

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

DANNY HOLLOWAY, JAMES
KÖHLHAGEN, JEFFREY LEFFIN, AND
KEITH PFISTER, on behalf of themselves and
all others similarly situated,

PLAINTIFFS,

vs.

KÖHLER CO. AND THE KÖHLER CO.
PENSION PLAN.

DEFENDANTS.

No. 2:23-cv-01242-JPS

CLASS ACTION

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL BACKGROUND.....	2
III.	PROCEDURAL BACKGROUND	3
IV.	THE TERMS OF THE PROPOSED SETTLEMENT	4
	A. Class.....	4
	B. Plan Amendment.....	5
	C. Calculation of Monthly Benefit Increases	5
	D. Timing of Benefit Increase.	6
	E. Benefit Amounts Upon the Death of a Participant Class Member.	6
	G. Release.	7
	F. Deceased Class Members.	7
	H. Notice and Administration.....	7
	I. Attorneys’ Fees and Expenses.	8
V.	ARGUMENT.....	8
	A. The Court Should Preliminarily Approve the Settlement.....	8
	1. Standard for Approval.....	8
	2. The Proposed Settlement Should Be Preliminarily Approved	10
	a. The Class Representatives and Proposed Class Counsel Have Adequately Represented the Class.....	10
	b. The Proposed Settlement Was Negotiated at Arm’s Length.	10
	c. The Relief Provided for The Class Is More Than Adequate.	11
	(i) The Costs, Risks, and Delay of Trial and Appeal	12
	(ii) The Effectiveness of Distribution to the Settlement Class .	13
	(iii) The Terms of Any Proposed Award of Attorneys’ Fees, Including Timing of Payment	14

3.	The Settlement Treats Class Members Equitably Relative to Each Other.	19
B.	The Class Should Be Preliminarily Certified.....	19
1.	Satisfies Rule 23(a)'s Requirements.	19
a.	Numerosity.....	19
b.	Commonality.....	20
c.	Typicality	22
d.	Adequacy	23
e.	The Proposed Class is Ascertainable	24
2.	The Class Satisfies the Requirements of Rule 23(b).	24
C.	The Proposed Notice to Class Members Is Adequate.....	25
VI.	PROPOSED SCHEDULE.....	26
VII.	CONCLUSION	27

TABLE OF AUTHORITIES

CASES

<i>Abbott v. Lockheed Martin Corp.</i> , 2015 WL 4398475 (S.D. Ill. July 17, 2015)	13, 17, 19
<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	24, 25
<i>Beach v. JPMorgan Chase Bank, Nat’l Ass’n</i> , No. 17-cv-00563 (S.D.N.Y. May 20, 2020)	14
<i>Beach v. JPMorgan Chase Bank, Nat’l Ass’n</i> , No. 17-cv-00563, 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020).....	12
<i>Beaton v. SpeedyPC Software</i> , 907 F.3d 1018 (7th Cir. 2018)	20
<i>Beesley v. Intl’ Paper Co.</i> , No. 3:06-cv-00703 (S.D. Ill. Jan. 31, 2014)	13
<i>Berry v. Wells Fargo & Co.</i> , No. 3:17-cv-304, 2020 WL 9311859 (D.S.C. July 29, 2020).....	17, 18
<i>Berube v. Rockwell Automation</i> , No. 2:20-cv-01783 (E.D. Wisc.).....	2, 15, 16, 22, 23, 26
<i>Caufield v. Colgate-Palmolive Co.</i> , No. 16-cv-4170, 2017 WL 3206339 (S.D.N.Y. July 27, 2017).....	24
<i>Clark v. Duke Univ.</i> , No. 16-CV-1044, 2019 WL 2579201 (M.D.N.C. June 24, 2019)	15
<i>Cook v. Niedert</i> , 142 F.3d 1004 (7th Cir. 1998)	19
<i>Covic v. Fedex Corporation</i> , 2:23-cv-02593 (W.D. Tenn.)	18
<i>Cruz v. Raytheon</i> , No. 19-11425 (D. Mass. June 11, 2021).....	15, 17, 18
<i>Dekeyser v. Thyssenkrupp Waupaca, Inc.</i> , 314 F.R.D. 449 (E.D. Wis. 2016), <i>aff’d</i> , 860 F.3d 918 (7th Cir. 2017)	23
<i>Dolins v. Contl’ Cas. Co.</i> , No. 1:16-cv-08898 (N.D. Ill. Sept. 20, 2018).....	11
<i>Florin v. Nationsbank of Ga., N.A.</i> , 34 F.3d 560 (7th Cir. 1994)	15

<i>Foley v. Student Assistance Corp.</i> , 336 F.R.D. 445 (E.D. Wis. 2020)	19,20
<i>Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., Ltd.</i> , No. 09-cv-0852, 2016 WL 3579953 (E.D. Wis. June 24, 2016)	20
<i>Godfrey v. GreatBanc Trust Co.</i> , No. 18-cv-7918, 2021 WL 679068 (N.D. Ill. Feb. 21, 2021)	22
<i>Herndon v. Huntington Ingalls Industries</i> , No. 4:19CV52 (RCY) (E.D. Va. May 10, 2022)	15, 18
<i>In re J.P. Morgan Stable Value Fund ERISA Litig.</i> , No. 12-cv-2548 (VSB), 2019 WL 4734396 (S.D.N.Y. Sept. 23, 2019)	19
<i>In re Synthroid Mktg. Litig.</i> , 264 F.3d 712 (7th Cir. 2001)	16
<i>In re Synthroid Mktg. Litig.</i> , 325 F.3d 974 (7th Cir. 2003)	16
<i>Isby v. Bayh</i> , 75 F.3d 1191 (7th Cir.)	9
<i>Johnson v. Fujitsu Tech. & Bus. of Am., Inc.</i> , 2018 WL 2183253 (N.D. Cal. May 11, 2018)	12
<i>Johnson v. Meriter Health Services</i> , 702 F.3d 364 (7th Cir. 2012)	23
<i>Kelly v. Johns Hopkins Univ.</i> , No. 16-CV-2835-GLR, 2020 WL 434473 (D. Md. Jan. 28, 2020)	15
<i>Kemp-DeLisser v. St. Francis Hosp. & Medical Ctr.</i> , No. 15-cv-1113, 2016 WL 6542707 (D. Conn. Nov. 3, 2016)	17
<i>Koerner v. Copenhaver</i> , 2014 WL 5544051 (C.D. Ill. Nov. 3, 2014)	13, 17
<i>Lacy v. Cook County, Illinois</i> , 897 F.3d 847 (7th Cir. 2018)	21, 22
<i>McAlister et al v. Metropolitan Life Insurance Company</i> , No. 18-cv-11229 (RA) (S.D.N.Y. Sept. 7, 2023)	17
<i>Mezyk v. U.S. Bank Pension Plan</i> , No. 3:09-cv-384, 2011 WL 601653 (S.D. Ill. Feb. 11, 2011)	25
<i>Mullins v. Direct Digital, LLC</i> , 795 F.3d 654 (7th Cir. 2015)	24
<i>Nistra v. Reliance Tr. Co.</i> , No. 16-4773, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018)	17

<i>Orr v. Shicker</i> , 953 F.3d 490 (7th Cir. 2020)	20
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985).....	26
<i>Prince v. Eaton Vance Corp.</i> , No. 18-12098 (D. Mass Sept. 24, 2019)	12
<i>Ruppert v. Alliant Energy Cash Balance Pension Plan</i> , 255 F.R.D. 628 (W.D. Wisc. 2009)	22
<i>Silverman v. Motorola Sols., Inc.</i> , 739 F.3d 956 (7th Cir. 2013)	16
<i>Sims v. BB&T Corp.</i> , No. 15-732, 2019 WL 1993519 (M.D.N.C. May 6, 2019).....	12
<i>Spano v. Boeing Co.</i> , 2016 WL 3791123 (N.D. Ill. Mar. 31, 2016).....	13
<i>Suchanek v. Sturm Foods, Inc.</i> , 764 F.3d 750 (7th Cir. 2014)	20
<i>Sutton v. Bernard</i> , 504 F.3d 688 (7th Cir. 2007)	15
<i>Swinton v. SquareTrade, Inc.</i> , 2019 WL 617791 (S.D. Iowa Feb. 14, 2019).....	9
<i>Synfuel Techs., Inc. v. DHL Express (USA), Inc.</i> , 463 F.3d 646 (7th Cir. 2006)	9
<i>Temme v. Bemis Co.</i> , No. 08-cv-090, 2009 WL 1505120 (E.D. Wis. May 28, 2009)	23, 25
<i>Thompson v. Ret. Plan for Empl. of S.C. Johnson & Sons, Inc.</i> , 265 F.R.D. 405 (E.D. Wisc. 2010)	20, 23, 24
<i>Toomey v. Demoulas Super Markets, Inc.</i> , No. 1:19-cv-11633 (D. Mass. Apr. 7, 2021).....	12
<i>Toomey v. Demoulas Super Markets, Inc.</i> , No. 1:19-cv-11633 (D. Mass. Mar. 24, 2021)	12
<i>Tussey v. ABB, Inc.</i> , 746 F.3d 327 (8th Cir. 2014)	12
<i>Tussey v. ABB, Inc.</i> , 850 F.3d 951 (8th Cir. 2017)	13
<i>Tussey v. ABB, Inc.</i> , No. 06-cv-4305 (W.D. Mo. Aug. 16, 2029)	13

<i>Urakhchin v. Allianz Asset Mgmt. of Amer., L.P.</i> , No. 15-1614, 2018 WL 8334858 (C.D. Cal. July 30, 2018).....	12
<i>Velazquez v. Massachusetts Fin. Services Co.</i> , No. 17-11249 (D. Mass Dec. 5, 2019).....	12
<i>Wachala v. Astellas US LLC</i> , No. 20-cv-3882, 2022 WL 408108 (N.D. Ill. Feb. 10, 2022).....	24
<i>Williams v. Rohm & Haas Pension Plan</i> , 658 F.3d 629 (7th Cir. 2011)	16
<i>Wong v. Accretive Health, Inc.</i> , 773 F.3d 859 (7th Cir. 2014)	11

STATUTES

ERISA § 205(d), 29 U.S.C. § 1055(d).....	2, 23
ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).....	23

RULES

Fed. R. Civ. P. 23.....	9, 22, 23
Fed. R. Civ. P. 23(a)	19, 20, 23, 24
Fed. R. Civ. P. 23(a)(3).....	22
Fed. R. Civ. P. 23(a)(4).....	23
Fed. R. Civ. P. 23(b)	24
Fed. R. Civ. P. 23(b)(1).....	24, 25
Fed. R. Civ. P. 23(b)(1)(A)	24, 25
Fed. R. Civ. P. 23(c)(2).....	26
Fed. R. Civ. P. 23(e)	13
Fed. R. Civ. P. 23(e)(1)(B)	25
Fed. R. Civ. P. 23(e)(2).....	8, 9, 10
Fed. R. Civ. P. 23(e)(2)(A)	10
Fed. R. Civ. P. 23(e)(2)(B)	10
Fed. R. Civ. P. 23(e)(2)(C)	12, 13
Fed. R. Civ. P. 23(e)(2)(C)(i).....	12

Fed. R. Civ. P. 23(e)(2)(C)(iii)	14
Fed. R. Civ. P. 23(e)(2)(D)	19
Fed. R. Civ. P. 23(e)(3).....	9
Fed. R. Civ. P. 23(h)	14
Fed. R. Civ. P. 26(f).....	3

REGULATIONS

26 C.F.R. § 1.401(a)-11(b)(2).....	21
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OTHER AUTHORITIES

Alba Conte, 1 Attorney Fee Awards (3d ed. 2019)	16
Manual for Complex Litigation (Fourth) (2004)	25
Manual for Complex Litigation (Third) (1995)	11

Plaintiffs Danny Holloway, James Kohlhagen, Jeffrey Leffin, and Keith Pfister (“Plaintiffs”) move for an order preliminarily approving a class action settlement agreement they reached concerning the claims in this case, approving notice to the class, and setting a date for a fairness hearing.¹ Specifically, Plaintiffs asks the Court to: (1) preliminarily approve the proposed Settlement; (2) preliminarily certify the Settlement Class; (3) approve the proposed form and method of notice to the Class; and (4) schedule a hearing at which the Court will consider final approval of the Settlement.

I. INTRODUCTION

The proposed Settlement is an excellent result for the Class. The Settlement’s present value is \$2.45 million, which is approximately 1/3 of the \$7.39 million in class-wide damages as calculated by Plaintiffs’ actuarial expert. The Settlement will increase the amount that Class Members receive in their monthly pension checks — a benefit that will continue for the rest of their lives and the lives of their beneficiaries.

The Employee Retirement Income Security Act of 1974 (“ERISA”) requires that pension benefits in the form of a Joint and Survivor Annuity (“JSA”), which provides benefits for the lives of the participant and the participant’s spouse. The JSA must be “actuarially equivalent” to the single-life annuity (“SLA”) offered to the participant. In this case, Plaintiffs alleged that Kohler Co. and the Kohler Co. Pension Plan (the “Plan”) (collectively, “Defendants”) violated those ERISA requirements by not providing actuarially equivalent JSAs to married retirees. In sum, Plaintiffs contend that Defendants are underpaying married retirees receiving JSAs.

The proposed Settlement’s value must be considered in light of the substantial litigation

¹ Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties’ Settlement Agreement.

risks in this cutting-edge and complex case. Plaintiffs’ legal theory has not been litigated through trial in any case to date, there are no appellate decisions directly on point, and few cases involving the same claims have resulted in a class-wide settlement. Plaintiffs’ ability to prevail in this case hinges on which actuarial assumptions are used to measure retiree’s benefits. Defendants would vigorously dispute the actuarial assumptions selected by Plaintiffs’ expert through their own expert witness. Accordingly, success at trial would depend on Plaintiffs winning a “battle of experts” in a highly technical field. For these reasons, and others discussed in more detail below, the Settlement satisfies the criteria for preliminary approval, and Plaintiffs request that the Court grant this motion.

On March 8, 2024, this Court approved a class action settlement involving materially identical claims under very similar terms as the Settlement in this case in *Berube v. Rockwell Automation, et al*, Civil Action No. 2:20-CV-01783 (E.D. Wis.) In approving the settlement, the court in *Berube* certified the settlement class, approved counsel here as class counsel in that case, found the settlement to be fair, reasonable, and adequate, and awarded attorneys’ fees, reimbursement of expenses and payment of a case contribution award. *Id.* at Dkt. 90 (Order Granting Plaintiff’s Motion for Final Approval of Class Action Settlement). (“Berube Order”). Plaintiffs seek the same relief here as the court in *Berube* awarded.

II. FACTUAL BACKGROUND

Plaintiffs filed an Amended Complaint on January 16, 2024, on behalf of participants and beneficiaries receiving pension benefits in the form of a JSA from the Plan. *See* Dkt. 22. As Plaintiffs alleged, ERISA requires that JSAs be at least the “actuarially equivalent” of the SLA the participant could have selected when he or she began to receive benefits. *Id.* ¶¶ 26-34. (citing ERISA § 205(d) , 29 U.S.C. § 1055(d). Two benefit forms are “actuarially equivalent” when they have the same present value, calculated using the same, reasonable actuarial assumptions. *Id.* at ¶¶

35-46.

The actuarial assumptions used to determine actuarial equivalence are mortality and interest rates. A mortality assumption estimates how many benefit payments will be made, based on the ages of the participant and (in the case of JSAs), the beneficiary. An interest rate assumption discounts the value of expected future payments. When payments under one benefit option may extend longer than those under another, the benefit amount under the first option will be lower to account for the likelihood that more payments will be made. For example, the amount of a JSA benefit will be lower than the amount of an SLA benefit to account for the possibility that the beneficiary will receive benefits after the participant's death. But, the present values of those two forms of benefits must be the same to be actuarially equivalent.

Plaintiffs alleged that Defendants calculated their JSA benefits (and the JSAs of other Class Members) using outdated mortality and interest rate assumptions which caused their monthly benefit to be less than an "actuarially equivalent" amount. *Id.* at ¶¶ 71-87. In other words, the present values of Class Members' JSA benefits were less than the present values of the SLAs they could have selected. Plaintiffs allege the present values of the two benefit types would have been equal had Defendants used mortality and interest rate assumptions that were reasonable as of the date Class Members began to receive their benefits.

III. PROCEDURAL BACKGROUND

On September 19, 2023, Plaintiffs filed this class action. Dkt. 1. On October 24, 2023, the Parties held a discovery and case management conference and filed a Joint Report under F.R.C.P. 26(f). Dkt. 14.

On October 24, 2023, Defendants filed an Executive Summary of their intended Motion to Dismiss for failure to exhaust administrative remedies and failure to state a claim for breach of fiduciary duty. Dkt. 13. Thereafter, the Parties engaged in targeted discovery related to the

Defendants' anticipated Motion to Dismiss.

On December 19, 2023, Plaintiffs filed a notice of intention to file an amended complaint and moved to vacate deadlines and stay discovery until after that filing. Dkt. 21. The Court granted Plaintiffs' motion through a Text Order on December 21, 2023. On January 16, 2024, Plaintiffs filed an Amended Complaint. Dkt. 22.

On January 18, 2024, counsel for the Parties began to discuss settlement. To facilitate those discussions, Defendants agreed to provide Plaintiffs with data necessary to assess the size of the Class and calculate potential damages (the "Class Data").

On January 29, 2024, Defendants submitted an Executive Summary of their anticipated Motion to Dismiss the Amended Complaint. Dkt. 30. Through a Text Order on January 30, 2024, the Court ordered that Defendants file the Motion to Dismiss by March 4, 2024, while permitting the Parties to continue limited discovery relating to the anticipated Motion to Dismiss. In accordance with the Court's January 30, 2024 order, the Parties engaged in limited discovery bearing on the futility exception to the administrative exhaustion doctrine, with Defendants producing more than 600 pages of documents.

On February 7, 2024, Defendants provided Plaintiffs with Class Data for Plaintiffs to evaluate a potential resolution and the Parties thereafter began discussing the possibility of settlement. On March 13, 2024, the Parties, through Counsel, reached a settlement in principle to resolve the claims asserted in Plaintiffs' Amended Complaint.

IV. THE TERMS OF THE PROPOSED SETTLEMENT

The Settlement is attached to the Declaration of Robert A. Izard ("Decl.") as Exhibit A, and the material terms are summarized below:

A. Class. The Class is a non-opt out class defined as:

All participants and spouse beneficiaries entitled to benefits under

the Kohler Co. Pension Plan who began receiving a (1) joint and survivor annuity, (2) qualified optional survivor annuity, or (3) qualified preretirement survivor annuity, on or after September 19, 2017 but before January 1, 2021, whose benefits had a present value that was less than the present value of the SLA they were offered using the applicable Treasury Assumptions as of each participant's Benefit Commencement Date. Excluded from the Class are Defendants and any individuals who are subsequently to be determined to be fiduciaries of the Plan.

Settlement, § I.J.

B. Plan Amendment. Within sixty (60) days after Final Approval, Kohler will amend the Plan to provide that each Class Member is entitled to an increased monthly as of July 31, 2024. The Plan Amendment will allocate the Net Settlement Amount, i.e., the \$2.45 million minus any amounts the Court awards as attorneys' fees, expenses and a case contribution award, among Class Members in proportion to the total value of their past and future pension benefit payments.

Settlement, § III.A.

C. Calculation of Monthly Benefit Increases: Except for Deceased Class Members, discussed below, the increase to Class Members' monthly benefits will be calculated in accordance with the following steps:

(1) calculate the total benefits paid to each Class Member and/or his or her Associated Participant, adding interest at 5.32% annually from the date each amount was paid until August 1, 2024 (the "Past Benefit Amount");

(2) calculate the value of the Past Benefit Amount if paid as a monthly benefit in the same form (*e.g.*, a 50 or 75% JSA) as the Class Member is currently receiving using the Annuitization Assumptions (the "Adjusted Past Benefit");

(3) The Monthly Benefit Increase is the Settlement Percentage multiplied by the sum of (a) the Adjusted Past Benefit and (b) the Currently Monthly Benefit. The "Settlement Percentage" is calculated by dividing the Net Settlement Amount by the sum of (i) the Past Benefit

Amounts of all Deceased Class Members, (ii) the present value as of August 1, 2024, of the Adjusted Past Benefits for all Class Members and/or Associated Participants (other than Deceased Class Members), and (iii) the present value of all future benefit payments owed to Class Members (before the increase contemplated by this Agreement) as of August 1, 2024 (with (ii) and (iii) calculated using the Settlement Assumptions).²

Settlement, § III.B.

D. Timing of Benefit Increase. Class Members will begin receiving an increased benefit by the first day of the first calendar month that is at least one hundred and twenty (120) days after Final Approval (the “Benefit Increase Payment Date”). Settlement, § III.C. The first payment will include a lump sum equal to the sum of such increases in monthly payments due from August 1, 2024, until the Benefit Increase Payment Date. Settlement, § III.E.

E. Benefit Amounts Upon the Death of a Participant Class Member. Upon the death of a Participant Class Member, the amount of the survivor annuity payable to the Participant Class Members’ beneficiary, if any, shall be determined using the Class Members’ Recalculated Benefit Amount, i.e., the amount received after the benefit increase, in a manner consistent with the JSA form being received. Settlement, III.E. For example, if a Class Member’s Recalculated Benefit is \$1,000/month as a 50% JSA, the surviving spouse will receive \$500/month after the Class Member’s death.

² The amount actually payable to a Class Member following the Court’s approval of the Settlement is subject to the terms of any Qualified Domestic Relations Order (“QDRO”) with respect to division of benefits between the Participant and the QDRO’s alternate payee. Settlement, § III.D.

F. Deceased Class Members. Deceased Class Members are those that would have been entitled to increased benefit but die before the Benefit Increase Payment Date. Settlement, § I.T. In other words, the participant and the participant's spouse are both deceased. In these instances, the Settlement provides that upon the completion and return of an Estate Claim Form, the Plan will pay the estate of a Deceased Class Member (the participant or beneficiary, whichever is most recently deceased) a lump sum amount equal to the Class Member's Past Benefit Amount multiplied by the Settlement Percentage. Settlement, § III.F.³

G. Release. In consideration for the increases to their monthly benefits, Plaintiffs and each Class Member shall be deemed to forever release and discharge the Released Parties from any and all Claims arising on or before the Preliminary Approval Date that were brought, or could have been brought, arising out of, or relating to, the provisions of the Plan applicable in the calculation of the Class Member's benefit. For the avoidance of doubt, a Claim arises on or before the Preliminary Approval Date if a Class Member's benefit amount is determined as of the Preliminary Approval Date or earlier, even as to monthly payments made after the Preliminary Approval Date. Settlement, § IV.A.

H. Notice and Administration. The Plan's records indicate that there are approximately 500 Class Members. Under the Settlement, Defendants will pay for and provide notice to the Class and to governmental entities required under the Class Action Fairness Act ("CAFA"). Defendants will send Notice to Class Members by first class mail to the address maintained in Kohler's records. For notices that are returned as undeliverable, Defendants will attempt to find a current address and re-send the Notice. Settlement, § II.B.

³ The Estate Claim Form, attached as an Exhibit to the Settlement, must be returned by no later than six (6) months from the date of Final Approval. Settlement, Exhibit 1.

The proposed Class Notice (Settlement Agmt. Ex. 2) informs Class Members about the nature of the Action, the terms of the Settlement, and how to enter an appearance to be heard or to object to the Settlement. In addition, key court documents, including the Amended Complaint, the Settlement Agreement, preliminary approval papers, Plaintiffs' Motion for Award of Attorneys' Fees, Plaintiffs' Motion for Final Approval, and pertinent Court Orders will be posted on a Settlement Website.

I. Attorneys' Fees and Expenses. The Parties present value of the Settlement is \$2.45 million. The Settlement Agreement provides that proposed Class Counsel Izard, Kindall & Raabe, LLP ("IKR"), Motley Rice LLC ("MR") and Siri & Glimstad LLP ("SG") will request that this Court award attorneys' fees of up to 30% of the present value of the Settlement, plus expert and other litigation expenses and costs subject to Court approval. Plaintiffs also intend to request a case contribution award to each Plaintiff of up to \$2,500, subject to Court approval. Settlement, § II.E. The Settlement is not conditioned upon the Court approving the requested amounts for fees, expenses or the Case Contribution Award. Furthermore, the Settlement Agreement does not contain a "clear sailing" provision, as Defendants may object to the request for attorneys' fees, costs and expenses. *Id.*

V. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement

1. Standard for Approval

Rule 23(e)(2) provides that a court may approve a proposed Settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:" "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate taking into account:

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

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

Fed. R. Civ. P. 23(e)(2).

These factors are not, however, exclusive. The four factors set forth in Rule 23(e)(2) “were not intended to displace the various factors that courts have developed in assessing the fairness of a settlement.” *Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019). For this reason, the traditional factors that are utilized by courts in the Seventh Circuit to evaluate the propriety of a class action settlement (certain of which overlap with Rule 23(e)(2)) are still relevant:

In order to evaluate the fairness of a settlement, a district court must consider the strength of Plaintiffs’ case compared to the amount of defendants’ settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement.

Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006); *Isby*, 75 F.3d 1191, 1199 (7th Cir. 1996).

In sum, although the specific factors by which a settlement is evaluated may have changed in some respects, what has not changed is that “[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate.” Rule 23 advisory committee’s note to 2018 Amendments.

2. The Proposed Settlement Should Be Preliminarily Approved

Consideration of all relevant factors demonstrates that the Settlement is likely to be finally approved under Rule 23(e)(2) and should therefore be preliminarily approved.

a. The Class Representatives and Proposed Class Counsel Have Adequately Represented the Class.

The adequacy determination under Rule 23(e)(2)(A) looks to whether the interests of the class representatives do not conflict with the interests of any of the class members and that Plaintiffs' counsel are qualified, experienced and provided vigorous representation during the course of the case. Where, as here, the injuries allegedly suffered by the named Plaintiffs are the same as those that the class is alleged to have suffered, the adequacy requirement is usually satisfied. *See* Part B.1.d., *supra*.

Plaintiffs have been exemplary representatives. They have spent significant time on behalf of the putative class, gathering their relevant documents, working with Class Counsel to frame the claims, and participating in settlement negotiations. Their claims are the same as those of all Class Members, and the relief that they are seeking is calculated using the same formula as that used for all Class Members.

In addition, proposed Class Counsel are well-qualified and have vigorously prosecuted this class action. IKR, MR and SG are active class-action practitioners whose long experience in ERISA and class action litigation is demonstrated by the declarations attached to this memorandum. Iazard Decl., ¶¶ 29-32 and Ex. B; Needham Declaration at Ex. A. Therefore, the "adequacy of representation" factor of Rule 23(e)(2)(A) is met.

b. The Proposed Settlement Was Negotiated at Arm's Length.

Rule 23(e)(2)(B) instructs the court to consider whether the proposed settlement was negotiated at arm's length. There is typically an initial presumption that a proposed settlement is

fair and reasonable when it was the result of arm's-length negotiations between experienced, capable counsel after meaningful discovery. *See* Manual for Complex Litigation (Third), §30.42 at 238 (1995). Courts look first at whether the parties “have engaged ‘in sufficient investigation of the facts to enable the court to intelligibly make an appraisal’ of the fairness of a proposed class settlement.” *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 133, at *5 (N.D. Ill. Sept. 20, 2018).

Here, there is no dispute about many of the core factual allegations, including the assumptions Defendants used to calculate Class Members' JSAs. The Parties do dispute, however, whether those assumptions generated actuarially equivalent JSAs for Class Members. This case is a “battle of the experts.” Plaintiffs' expert will opine the Plan's assumptions did not generate actuarially equivalent JSAs; Defendants' expert will opine that they did.

c. The Relief Provided for The Class Is More Than Adequate.

The key question — whether the benefits provided to Class Members during the Class period were less than the actuarial equivalent of the SLAs that they could have selected — is one that could only be determined at trial through expert testimony. Accordingly, this case was a “battle of experts,” and the results of such battles are notoriously difficult to predict.

The proposed Settlement is an excellent result for the Class. It has a present value of \$2.45 million, which is 1/3 of the \$7.4 million in class-wide damages as calculated by Plaintiffs' actuarial expert. Izard Decl., ¶ 17. This is an outstanding result considering the likelihood of further lengthy, expensive litigation and the risk that the Class would recover less — or possibly nothing at all. ERISA class settlements involving statutory claims that have been litigated much more frequently (and, thus, have more of a track-record) often settle for lower percentages of Plaintiffs' asserted damages. *See, e.g., Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, Dkt. 95 at 10 (D. Mass. Mar. 24, 2021), *approved* Dkt. 100 (D. Mass. Apr. 7, 2021) (approving settlement that

represented approximately 15–20% of alleged losses); *Beach v. JPMorgan Chase Bank, Nat’l Ass’n*, No. 17-cv-00563, Dkt. 211 (S.D.N.Y. May 20, 2020), *approved* 2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (approving settlement of 16% of alleged losses); *Velazquez v. Massachusetts Fin. Services Co.*, No. 17-11249 Dkt. 108 (D. Mass Dec. 5, 2019) (approving settlement for 29% of maximum damages); *Prince v. Eaton Vance Corp.*, No. 18-12098, Dkt. 57 (D. Mass Sept. 24, 2019) (approving settlement for 23% of total damages); *Sims v. BB&T Corp.*, No. 15-732, 2019 WL 1993519, *2 (M.D.N.C. May 6, 2019) (\$24 million settlement representing 19% of alleged damages); *Urakhchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-1614, 2018 WL 8334858, *4 (C.D. Cal. July 30, 2018) (\$12 million settlement representing 17.7% of maximum alleged damages); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *6–7 (N.D. Cal. May 11, 2018) (approximately 10% of losses under Plaintiffs’ highest model).

(i) The Costs, Risks, and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) requires the court to consider the adequacy of class relief in light of the costs, risks, and delay of trial and appeal. The risk of delay in this case is high. Because no appellate court has, to date, directly considered Plaintiffs’ legal theory, the party that lost at trial would almost certainly appeal.

Moreover, while delay is a risk in all litigation, it is a particularly serious risk in a case that involves retirees in their 60s and 70s. ERISA class actions concerning novel theories of liability like this one tend to have significant life-cycles even after trial. For example, in *Tussey v. ABB, Inc.*, the first ERISA fiduciary breach class action trial was conducted in January, 2010. *See, Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). The participants received a trial verdict in 2012, saw that verdict reduced by the court of appeals in 2014 and eventually settled in 2019 — a decade after trial. *Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (remanding on damages); *Tussey v. ABB, Inc.*, No. 06-4305, Dkt. 869 (W.D. Mo. Aug. 16, 2019) (granting final approval of

settlement). *See also, e.g., Spano v. Boeing Co.*, 2016 WL 3791123, at *1, 4 (N.D. Ill. Mar. 31, 2016) (9 years); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) (8.5 years); *Beesley v. Intl' Paper Co.*, No. 3:06-cv-00703, Dkt. 559 (S.D. Ill. Jan. 31, 2014) (more than 7 years). Such delays significantly harm class members already in retirement. In contrast, if this Settlement is approved, the Class will begin receiving higher monthly pension payments now, instead of years later if the case were ultimately successful after trial.

The litigation risks in the case are also high. Plaintiffs and Defendants have vastly different views about Defendants' potential liability and the likely outcome of the litigation. Plaintiffs' core allegations regarding actuarial equivalence are entirely untested on the merits. *See Abbott*, 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.")

Ultimately, if approved by the Court, Class Members will receive a significant percentage of the total possible recovery as calculated by Plaintiffs' expert without the burden and risks of further litigation. This "adequate relief" factor of Rule 23(e)(2)(C) weighs in favor of preliminary approval.

(ii) The Effectiveness of Distribution to the Settlement Class

The advisory committee's notes to the 2018 amendments to Rule 23(e) indicate that "[m]easuring the proposed relief may require evaluation of any proposed claims process. . . ." Here, no such process is needed.⁴ The Settlement Agreement will, if approved, increase Class

⁴ When Participant Class Member and his or her Associated Beneficiary have both passed away before increase benefits under the Settlement commence, Defendants will send notice of the

Members' future monthly benefit payments without the need for Class Members to file claims or have those claims reviewed by a Claims Administrator. Moreover, many people have their benefit checks deposited directly, and those who do not have a strong incentive to ensure that the Covered Plan has their current address information, so that they can receive and promptly cash their benefits checks. Thus, the increase in monthly benefits will result in the efficient and effective distribution of the Settlement's benefits.

The Settlement is non-reversionary as to living Class Members and their Beneficiaries. The revisions were extensively negotiated between the Parties. Payments to living Class Members pursuant to that resolution will be made automatically and fully over the course of the Class Members' lives, ensuring that none of the settlement allocated to living Class Members will be returned to Kohler. Heirs (but not Beneficiaries) of deceased Class Members must file claims. Finally, the Settlement will provide Class Members with a distribution in the same form in which they were harmed — a reduction in benefits is being remedied by an increase in benefits. Accordingly, the method of distribution matches the claims alleged. Each Class Member's recovery will be based on the same percentage of the total value of their past and future benefits.

**(iii) The Terms of Any Proposed Award of Attorneys' Fees,
Including Timing of Payment**

Rule 23(e)(2)(C)(iii) directs the Court to consider, as part of its evaluation of the fairness of the Settlement, provisions related to payment of attorneys' fees, including the timing of the payment. The advisory committee's notes on the 2018 Amendment indicates that "[u]ltimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in

Settlement to the last known address of the person who was receiving benefits, and a payout will be made to the estate or heirs upon receipt of an Estate Claim Form. Settlement, § III.B.2.

determining the appropriate fee award.”

Both the structure and the amount of this fee request are appropriate.

Structure: The Seventh Circuit has held that “[w]hen a case results in the creation of a common fund for the benefit of the class, the common fund doctrine allows Plaintiffs’ attorneys to petition the court to recover its fees out of the fund.” *Florin v. Nationsbank of Ga., N.A.* (“*Florin I*”), 34 F.3d 560, 563 (7th Cir. 1994); *see also Sutton v. Bernard*, 504 F.3d 688, 691-92 (7th Cir. 2007) (the “common fund doctrine” is “based on the equitable notion that those who have benefited from litigation should share in its costs”).

The Settlement’s present value of \$2.45 million provides, for purposes of analysis, a “common fund.” Under the Settlement, the amount that Defendants pay to Plaintiffs for attorneys’ fees, costs, and expenses, as well as the Client Contribution Award, will be subtracted from the present value of the total class wide Settlement, and each Class Member will receive a share of the value of the Settlement net of these payments. This is the appropriate methodology to use in a common fund case that involves payment of future benefits. *See, e.g., Berube Order*, ¶ 10; *Herndon v. Huntington Ingalls Industries, et al*, No. 4:19-cv-52 (RCY), Dkts. 133, 137 (E.D. Va. May 10, 2022) (awarding percentage of present value of increased future benefits); *Cruz v. Raytheon*, No. 19-11425, Dkt. 113 (D. Mass. June 11, 2021) (Final Order and Judgment) (same); *Kelly v. Johns Hopkins Univ.*, No. 16-CV-2835-GLR, 2020 WL 434473, at *6 (D. Md. Jan. 28, 2020) (awarding counsel a percentage of the total value of the settlement, including future tax deferral and fee savings that would benefit the Class); *Clark v. Duke Univ.*, No. 16-CV-1044, 2019 WL 2579201, at *3 (M.D.N.C. June 24, 2019) (same).

Reasonableness of the Percentage: Attorneys’ fees in this circuit are based on the market price. *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013); *In re Synthroid Mktg.*

Litig., 264 F.3d 712, 718 (7th Cir. 2001) (“*Synthroid I*”). In that regard, the Seventh Circuit has approved a sliding scale which provides for a 30% fee for the first \$10 million recovered as a common fund. *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (“*Synthroid II*”) (7th Cir. 2003); *Berube* Order, ¶ 10. Accordingly, Plaintiffs will request that the Court award 30 percent of the present value of the Settlement —\$735,000 — plus costs, expenses, and a case contribution award.

⁵ Additional work remains to be done in connection with final approval and settlement administration.⁶ While the Court will ultimately determine the amount of the Settlement to be awarded after Plaintiffs has filed and thoroughly briefed the request for fees and expenses, nothing in the Settlement’s provisions concerning attorneys’ fees should lead the Court to question the reasonableness of the Settlement itself.

This fee is particularly reasonable in that it is highly complex, both legally and factually. The case required detailed familiarity with not only the text of ERISA and the applicable regulations, but the ways in which the Retirement Equity Act modified and enhanced the statute’s protections for actuarial equivalence. Since the caselaw related to this area was undeveloped, Plaintiffs could not simply rely on prior precedents to provide a roadmap for how to litigate this case. Finally, Class Counsel also had to understand and explain the actuarial science behind the statutory requirement of “actuarial equivalence,” which involved lengthy and detailed work with actuaries who are experts in the field.

Moreover, as discussed above, this case had a high degree of litigation risk. *See Abbott v.*

⁵ The Seventh Circuit does not use a lodestar calculation as a secondary measure of reasonableness when the percentage-of-the-recovery approach is employed. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); *Synthroid II*, 325 F.3d at 979–80.

⁶ “The prevailing view is that expenses are awarded in addition to the fee percentage.” Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed. 2019). This follows from the “equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund” *Id.*

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.”)

For these reasons, this case required Proposed Class Counsel who are highly experienced attorneys with substantial background in ERISA cases. IKR has litigated many of the issues involved in ERISA’s “actuarial equivalence” requirements. As demonstrated by their attached firm resumes (Izard Decl., Ex. B), IKR is among the leading firms in the country that handle nationwide ERISA class actions. IKR (individually and with co-counsel) have been appointed to represent Plaintiffs in several significant ERISA class actions. *See, e.g., McAlister et al v. Metropolitan Life Insurance Company, et al*, No. 18-cv-11229 (RA) (S.D.N.Y. Sept. 7, 2023) Dkt. 161, (Opinion and Order certifying class and appointing IKR as class counsel); *Cruz v. Raytheon*, No. 19-11425 (D. Mass.) (see Final Order and Judgment, Dkt. 112, ¶ 6, appointing IKR to represent the settlement class in an ERISA class action about pension plan’s actuarial assumptions); *Nistra v. Reliance Tr. Co.*, No. 16-4773, 2018 WL 835341, at *5 (N.D. Ill. Feb. 13, 2018) (appointing IKR to represent Plaintiffs in an ERISA class action about employee stock ownership plan); *Berry v. Wells Fargo & Co.*, No. 3:17-cv-304, 2020 WL 9311859, at * 14 (D.S.C. July 29, 2020) (finding that IKR “displayed extraordinary skill and determination” when approving a \$79 million settlement in an ERISA class action); *Kemp-DeLisser v. St. Francis Hosp. & Medical Ctr.*, No. 15-cv-1113, 2016 WL 6542707, * 16 (D. Conn. Nov. 3, 2016) (describing IKR as a “national leader[] in class action litigation and ERISA matters” when appointing it as class counsel and approving a settlement).

MR is also well qualified to serve as Class Counsel. MR has been at the forefront of some

of the most significant civil actions over the last 30 years in a wide range of subject areas. Its attorneys have served or are serving as class counsel in numerous ERISA cases, including ones involving ERISA’s actuarial equivalence requirements. *See, e.g., Berry v. Wells Fargo*, 2020 WL 931859, at * 13 (co-lead class counsel, securing a settlement the court found was the “largest recovery” in a case of its kind “in the history of ERISA”); *Covic et al. v. FedEx Corporation*, No. 2:23-cv-2593, Dkt. 42 (appointing MR as co-lead counsel in actuarial equivalence case).

Moreover, proposed Class Counsel pioneered many of the issues involved in ERISA’s “actuarial equivalence” requirements, and thus are uniquely qualified to represent the Class here. *See, e.g., Cruz v. Raytheon*, 435 F.Supp. 3d 350 (D. Mass. 2020); *Herndon v. Huntington Ingalls. Industr.*, 4:10-cv-52, 2020 WL 3053465 (E.D. Va. Feb. 20, 2020). Proposed Class Counsel’s work on these cases allowed them to litigate this case effectively and efficiently.

Finally, public policy considerations favor Class Counsel’s fee request. As another court noted in a recent case involving settlement involving complex and novel ERISA claims,

Public policy considerations weigh in favor of granting the requested fees. In awarding attorneys’ fees in common fund cases . . . [courts] have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation. Attorneys’ fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest. Fee awards should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature.

This is especially true in ERISA class actions. . . . Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers and [t]he ERISA statute specifically encourages private enforcement.

In re J.P. Morgan Stable Value Fund ERISA Litig., No. 12-cv-2548 (VSB), 2019 WL 4734396, at *3–4 (S.D.N.Y. Sept. 23, 2019) (internal quotations and citations omitted).

3. The Settlement Treats Class Members Equitably Relative to Each Other.

The Settlement treats Class Members equitably relative to each other.⁷ Fed. R. Civ. P. 23(e)(2)(D). The dollar amount of the benefit increase that Class Members will receive will vary based on the total present value of their past and future benefit payments. But, each Class Member will receive the same *percentage* of the present value of their benefits.

Although the Settlement only provides a *prospective* increase in benefits, it ensures that Class Members who retired at an older age and/or earlier in the Class Period (and thus are likely to have fewer future benefits payments) are treated equitably by including the value of past benefit payments, plus interest, in the calculation for their future benefit increases, giving past payments the same weight in the calculation as the present value of future benefits.

B. The Class Should Be Preliminarily Certified

1. Satisfies Rule 23(a)'s Requirements.

a. Numerosity

Numerosity requires that the proposed class be “so numerous that joinder of all members is impracticable.” *Foley v. Student Assistance Corp.*, 336 F.R.D. 445, 448 (E.D. Wis. 2020). “While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement.” *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020). Here, the Plan data that Defendants provided shows that there are approximately 500

⁷ Plaintiffs will also request a Case Contribution Award for their services on behalf of the Class. Settlement, § II.B. Such an award does not create a conflict or result in Plaintiffs being treated more favorably than other Class members. Rather, modest incentive awards to the named Plaintiffs intended to compensate the class representatives for work done on behalf of the class. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of \$25,000 to class representative); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (\$25,000 awards to six class representatives and \$10,000 to an additional named Plaintiffs).

members of the proposed Class. Izard Decl. ¶ 17. Accordingly, numerosity is satisfied. *Thompson v. Ret. Plan for Empl. of S.C. Johnson & Sons, Inc.*, 265 F.R.D. 405, 410 (E.D. Wisc. 2010) (certifying class of 75 ERISA plan participants).

b. Commonality

To satisfy Rule 23(a)'s commonality requirement, "there needs to be one or more common questions of law or fact that are capable of classwide resolution and are central to the claims' validity." *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1026 (7th Cir. 2018). Commonality does not "require[] that every question be common." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (emphasis in original). Rather, a Plaintiffs "need only show a single common question." *Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., Ltd.*, No. 09-cv-0852, 2016 WL 3579953, at * 5 (E.D. Wis. June 24, 2016). "A question is common to the class if it generates a common answer, such that determination of the question will resolve an issue that is central to the validity of each one of the claims in one stroke." *Foley*, 336 F.R.D. at 448 (internal citations and quotations omitted). "[T]he focus must be whether a defendant's injurious conduct gives rise to class members' claims." *Fond Du Lac*, 2016 WL 3579953, at * 5.

Here, the central issue is whether Class Members' JSA benefits are actuarially equivalent to the SLAs they were offered. Determining whether the Plan's formulas used for participants unreasonably reduced their pensions will resolve this central issue for the entire Class. *Suchanek*, 764 F.3d at 756 ("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") (collecting cases); *see also Thompson*, 265 F.R.D. at 411 (finding that "whether the Plans underpaid lump sum benefits" was a common issue in an ERISA class action.).

ERISA requires the use of actuarial assumptions that are "reasonable" when determining if a JSA is actuarially equivalent. *See, e.g.*, 26 C.F.R. § 1.401(a)-11(b)(2). This case will determine

what those “reasonable” actuarial assumptions should be and will resolve the claims that the JSAs being received by Plaintiffs and all Class Members violate ERISA’s actuarial equivalence requirement. A class member’s particular circumstances (*e.g.*, normal form of benefit, age at retirement, etc.) will not affect what actuarial assumptions should be used to determine if they are receiving an actuarially equivalent benefit and thus should have their benefit increased. *See, e.g., Lacy v. Cook County, Illinois*, 897 F.3d 847, 866–67 (7th Cir. 2018) (finding that “commonality abounds” when class members “complain about the same failure to implement and enforce policies” under the ADA).

Plaintiffs raise core ***factual*** questions that drive this litigation that have common answers for all Class Members, which include:

- Which conversion factors should be used to determine whether JSA benefits are actuarially equivalent to the SLA offered to participants when they start receiving benefits?
- Does the Plan use proper conversion factors to determine whether JSA benefits are actuarially equivalent to the SLA offered to participants when they start receiving benefits?
- Does the Plan provide participants with actuarially equivalent benefits when they start receiving benefits?

The common ***legal*** issues for all Class Members include:

- Whether ERISA requires that JSA benefits be actuarially equivalent to the SLA offered to participants when they start receiving benefits?
- Whether the Plan’s fiduciaries breached their fiduciary duties by authorizing the payment of JSA benefits that were not actuarially equivalent to Class Members’ SLAs?
- Whether Class Members are entitled to have their future benefit payments re-calculated using reasonable conversion factors?

- Whether Class Members are entitled to be paid the shortfall between what they have received as pension benefit payments and what they would have received if their JSA benefits were actuarially equivalent?

In sum, all Class Members' claims turn on common legal and factual questions. Proof of each of these issues will necessarily be proof for the entire Class because it goes to how Defendants calculated pension benefits for all Class Members and whether those benefits satisfy ERISA's actuarial equivalence requirement. This satisfies Rule 23's commonality requirement. *Godfrey v. GreatBanc Trust Co.*, No. 18-cv-7918, 2021 WL 679068, * 6 (N.D. Ill. Feb. 21, 2021) (finding that "whether the defendants are liable under . . . ERISA" presented common questions, the answers to which "will resolve an issue central to the validity of each one of the claims in one stroke."); *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 255 F.R.D. 628, 629 (W.D. Wisc. 2009) (certifying class in ERISA case because "the central issue is . . . whether defendant's method for determining the value of [class members' benefits] was illegal.") *Berube* Order, ¶ 5 b.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A Plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Lacy*, 897 F.3d at 866–67.

A Plaintiffs' claims do not need to be identical to those of each class member in a class action. Rather, Rule 23's typicality requirement "boils down to two considerations: whether the same event, practice, or course of conduct gives rise to the claims of the class and whether the claims are grounded in the same legal theory." *Dekeyser v. Thyssenkrupp Waupaca, Inc.*, 314 F.R.D. 449, 454 (E.D. Wis. 2016), *aff'd*, 860 F.3d 918 (7th Cir. 2017) (citation omitted).

Here, the Class Representatives' claims are typical of those of the Class because they stem from the Plan's allegedly outdated formulas used to calculate JSAs for participants in the Plan and the comparison of the conversion factors generated by the Plan's formulas to those generated by reasonable actuarial assumptions. The claims arising from these core facts are based on the same legal theory—that Defendants violated ERISA § 205(d). *Temme v. Bemis Co.*, No. 08-cv-090, 2009 WL 1505120, at * 5 (E.D. Wis. May 28, 2009) (typicality satisfied in ERISA case because the claims “arise from the same conduct [involving a] reduction in benefits. . . .and based on the same legal theory. . . .”). Moreover, Plaintiffs and the proposed Class seek the same remedies, asking the Court for declaratory and injunctive under ERISA § 502(a)(3) that Defendants violated ERISA and to increase their future pension benefits. Dkt. 1 ¶¶ 82–103. Accordingly, Rule 23(a)(3)'s typicality requirement is satisfied. *Johnson v. Meriter Health Services*, 702 F.3d 364, 369 (7th Cir. 2012); *Thompson*, 265 F.R.D. at 411 (finding that “typicality exists because the claims . . . arise from the Plans' formula for interest credits and . . . methods of calculating [pension] payments”). *Berube Order*, ¶ 5 c.

d. Adequacy

The final prong of Rule 23(a) asks whether Class Representative “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “Antagonistic or conflicting claims between class members preclude fair and adequate representation by the class representatives.” *Thompson*, 265 F.R.D. at 411.

Here, Plaintiffs easily satisfies Rule 23's adequacy requirement. They have been involved in this case at each step, reviewing the Complaint and other relevant documents before the case was filed and regularly communicating with Class Counsel. They know their duties as a class representative and have no antagonistic or conflicting interests with absent class members. *Wachala v. Astellas US LLC*, No. 20-cv-3882, 2022 WL 408108, at * 8 (N.D. Ill. Feb. 10, 2022).

Finally, “[t]o establish adequacy . . . the court considers whether the Plaintiffs’ attorney is qualified, experienced and generally able to conduct the proposed litigation.” *Thompson*, 265 F.R.D. at 411. Proposed class counsel are well-qualified and will fairly and adequately represent the Class. Both IKR and MR have served and are serving as class counsel in numerous ERISA class actions around the country, including several other lawsuits involving ERISA’s actuarial equivalence. Accordingly, Class Counsel is uniquely positioned to represent the best interests of the Class given their extensive experience.

e. The Proposed Class is Ascertainable

Classes must also meet Rule 23’s implicit requirement of “ascertainability,” which “requires that a class . . . be defined clearly and based on objective criteria.” *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). Whether a class is ascertainable depends on “the adequacy of the class definition itself . . . [not] whether, given an adequate class definition, it would be difficult to identify particular members of the class.” *Id.* Here, the proposed Class is based on objective criteria—participation in the Plan—and membership can be determined using Defendants’ records. Accordingly, the proposed Class is ascertainable. *Mullins*, 795 F.3d at 657.

2. The Class Satisfies the Requirements of Rule 23(b).

Having satisfied all the requirements of Rule 23(a), the Class needs only to satisfy one subsection of Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Here, the proposed Class may be certified under Rule 23(b)(1).

Rule 23(b)(1)(A) is satisfied where “prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.” Fed. R. Civ. P. 23(b)(1)(A). The rule is designed for cases “where the party is obliged by law to treat the members of the class alike . . . or where the party must treat all alike

as a matter of practical necessity.” *Amchem*, 521 U.S. at 614 (citation omitted). Because ERISA protects against the risk of differential treatment of class members by fiduciaries, courts regularly certify ERISA cases under 23(b)(1). *See, e.g., Temme*, 2009 WL 1505120, at * 6; *see also Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 3206339, at * 6 (S.D.N.Y. July 27, 2017) (“Most ERISA class actions are certified under Rule 23(b)(1).”).

This is true here. If the Court were not to certify a class, hundreds of class members would be left to raise separate claims and Defendants would face “a risk of ‘inconsistent or varying adjudications’—including “contradictory rulings” about how to determine if Class Members received actuarially equivalent benefits. Rule 23(b)(1)(A) is designed to address this exact issue. *Temme*, 2009 WL 1501520, at * 6 (certifying a (b)(1) class because the “[defendant] may win in some cases and lose in others, generating contradictory obligations with regard to required coverage.”); *Mezyk v. U.S. Bank Pension Plan*, No. 3:09-cv-384, 2011 WL 601653, at *9 (S.D. Ill. Feb. 11, 2011) (certifying class of ERISA participants under (b)(1)(A) because the case would “establish one single standard of conduct” regarding pension benefits for class members). *Berube* Order, ¶ 5 e.

C. The Proposed Notice to Class Members Is Adequate

Class Members are entitled to notice of any proposed settlement and an opportunity to object before it is finally approved by the Court. *See Manual for Complex Litig. (Fourth)*, § 21.31. The Court should “direct notice in a reasonable manner to all class members who would be bound by the proposal. Fed. R. Civ. P. 23(e)(1)(B)).

Here the proposed method of notification is adequate. The proposed Notice, attached as Exhibit 2 to the Settlement Agreement, is clear and straightforward, providing Class Members with enough information to evaluate whether to object to the Settlement, as well as directions to the Settlement Website which will include further information. Notice, § XII. Notice will be

provided by First Class Mail. Class Members will not be required to submit a claim form or take any steps to receive the benefit of the Settlement.⁸ The Class Notice will also be posted to the Settlement Website. This proposed method of providing notice is adequate under Rule 23(c)(2). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (holding that individual mailed notice which clearly describes the case and Class Members' rights meets due process requirements); *Berube* Order, ¶ 9.

VI. PROPOSED SCHEDULE

Should this Court grant preliminary approval to the Settlement, the parties respectfully propose the following schedule for sending notice to the Settlement Class and scheduling a final approval hearing:

<u>EVENT</u>	<u>SCHEDULED DATE</u>
Deadline for mailing Notice to Class members.	45 days after entry of Preliminary Approval Order, or such other date as the Court may set in a Preliminary Approval Order
Motion(s) for, and memoranda in support of (i) Final Approval of Settlement and (ii) Attorneys' Fees and Costs	45 days before the final approval hearing; hearing to be set by the court.
Last day for objections to the Settlement to be filed with the Court and sent to counsel	28 days before date set by Court for Final Approval Hearing
Parties file responses to any filed objections and any other reply briefs in support of Final Approval and Attorneys' Fees and Costs	7 days before date set by Court for Final Approval Hearing
Final Approval Hearing	At the convenience of the Court, not less than 110 days after entry of Preliminary Approval Order

⁸ As discussed above, the only exception is for estates and heirs where both the Class Member Participant and his or her Associated Beneficiary passed away prior to the date when increased benefits commence.

VII. CONCLUSION

The proposed class action Settlement Agreement is fair, reasonable, and adequate. For the foregoing reasons, Plaintiffs request that this Court approve the Settlement Agreement and certify the Settlement Class on a preliminary basis so that Notice may be sent, schedule appropriate deadlines for various settlement requirements as reflected in the accompanying motion and schedule a hearing for final approval of the Settlement.

Dated: June 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, 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.

/s/ Christopher M. Barrett
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