motion to dismiss, and granted Plaintiffs leave to re-plead the claims that were dismissed. *Id.* at 26-27.

Plaintiffs then re-pleaded their FDA claim in the operative Second Amended Complaint, and added three new Plaintiffs from the Agent Plan who were defaulted into the Fixed Dollar Account. *See* ECF 63. Defendants brought another (partial) motion to dismiss, ECF 66, and the Court denied that motion in full on March 28, 2023. *See* ECF 93.

On June 26, 2023, Plaintiffs moved for class certification. ECF 115. When this case settled, Plaintiffs' motion for class certification was pending.

II. Discovery and Settlement

The Parties developed a substantial record during discovery. Defendants produced over 179,000 pages of documents in response to Plaintiffs' discovery requests, and the Plans' investment consultants produced over 100,000 additional pages in response to subpoenas. *Richter Decl. ¶ 13.*

Deposition discovery was also extensive. *Id.* ¶ *14.* Plaintiffs took the depositions of eight defense witnesses, deposed three third-party witnesses, and defended ten named Plaintiff depositions. In connection with discovery, the parties also engaged in letter motion practice before the Court. *See* ECF 106, 109, 147-148.

Following fact discovery, the Parties exchanged multiple rounds of expert reports: Plaintiffs served two initial expert reports, Defendants served two expert rebuttal reports, and Plaintiffs served two expert reply reports. *Id.* ¶ 15. The parties then completed expert depositions of both Plaintiffs' and Defendants' experts. *Id*.

After fact and expert discovery were complete, the Parties engaged in private mediation with Robert Meyer of JAMS on January 18, 2024. *Id.* ¶ *17.* Mr. Meyer is an experienced mediator who has substantial experience mediating ERISA cases and other class action cases. *Id.* Following extensive arms'-length negotiations (which lasted approximately ten hours), the Parties reached a settlement-in-principle, and then drafted the comprehensive Settlement Agreement that is the subject of this motion. *Id*.

III. Overview of Settlement Terms

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> [A]ll participants and beneficiaries of the New York Life Insurance Company Employee Progress-Sharing Investment Plan or the New York Life Insurance Company Agents Progress-Sharing Investment Plan who held assets in the MainStay Epoch U.S. All Cap Fund, MainStay Epoch U.S. Small Cap Fund, MainStay Income Builder Fund, any MainStay Retirement Fund, or the Fixed Dollar Account in the Plans at any time from March 2, 2015 to the Effective Date of Settlement, excluding Defendants, any of their directors, and any members of the Committees during the Class Period.

Settlement § 1.9. Based on preliminary information provided by Defendants in discovery, it is estimated that there are more than 40,000 Class Members. *Richter Decl.* ¶ *4.*

B. Monetary Relief and Plan of Allocation

Under the Settlement, New York Life or its insurers will pay a Gross Settlement Amount of $19,000,000 into a Qualified Settlement Fund. *Settlement* §§ 1.33, 4.2. After accounting for any Attorneys' Fees and Expenses, 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.* §§ 5.1–5.4.

The Plan of Allocation provides for calculation of a Settlement Allocation Score for each Class Member based on the sum of his or her underlying Fund Allocation Scores in connection with the Disputed Investments, as follows:

(i) MainStay U.S. Epoch All Cap Fund: (average personal month-end balance[5] in the fund from March 2015 to December 2020), *divided by* (average aggregate month-end balance in the fund from March 2015 to December 2020 for all Class Members), *multiplied by* (54,989,635)

(ii) MainStay U.S. Epoch Small Cap Fund: (average personal month-end balance in the fund from March 2015 to February 2019), *divided by* (average aggregate month-end balance in the fund from March 2015 to February 2019 for all Class Members), *multiplied by* (9,568,683)

(iii) MainStay Retirement Funds: (average personal month-end balance in all such funds from March 2015 to February 2019), *divided by* (average aggregate month-end balance in all such funds from March 2015 to February 2019 for all Class Members), multiplied by (3,490,229)

(iv) MainStay Income Builder Fund: (average personal month-end balance in the fund from March 2015 to November 2022), *divided by* (average aggregate month-end balance in the fund from March 2015 to November 2022 for all Class Members), *multiplied by* (4,647,776)

(v) Fixed Dollar Account (FDA): (average personal month-end balance in the FDA from March 2015 to December 2023), *divided by* (average aggregate month-end balance in the FDA from March 2015 to December 2023 for all Class Members), *multiplied by* (8,265,491). For any Class Member identified as enrolled in the FDA by default

[5] Neither the Company, the Plans, nor the Recordkeeper have end-of-month participant balance data as of the end of May, September, and November 2015, or July and August 2016. The calculations will therefore omit those months. *Id.* § 5.1(a), n.2.

> during the Class Period, their Fund Allocation Score for the FDA shall be further multiplied by 1.5.[6]

Id. § 5.1(a). In summary, the Fund Allocation Score for each Disputed Investment is calculated based on the Class Member's level of investment in such Disputed Investment relative other Class Members, and the amount of estimated losses (or profits, in the case of the FDA) that Plaintiffs' expert calculated for each such Disputed Investment during the Class Period. *Richter Decl.* ¶ 8*; see also id.* ¶ 5. To account for the estimated losses specific to Class Members who were defaulted into the FDA, any Class Members who were identified as defaulted by Plaintiffs' expert for purposes of his loss analysis (based on the data provided to him) will have their Fund Allocation Score specific to the FDA multiplied by 1.5. *Richter Decl.* ¶ 8. This 50% enhancement reflects the fact that approximately $4.1 million in losses were calculated for FDA defaultees in addition to the approximately $8.2 million in profits from all FDA investors (a ratio of 50%), based on the most conservative estimates of Plaintiffs' expert. *Id.*

Once these calculations are completed, the Settlement Administrator will then determine the Entitlement Amount of each Class Member (the amount they will be paid) by calculating each such Class Member's pro rata share of the Net Settlement Amount based on his or her Settlement Allocation Score compared to the sum of the Settlement Allocation Scores for all Class Members. *Settlement* § 5.1(b). If the dollar amount of the settlement payment to a Class Member is calculated by the Settlement Administrator to be less than $2.00, then that Class Member's pro rata share shall be zero (to minimize administrative expenses associated with any *de minimis* payments), and shall be reallocated among the remaining Class Members on a pro rata basis. *Id.*

[6] The Parties agree that, for purposes of this calculation only, the Class Members identified as enrolled in the FDA by default will be those Class Members identified as having been defaulted into the FDA by Plaintiffs' expert Dr. Pomerantz in connection with his October 13, 2023 expert report (based on data provided by Defendants and the Recordkeeper), and that neither the Parties nor the Recordkeeper will conduct any further or supplemental analysis of defaulted Class Members. *Id.* § 5.1(a)(v).

Active and Inactive Participants (those with a Plan account balance greater than $0) will automatically receive their share of the Settlement via a deposit to their Plan account. *Id*. § 5.2. Former Participants will automatically receive their payment by check, unless they elect to have their distribution rolled over to an individual retirement account or other eligible employer plan. *Id*. § 5.3. The Settlement Agreement also provides for automatic payments to Beneficiaries and Alternate Payees under a Qualified Domestic Relations Order. *Id.* § 5.4. Participants are not required to submit a claim form to receive payment. *Richter Decl.* ¶ 10.

C. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class and the Plans will release Defendants and affiliated parties ("Released Defendant 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 were asserted in the Action or could have been asserted based on the same factual predicate;[7]
- That would be barred by *res judicata* based on the Court's entry of the Final Approval Order;
- That arise from or relate to the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Amount pursuant to the Plan of Allocation; or
- That arise from or relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone.

Settlement § 1.40. The Released Claims do not include claims to enforce the Settlement Agreement or claims for denial of benefits from the Plans. *Id.* §§ 1.40, 7.1(c).

[7] The release language goes on to provide certain examples that are not repeated here due to space limitations. The full release language, incorporated by reference, appears in Section 1.40 of the Settlement Agreement.

D. Class Notice and Settlement Administration

All Class Members will receive notice of the settlement. The Notice of Settlement (including a Former Participant Rollover Form) will be sent to Class Members via first-class U.S. Mail. *Id.* §§ 3.2(b)-(c). The Notice provides 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 Awards; (8) the date, time, and location of the final approval hearing; and (9) Class Members' right to appear at the final approval hearing.[8] *See id.* at Ex. A.

To the extent that Class Members would like more information, the Settlement Administrator will establish a Settlement Website on which it will post the Notice, Former Participant Rollover Form, and relevant case documents, including but not limited to a copy of all documents filed with the Court in connection with the Settlement. *Id.* §§ 3.3(a)–(b). The Settlement Administrator also will establish a toll-free telephone support line through which Class Members may contact the Settlement Administrator directly. *Id.* § 3.3(c).

E. Attorneys' Fees and Expenses

The Settlement does not provide for an award of a specific amount of attorneys' fees and is not conditioned on the award of any such fees. *See id.* § 6.1. The Settlement requires that Class Counsel file their motion for Attorneys' Fees and Expenses at least 14 days before the deadline for

[8] The Notice does not contain information regarding opting out of the Settlement Class because the Class is properly certified under Rule 23(b)(1), *see Settlement* Ex. A at 7, consistent with other ERISA cases involving similar claims. *See infra* at 23-25; *Beach v. JPMorgan Chase Bank, N.A.*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019) (certifying (b)(1) class for litigation purposes); *Beach*, No. 1:17-cv-00563, ECF 213 (reaffirming (b)(1) certification for settlement purposes). "When a class is eligible for certification under both Rules 23(b)(1) and (b)(3), courts find that Rule 23(b)(1) controls." *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 165 (S.D.N.Y. 2017) (citing *Doe v. Karadzic*, 176 F.R.D. 458, 463 (S.D.N.Y. 1997)).

objections to the proposed Settlement. *Id.* § 6.1. Class Counsel will limit their request for Attorneys' Fees to 33% of the Gross Settlement Amount. *Id.* Ex. A at 6. In addition, the Settlement provides for recovery of litigation expenses and administrative expenses related to the Settlement, and for Service Awards up to $10,000 per Class Representative. *Id.* §§ 6.1–6.2. As with Attorneys' Fees, the Settlement is not conditioned on approval of any such Service Awards. *Id.* § 6.2.

Plaintiffs solicited bids from three potential settlement administrators, and have retained Analytics Consulting LLC ("Analytics") as the Settlement Administrator. *Richter Decl.* ¶ 43. Analytics provided the lowest bid among the candidates and has extensive experience handling similar ERISA settlements, including the court-approved settlements in *Andrus v. New York Life Ins. Co.*, No. 1:16-cv-05698 (S.D.N.Y.) and *Beach v. JPMorgan Chase Bank*, 1:17-cv-00563 (S.D.N.Y.). *Id.* Plaintiffs also have retained Eagle Bank as the Escrow Agent for the Qualified Settlement Fund. *Id.* ¶ 44. Eagle Bank previously served as the escrow agent in connection with the ERISA class action settlement in *Becker v. Wells Fargo Co.*, No. 0:20-cv-02016 (D. Minn.) (another case involving funds affiliated with the plan sponsor), and has agreed to serve as the Escrow Agent for a fraction of the amount that other institutions charge for this service. *Id.*

F. Review by Independent Fiduciary

As required under ERISA, Defendants will retain an Independent Fiduciary to review the Settlement and determine whether to authorize the release on behalf of the Plan. *Settlement* § 2.2; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632 (Dec. 31, 2003), as amended, 75 Fed. Reg. 33830 (June 15, 2010). The Independent Fiduciary will issue its report at least 50 days before the final Fairness Hearing, so it may be considered by the Court. *Settlement* § 2.2(b).

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. This involves a two-step process. *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). In the first step, the Court considers whether the settlement warrants preliminary approval, such that notice of the settlement may be sent to the class members. *Id.*[9] In the second step, after notice of the proposed settlement has been issued and class members have had an opportunity to be heard, the Court considers whether the settlement warrants final court approval. *Id*.

The decision whether to approve a proposed class action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). However, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quotation omitted). As a result, "courts should give proper deference to the private consensual decision of the parties … [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Clark*, 2009 WL 6615729, at *3 (citations omitted).

Under Rule 23(e)(1), courts are authorized to grant preliminary approval of a proposed settlement so long as the court will "likely be able to" grant final approval of the settlement and certify the class for purposes of settlement. Fed. R. Civ. P. 23(e)(1)(B); *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332, at *1 (S.D.N.Y. Dec. 16, 2019). This standard is satisfied here.

[9] A motion for preliminary approval involves only an "initial evaluation" of the fairness of the proposed settlement. *Clark v. Ecolab Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (quoting 4 NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002)). To grant preliminary approval, the Court need only find that there is "probable cause" to submit the settlement to class members and hold a full-scale hearing as to its fairness. *In re Traffic Exec. Ass'n-E. Railroads*, 627 F.2d 631, 634 (2d Cir. 1980).

II. The Settlement Meets the Standard for Preliminary Approval

To approve a settlement under Rule 23(e)(2), the Court must consider four factors: (1) adequacy of representation; (2) existence of arm's-length negotiations; (3) adequacy of relief; and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). Each of these factors support preliminary approval of the Settlement. [10]

A. The Class is Adequately Represented

"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.'" *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332, at *2. This adequacy standard is more than met here.

Plaintiffs have adequately represented the Settlement Class. At the outset of the case, Plaintiffs signed written acknowledgements of their duties as class representatives, and each of them has sought to fulfill those duties throughout the course of this case. *See Plaintiff Declarations*[11] ¶¶ 5-6. Among other things, Plaintiffs (1) reviewed the allegations in the Complaints bearing their names; (2) communicated with Class Counsel; (3) provided information in response to interrogatories; (4) produced documents in response to document requests; (5) testified at their depositions; and (6) discussed the proposed Settlement with counsel and reviewed the terms of the Settlement Agreement. *Id.* ¶¶ 4, 7. Plaintiffs fall within the proposed Settlement

[10] The Rule 23(e) factors "supplement rather than displace the[] '*Grinnell*' factors" previously applied in this circuit. *In re GSE Bonds*, 2019 WL 6842332, at *1. The nine *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. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (citations omitted). Consistent with the intent of the 2018 amendments, only those *Grinnell* factors that are relevant to this Settlement are addressed here.

[11] "Plaintiff Declarations" refers to the accompanying Declarations of Amy Laurence, Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, Rafael Musni, Thomas Lantz, Sandra Scanni, and Claudia Gonzalez.

Class and are not aware of any conflicts between themselves and any other class members. *Id.* ¶¶ 2-3, 6.

Class Counsel is also more than adequate. Counsel from Cohen Milstein Sellers & Toll, PLLC ("Cohen Milstein") are seasoned class action practitioners who have successfully litigated numerous ERISA class actions involving similar claims, including recent cases against Wells Fargo, T. Rowe Price, and BlackRock arising from use of proprietary funds in their 401(k) plans. *See Richter Decl.* ¶ 32. Undersigned counsel Kai Richter also previously served as counsel of record (at his former law firm) in four ERISA class cases in this District, including the *Andrus* case involving New York Life and in *Beach v. JPMorgan Chase Bank, N.A.*, No. 1:17-cv-00563 before this Court. *Id.* ¶ 22. In recognition of its work, Cohen Milstein's Employee Benefits/ERISA Group was named Practice Group of the Year in 2022 by Law360. *Id.* ¶ 31. Plaintiffs' counsel thoroughly investigated the claims, successfully litigated two motions to dismiss, vigorously sought discovery from both Defendants and third parties, consulted with experts, and skillfully negotiated the present settlement based on their experience and the record that was developed. *See supra* at 2-4; *Richter Decl.* ¶¶ 12-16.

B. The Settlement was Negotiated at Arm's Length After Extensive Discovery

The second Rule 23(e) factor examines whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). A class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation[.]" *In re Excess Value Ins. Coverage Litig.*, 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) (citation omitted); *see also Wal-Mart*, 396 F.3d at 116. That is exactly the situation here. Class Counsel and Defendants' counsel (Goodwin Procter LLP) are knowledgeable and experienced in complex class actions such

as this. Their negotiations were conducted at arm's length, and were facilitated by a seasoned mediator. *Richter Decl.* ¶ 17. Accordingly, this factor also favors settlement approval.

"[T]he stage of the proceedings and the amount of discovery completed" are also pertinent to the Court's review. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *8 (D. Conn. Nov. 3, 2016) (citation omitted). As noted above, this case was settled only after significant discovery, including production and review of over a quarter million pages of documents, eight defense witness depositions, three third-party witness depositions, ten plaintiff depositions, an exchange of expert reports, and four expert depositions. *See supra* at 3-4. These circumstances further favor approval of the Settlement. *See Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 56 (W.D.N.Y. 2018) (approving settlement where the parties engaged in "robust" discovery that was "scheduled to conclude near the time the parties reached a settlement").

C. The Settlement Provides Significant Relief to Class Members that Is Fair and Adequate Based on All Relevant Considerations

The Parties' negotiations resulted in a Settlement that provides substantial relief to the Class. The $19 million settlement amount is a robust monetary recovery that represents a significant portion of the alleged losses sustained by the Plans. Specifically, Plaintiffs' expert estimated that the total losses associated with Plaintiffs' breach of fiduciary duty claims was between $76.8 - $93.4 million. *Richter Decl.* ¶ 5. Based on this estimate, the $19 million recovery represents approximately 20–25% of the total estimated losses. *Id.* Plaintiffs' expert also estimated the profits to New York Life on *all* monies invested in the FDA (not just defaulted assets) because Plaintiffs' prohibited transaction claims involving the FDA were not limited to monies invested in the FDA by default. *Id.* ¶ 6. Based on his analysis, these profits totaled between $8,265,491 and $9,512,443. *Id.* If these amounts are added to the estimated losses above for purposes of analyzing the recovery, the $19 million Gross Settlement Amount represents a recovery rate of approximately 18–22%.

Id. Under either calculation, Plaintiffs' percentage of recovery is on par with numerous other ERISA class action settlements across the country, including in this District. *See e.g.*, *Kohari v. MetLife Group, Inc.*, No. 1:21-cv-06146, ECF 110 at 11 (S.D.N.Y. Nov. 20, 2023) (ERISA settlement involving proprietary funds represented 19% of plaintiffs' highest measure and 27% of lowest measure of damages); *Jacobs v. Verizon Commc'ns. Inc.*, No. 1:16-cv-01082, ECF 234 at 20 (July 7, 2023) (settlement represented approximately 13-29.2% of alleged losses to plan), *approved* ECF 247 (S.D.N.Y. Nov. 21, 2023); *Bhatia v. McKinsey & Co.*, No. 1:19-cv-01466, ECF 101 at 15 (Feb. 3, 2021) (settlement represented 21-22% of disputed fees paid to McKinsey affiliate), *approved* ECF 110 (S.D.N.Y. Feb. 17, 2021).[12] Indeed, the recovery in this case exceeds the 16% recovery in *Beach*. *See* Mem. in Supp. of Pls.' Mot. for Prelim. Approval of Settlement, *Beach*, No. 1:17-cv-00563, ECF 211 at 21 (S.D.N.Y. May 22, 2020), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020) (Furman, J.).

The specific subfactors enumerated in Rule 23(e)(2)(C) further support approval of the Settlement. Those factors include:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). Each of these factors are briefly discussed below.

[12] *See also Toomey v. DeMoulas Super Mkts., Inc.*, No. 1:19-cv-11633, ECF 95 at 10 (Mar. 24, 2021), *approved* ECF 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Price v. Eaton Vance Corp.*, No. 18-12098, ECF 32 at 12 (D. Mass. May 6, 2019), *approved* ECF 57 (D. Mass. Sept. 24, 2019) (23% of alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858, at *4 (C.D. Cal. July 30, 2018) (approximately 17.7% of losses under plaintiffs' highest model); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *5 (N.D. Cal. May 11, 2018) (approximately 10% of losses under plaintiffs' highest model).

1. The Risks, Costs, and Delay of Further Litigation Were Significant

In the absence of a settlement, Plaintiffs would have faced potential litigation risks. *See In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (noting that there is a "general risk inherent in litigating complex claims such as these to their conclusion"); *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."), *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997). Success is never assured in a case such as this, and several hurdles remained at the time of settlement. First, Plaintiffs' class certification motion was still pending. Second, in the event that class certification was granted, Defendants likely would have sought leave to file a summary judgment motion based on a recent Second Circuit decision affirming summary judgment in favor of the defendants in another ERISA proprietary funds case in the Southern District of New York. *See Falberg v. Goldman Sachs Grp., Inc.*, No. 22-2689, ECF 162-1 (Feb. 14, 2024). Although Plaintiffs believe *Falberg* is distinguishable on its facts, the decision highlights the risks of a case such as this. Third, if the case proceeded to trial, Defendants still might have prevailed. *See, e.g., Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (bench trial ruling in favor of defendants), *aff'd in part*, *vacated in part,* 9 F.4th 95 (2d Cir. 2021); *Vellali v. Yale Univ.*, No. 3:16-cv-1345, ECF 622 (D. Conn. July 13, 2023) (jury verdict in favor of defendants). And even if Plaintiffs prevailed on liability, issues regarding proof of loss would have remained. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (2012) (determination of losses in breach of fiduciary duty cases is "difficult"); *Sacerdote*, 328 F. Supp. 3d at 280 (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").

While Plaintiffs were confident in their claims, continuing the litigation would have, at a minimum, resulted in complex and costly proceedings that would have delayed relief to the class. ERISA 401(k) cases such as this "often lead[] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) ("*Krueger II*"). Indeed, ERISA class 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) (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). The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See 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"); *Koerner v. Copenhaver*, 2014 WL 5544051, at *4 (C.D. Ill. Nov. 3, 2014) ("The facts giving rise to Plaintiffs' claims are complicated, require the elucidation of experts, and are far from certain."). Given the risks, costs, and delay of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated. *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."); *accord Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or Class Member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks in terms of appeals and possible changes in the law and would, in light of the time value of money, make future recoveries less valuable than in this current recovery.").

2. The Proposed Method of Distributing Relief to the Class is Effective

The proposed method of distributing the Settlement proceeds is fair and reasonable. Current Plan participants will have their Plan accounts automatically credited with their share of the Settlement, and Former Participants will automatically receive their distribution via check unless they elect a tax-qualified rollover of their distribution to an individual retirement account or other eligible employer plan. *See supra* at 7. This method of distribution is both effective and efficient, and was approved by this Court in *Beach*. *See Beach*, No. 1:17-cv-00563, ECF 211 at 17 (May 22, 2020), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020). Any uncashed checks will be paid to the Plans for the purpose of defraying administrative fees and expenses of the Plans, *see Settlement* § 5.6, and will not revert to New York Life or its insurers.

3. The Settlement Terms Regarding Attorneys' Fees Are Reasonable

The Settlement terms relating to attorneys' fees are also fair and reasonable. The Settlement does not provide for the award of a specific amount of attorneys' fees and is not conditioned on the award of any such fees, which will be determined by the Court in its discretion. *See id.* § 6.1. Moreover, Class Counsel will voluntarily limit their request for Attorneys' Fees to 33% of the Gross Settlement Amount, *see Settlement* Ex. A at 6, consistent with the amounts approved in *Beach* and similar cases in this District. *See Beach*, No. 1:17-cv-00563, ECF 232 (S.D.N.Y. Oct. 7, 2020) (approving 33% attorneys' fee award); *Jacobs v. Verizon Commc'ns. Inc.*, No. 1:16-cv-01082, ECF 247 (S.D.N.Y. Nov. 21, 2023) (approving one-third fee); *Andrus v. New York Life Ins. Co.*, No. 1:16-cv-05698, ECF 83 (S.D.N.Y. June 15, 2017) (approving one-third fee); *accord Kruger*, 2016 WL 6769066, at *2 ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter.") (citing cases). Class Counsel will not receive any portion of their attorneys' fees unless and until the Settlement and their fees are approved by the Court.

4. There Are No Separate Agreements

As the Settlement states, "[t]his Settlement Agreement and all of the exhibits appended hereto constitute the entire agreement of the Parties with respect to their subject matter" and "[n]o representations or inducements have been made by any Party hereto concerning the Settlement Agreement or its exhibits other than those contained and memorialized in such documents." *Settlement* § 11.5. Accordingly, there are no separate agreements bearing on the proposed Settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv).

5. The Settlement Treats Class Members Equitably

Finally, the Settlement treats Class Members equitably. A uniform formula is used to calculate settlement payments for all Class Members, and that formula is designed to allocate the Net Settlement Amount to Class Members on a pro rata basis relative to their share of the alleged losses or profits associated with each of the Disputed Investments. *See supra* at 5-6. This is equitable, and consistent with the manner of allocation that this Court approved in *Beach*. *See Beach*, No. 1:17-cv-00563, ECF 211 at 22 (S.D.N.Y. May 22, 2020) ("Based on the loss calculations of Plaintiffs' damages expert, the Net Settlement Amount will be allocated among all eligible Class Members on a pro rata basis in proportion to their respective portion of damages based on their holdings in each of the Disputed Investments."), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020).[13] Moreover, these payments will be efficiently distributed to Class Members, without requiring them to submit a claim form. *See supra* at 7. Class Members only need to submit paperwork if they no longer have an account in the Plan and wish to request a rollover of their Settlement payment instead of a check made out to them personally.

[13] The $2.00 cutoff for Settlement payments is also consistent with the Court-approved Settlement in Beach. *See Beach*, No. 1:17-cv-00563, ECF 212-1 at § 5.1(b).

III. The Class Notice Plan Is Reasonable and Should Be Approved

In addition to reviewing the fairness of the Settlement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by it. *See* Fed. R. Civ. P. 23(e)(1)(B). The "best notice" practicable under the circumstances includes individual notice via United States mail 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. *See Settlement* ¶ 2.1(b). This type of notice is presumptively reasonable. *See* Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Notice is also reasonable. The Notice includes all relevant information, *see supra* at 8, and "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Lomeli v. Sec. & Inv. Co. Bahrain*, 546 Fed. App'x 37, 41 (2d Cir. 2013) (quotation omitted); *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice "need only describe the terms of the settlement generally"). To the extent that Class Members desire further information, the Notice will be supplemented through the Settlement Website and telephone support line. *See supra* at 8. This further supports the reasonableness of the notice program.

IV. The Proposed Class Should Be Certified For Settlement Purposes

In addition to approving the Settlement and authorizing distribution of the Notice, this Court should certify the Settlement Class for settlement purposes.[14] To certify the class, Plaintiffs 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). Here, all of the necessary requirements

[14] In the context of a settlement, class certification is more easily attained because the court need not inquire whether a trial of the action would be manageable on a class-wide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

of Rules 23(a) and 23(b)(1) are satisfied. Indeed, "ERISA breach of fiduciary duty claims are particularly appropriate for class certification" 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) (citations omitted).

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 Prods., Inc.*, 521 U.S. at 613. Each of these requirements is met here.

1. 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). This standard is clearly met for the Settlement Class, which includes over 40,000 Class Members. *See supra* at 4. This far exceeds the threshold for numerosity. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members[.]").

2. Commonality

Commonality requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This does not mean that all class members must make identical claims and arguments, but only that "plaintiffs' grievances share a common question of law or of fact." *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001) (citation omitted). "'Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.'" *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *4 (S.D.N.Y. Sept. 5, 2017) (quoting *Johnson v. Nextel Comms. Inc.*, 780 F.3d 128, 137 (2d Cir. 2015)).

"In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *Beach*, 2019 WL 2428631, at *6 (quoting *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004)). This case is no exception. "[T]he allegedly disloyal and imprudent conduct of defendants implicates the same set of concerns for investors in all of the funds." *Id.* at *5 (*citing Leber*, 323 F.R.D. at 157 (internal brackets omitted)). Likewise, the question of whether Defendants engaged in prohibited transactions in connection with the Disputed Investments (which are affiliated with New York Life) is also a common question. *See Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (granting class certification where plaintiff "identifie[d] several common issues of fact including whether defendants engaged in a prohibited transaction"). These and other common questions satisfy Rule 23(a)(2). *See, e.g.*, *Beach*, 2019 WL 2428631, at *6 ("Here, the questions of law and fact—including '(1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages'—are 'common questions [that] satisfy Plaintiffs' burden under Rule 23(a)(2).'") (quoting *In re Marsh ERISA Litig.*, 265 F.R.D. at 143).[15]

3. 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); *see also In re Virtus Inv. Partners,*

[15] *See also Sacerdote v. New York Univ.*, 2018 WL 840364, at *3 (S.D.N.Y. Feb. 13, 2018) (finding common questions including "whether defendant is a fiduciary; whether defendant breached its fiduciary duties in each respect alleged (e.g., whether it was imprudent to include the CREF Stock and TIAA Real Estate Accounts); whether the Plans suffered losses as a result of those breaches; the method of calculating the Plans' losses; [and] what equitable relief should be imposed to remedy the breaches and prevent future violations"); *Moreno*, 2017 WL 3868803, at *5 ("[N]umerous questions… are capable of classwide resolution, such as… whether Defendants' process for assembling and monitoring the Plan's menu of investment options, including the proprietary funds, was tainted by a conflict of interest or imprudence….").

Inc. Sec. Litig., 2017 WL 2062985, at *3 (S.D.N.Y. May 15, 2017) ("The typicality requirement overlaps with that of commonality."). Typicality is satisfied when "'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *Moreno*, 2017 WL 3868803, at *7 (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)).

The "typicality requirement is often met in putative class actions brought for breaches of fiduciary duty under ERISA." *In re Marsh ERISA Litig.*, 265 F.R.D. at 143 (citing, *Koch v. Dwyer*, 2001 WL 289972, at *3 (S.D.N.Y. Mar. 23, 2001)). Once again, this case is no exception:

> First, both the named plaintiffs and the class members they seek to represent participated in the same Plan[s] and invested in proprietary funds. They were therefore subject to the same course of conduct by the same defendants in managing the Plan[s]. Second, the class asserts claims based on identical legal arguments—that defendants breached their fiduciary duties of prudence and loyalty by failing to properly monitor and investigate the Plan[s'] investments because they were motivated by divided loyalties.

Leber, 323 F.R.D. at 162 (citing *Krueger v. Ameriprise Fin., Inc.,* 304 F.R.D. 559, 573 (D. Minn. 2014) ("*Krueger I*")); *see also Moreno*, 2017 WL 3868803, at *7; *Cunningham v. Cornell Univ.*, 2019 WL 275827, at *7 (S.D.N.Y. Jan. 22, 2019). "In short, [Plaintiffs] and the absent Class members seek the same relief for the same wrongs by the same Defendants. Accordingly, Rule 23(a)(3)'s typicality requirement is met." *In re Marsh ERISA Litig.*, 265 F.R.D. at 143.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy this requirement: (1) class counsel must be qualified, experienced and generally able to conduct the litigation; and (2) the representative plaintiffs' interests must not be antagonistic to those of the class. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Both of those requirements are met for the reasons discussed above. *See supra* at 11-12. Plaintiffs share a common interest with all of the

Class Members in connection with their common claims, have no conflicts of interest, and have vigorously prosecuted this action with the assistance of experienced and capable counsel.

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). Here, the proposed Class plainly satisfies this Rule in light of the nature of the claims alleged, which are brought on behalf of the Plans. *See, e.g.*, *Beach*, 2019 WL 2428631, at *9; *Moreno*, 2017 WL 3868803, at *7-8. "Indeed, courts have noted that the distinctive 'representative capacity' aspect of ERISA participant and beneficiary suits makes litigation of this kind 'a paradigmatic example of a [23](b)(1) class.'" *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012) (quoting *In Re Glob. Crossing*, 225 F.R.D. at 453); *see also Beach*, 2019 WL 2428631, at *9 (similarly ruling and collecting authority).

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

"The focus of [Subpart] A on avoiding 'inconsistent adjudications' establishing 'incompatible standards of conduct' for the party opposing the class applies here 'because the defendants have a statutory obligation, as well as a fiduciary responsibility, to treat the members of the class alike.'" *Douglin v. GreatBanc Tr.Co.*, 115 F. Supp. 3d 404, 412 (S.D.N.Y. 2015) (quoting *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 179 (S.D.N.Y. 2006) (citing

Amchem Prods., *Inc.*, 521 U.S. at 614)). ERISA's fiduciary duties apply "with respect to a plan" and protect the "interest of the participants" collectively. *See* 29 U.S.C. § 1104(a)(1). Thus, allowing individual actions to proceed would create a risk of "inconsistent or varying adjudications" that would create "incompatible standards of conduct" for Defendants. *See* Fed. R. Civ. P. 23(b)(1)(A); *accord Sacerdote*, 2018 WL 840364, at *6 ("[I]ndividual cases could result in varying adjudications over defendant's alleged breach and how to measure the damages."); *Krueger I*, 304 F.R.D. at 577 ("[S]eparate 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."). "In light of this risk, Plaintiffs have successfully satisfied the requirements of Rule 23(b)(1)(A)." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008); *see also Cunningham*, 2019 WL 275827, at *8 (finding requirements of Rule 23(b)(1)(A) satisfied in ERISA case involving claims relating in part to plan investments); *Sacerdote*, 2018 WL 840364, at *6 (same).

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

For similar reasons, class certification is also appropriate under Rule 23(b)(1)(B). *See, e.g., Beach*, 2019 WL 2428631, at *9; *Leber*, 323 F.R.D. at 165; *Moreno*, 2017 WL 3868803, at *8-10; *Cunningham*, 2019 WL 275827, at *8; *Sacerdote*, 2018 WL 840364, at *6 (all finding Rule 23(b)(1)(B) satisfied). "[B]ecause Defendants' alleged conduct was uniform with respect to each participant, adjudicating Plaintiffs' claims, as a practical matter, would dispose of the interests of the other participants or substantially impair or impede their ability to protect their interests." *Jacobs v. Verizon Commc'ns Inc.*, 2020 WL 4601243, at *1 (S.D.N.Y. June 1, 2020), *report and recommendation adopted*, 2020 WL 5796165 (S.D.N.Y. Sept. 29, 2020) (quoting *Moreno*, 2017 WL 3868803, at *8). Indeed, 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 Cmte. Note (1966). "This case falls squarely within the meaning articulated by the Advisory Committee as Plaintiffs allege breaches of fiduciary duties affecting the Plans and the thousands of participants in the Plans." *Shanehchian v. Macy's, Inc.*, 2011 WL 883659, at *10 (S.D. Ohio Mar. 10, 2011). Accordingly, "this action falls comfortably within the confines of Rule 23(b)(1)(B)." *Jacobs*, 2020 WL 4601243, at *14.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily approve the Settlement and enter the accompanying Preliminary Approval Order.

Respectfully Submitted,

Dated: February 26, 2024

/s/ Kai Richter

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