UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
HARTFORD DIVISION

Beth Andrew-Berry, individually and as a representative of the GWA, LLC 401(k) Profit Sharing Plan and a class of similarly situated persons,

Plaintiffs,

v.

George A. Weiss and GWA, LLC,

Defendants.

Case No.: 3:23−CV−00978−OAW

September 27, 2024

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Beth Andrew-Berry, on behalf of herself and the proposed Class Members, respectfully moves this Court for an Order: (1) granting preliminary approval of her Class Action Settlement Agreement with Defendants George A. Weiss and GWA, LLC (together, "Defendants"), (2) certifying the proposed Settlement Class for purposes of Settlement; (3) approving the proposed Notice of Settlement (Exhibit A to the Settlement Agreement) 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 (Exhibit D to the Settlement Agreement).

In support of this Motion, Plaintiff submits her contemporaneously filed Memorandum of Law, her accompanying declaration, the declaration of lead counsel Michelle C. Yau, and the materials attached thereto (including the Settlement Agreement).

Dated: September 27, 2024

Respectfully submitted,

/s/ Daniel R. Sutter

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CERTIFICATE OF SERVICE

I, Jacob T. Schutz, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 27, 2024.

/s/ Jacob T. Schutz
Jacob T. Schutz

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Case No.: 3:23−CV−00978−OAW

September 27, 2024

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

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INTRODUCTION

Plaintiff Beth Andrew-Berry submits this memorandum in support of her motion for preliminary approval of a class action settlement with Defendants George A. Weiss ("Weiss") and GWA, LLC ("GWA") (together, "Defendants") relating to the management of the GWA, LLC 401(k) Profit Sharing Plan (the "Plan").[1]

Under the proposed Settlement, GWA, LLC or its insurers will pay a Gross Settlement Amount of $7,900,000 into a common fund for the benefit of the Settlement Class of approximately 200 retirement participants. This is an outstanding outcome for the Class that, if approved, would result in an average gross recovery of about $40,000 per Class Member. Indeed, this Settlement exceeds the very high end of settlements in similar ERISA cases based on the average recovery per Class Member. 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 was negotiated at arm's length by experienced and capable counsel, with the assistance of a respected neutral mediator from JAMS;
- The Settlement followed contested motion practice and document discovery;
- The Settlement provides for substantial monetary recoveries for each class member 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;[2]
- 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

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

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

- 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, Plaintiff respectfully requests that the Court enter an order that: (1) preliminarily approves the Settlement; (2) certifies the proposed Settlement Class solely for purposes of Settlement; (3) approves the proposed Notice of Settlement and authorizing distribution of the Notice to Class Members; (4) schedules a final approval hearing; and (5) grants 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 Beth Andrew-Berry filed this Action as a putative class action on July 24, 2023, *see* ECF 1. In summary, Plaintiff alleged that (1) Defendants breached their fiduciary duties by investing the Plan's assets entirely in a hedge fund named the Weiss Multi-Strategy Partners (Cayman) Ltd. Fund and a mutual fund named the Weiss Alternative Multi-Strategy Fund (together, the "Weiss Funds"), both affiliated with GWA; (2) Defendants committed prohibited transactions with respect to the Plan's investment in the Weiss Funds; and (3) Defendants were liable as co-fiduciaries for each other's alleged fiduciary breaches. *Id.*, Counts I-IV.

Defendants moved to dismiss on October 31, 2023 (ECFs 32-34), Plaintiff responded on December 11 (ECF 36-37), and Defendants replied on January 11, 2024 (ECF 38). On April 4, 2024, the parties filed a Joint Motion to stay the matter for ten weeks pending the mediation. ECF 42. On April 29, 2024, Defendant GWA filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. *In re Weiss Multi-Strategy Advisers LLC*, No. 24-10743-mg, ECF 1 (Apr. 29, 2024). On May 13,

2024, Defendants apprised the Court that Plaintiff's action was automatically stayed as to GWA. ECF 44.

Prior to the scheduled mediation, Defendants advised Plaintiff that it would be necessary to postpone the mediation, as the bankruptcy filing called into question whether a fiduciary insurance policy held by GWA that provides $10 million in coverage remained available in light of the automatic stay pursuant to Section 362(d) of the Bankruptcy Code. *See* ECF 45. On June 12, 2024, GWA and related debtors filed a motion for an order from the United States Bankruptcy Court for the Southern District of New York granting relief from the automatic stay, to the extent necessary, to allow Defendant George Weiss access to certain policy proceeds under all applicable fiduciary insurance policies to fund his defense, including for payment of defense costs and to satisfy any liability or judgment in this action. *In re Weiss Multi-Strategy Advisers LLC*, No. 24-10743-mg, ECF 76.

On July 2, 2024, the United States Bankruptcy Court for the Southern District of New York entered an order approving the relief sought in the Motion, as amended following discussions with counsel for Plaintiff that had occurred after the Motion was filed. *In re Weiss Multi- Strategy Advisers LLC*, 24-10743-mg, ECF 121.

II. Discovery and Settlement

During their Rule 26(f) conference, the parties disagreed about when discovery should commence. In their report to the Court, Plaintiff argued that discovery should commence immediately, while Defendants contended discovery should be delayed until after their pending motion to dismiss has been resolved. *See* ECF 30. The Court then ordered the parties to meet and confer to discuss "reasonable limitations on discovery pending resolution of the motion to dismiss." ECF 31. The parties subsequently agreed to limited discovery, and Defendants produced a total of 1,945 pages of documents. Yau Decl. ¶ 19.

The Parties engaged in private mediation with Robert Meyer of JAMS on August 15, 2024. *Id.* ¶ 26. Mr. Meyer is an experienced mediator who has substantial experience mediating ERISA cases and other class action cases. *Id.* Following extensive arms'-length negotiations (both during the mediation and thereafter, all with the assistance of Mr. Meyer), the Parties signed a term sheet on August 23, 2024. Thereafter, the parties negotiated and executed a 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 GWA, LLC 401(k) Profit Sharing Plan (F/K/A the George Weiss Associates, Inc. 401(k) Profit Sharing Plan) from July 24, 2017 to the Effective Date of Settlement, excluding Defendant George A. Weiss and any of his relatives, heirs, or trusts for which he and/or his family members are beneficiaries or trustees.

Settlement § 1.11. Based on preliminary information provided by Defendants in discovery, it is estimated that there are more than 200 Class Members. Yau Decl. ¶ 29.

B. Monetary Relief and Plan of Allocation

Under the Settlement, GWA or its insurers will pay a Gross Settlement Amount of $7,900,000 into a Qualified Settlement Fund. *Settlement* §§ 1.34, 5.2. After accounting for any Attorneys' Fees and Expenses, Administrative Expenses, and Class Representative Service Award 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.* §§ 6.1–6.4.

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 Aggregate Account Balance, as follows:

(i) For each Active and Former Participant that belongs to the Settlement Class, sum his or her total account balance as of the end of each calendar quarter from July 1, 2017 through July 31, 2024 (as it relates to each individual, the "Aggregate Account

Balance");

(ii) Sum the Aggregate Account Balance calculated for each Active and Former Participant that belongs to the Settlement Class (the "Aggregate Settlement Class Balance");

(iii) For each Active and Former Participant that belongs to the Settlement Class, divide their Aggregate Account Balance by the Aggregate Settlement Class Balance.

Id. § 6.1(a). In summary, the Settlement Allocation Score is calculated based on the Class Member's level of investment in the at-issue Weiss Funds relative other Class Members. *Id.* 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* § 6.1(b).

Active 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, or by check (unless they elect to have their distribution rolled over to an individual retirement account or other eligible employer plan). *Id*. § 6.2. Former Participants will 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*. § 6.3. The Settlement Agreement also provides for automatic payments to Beneficiaries and Alternate Payees under a Qualified Domestic Relations Order. *Id.* § 6.4. Participants are not required to submit a claim form to receive payment. *Id.* §§ 6.2-6.4.[3]

C. Release of Claims

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

[3] 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 payment or pro rata share shall be zero for all purposes, and shall be reallocated among the remaining Class Members on a pro rata basis. *Settlement* §§ 6.1(b), 6.2(b)(ii), 6.3(a)(i)-(ii).

- 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 identical factual predicate;[4]
- 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 Plan. *Id.* §§ 1.40, 8.1(c).

D. Class Notice and Settlement Administration

All Class Members will receive a Class Notice (including a Rollover Form) via first-class U.S. Mail. *Id.* §§ 4.2(b)-(c). The Class 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 Settlement Class release; (6) the identity of Class Counsel and the amount of compensation they will seek in connection with the Settlement; (7) the amount of the proposed Class Representative Service Award; (8) the date, time, and location of the final approval hearing; and (9) Class Members' right to appear at the final approval hearing.[5] *See id.* at Ex. A.

[4] 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.

[5] 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 Agreement* Ex. A at Question 14, 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)).

The Settlement Administrator will establish a Settlement Website on which it will post the Notice, 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.* §§ 4.3(a)–(b). To the extent that Class Members would like more information, the Settlement Administrator will answer questions via an email and/or telephone support line through which Class Members may contact the Settlement Administrator directly. *Id.* § 4.3(c).

E. Attorneys' Fees and Administrative 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.* § 7.1. The Settlement requires that Class Counsel file their motion for Attorneys' Fees and Expenses at least 14 days before the deadline for objections to the proposed Settlement. *Id.* § 7.1.[6]

Plaintiff solicited bids from three potential settlement administrators, and have retained Analytics Consulting LLC ("Analytics") as the Settlement Administrator because it provided the lowest bid and has extensive experience handling similar ERISA settlements, including the court-approved settlements in *Krohnengold v. New York Life Insurance Co.*, No. 1:21-cv-01778 (S.D.N.Y.), *Andrus v. New York Life Insurance Co.*, No. 1:16-cv-05698 (S.D.N.Y.) and *Beach v. JPMorgan Chase Bank, N.A.*, 1:17-cv-00563 (S.D.N.Y.). Yau Decl. ¶ 30.

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* § 3.2; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632 (Dec. 31, 2003), as

[6] Class Counsel will limit their request for Attorneys' Fees to one-third of the Gross Settlement Amount. *Id.* Ex. A at Question 10. In addition, the Settlement provides for recovery of Administrative Expenses related to the Settlement, and for a Service Awards of up to $45,000 for the Class Representative. *Id.* §§ 7.1–7.2; Ex. A at Question 9. As with Attorneys' Fees, the Settlement is not conditioned on approval of any such Service Awards. *Id.* § 6.2.

amended, 75 Fed. Reg. 33830 (June 15, 2010). The Independent Fiduciary will issue its report at least 32 days before the final Fairness Hearing, so it may be considered by the Court. *Settlement* § 3.2(b).

G. Bankruptcy Court Approval

Under the Settlement Agreement, GWA shall seek authorization from the Bankruptcy Court to enter into the Settlement. *Settlement* § 2.1. GWA will apply to the Bankruptcy Court for entry of a Bankruptcy Court Approval Order, substantially in the form of the draft order attached to the Settlement Agreement as Exhibit B, and the other Parties will provide support for and cooperate in obtaining the Bankruptcy Court Approval Order. *Id.*

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. *Kemp-Delisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 10033380, at *3-4 (D. Conn. July 12, 2016) (citing *Bourlas v. Davis L. Assocs.*, 237 F.R.D. 345, 355 (E.D.N.Y. 2006)). 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.*[7] In the second step, after notice of the proposed settlement has been sent and class members have had an opportunity to object, the Court considers whether the settlement warrants final court approval. *Bourlas*, 237 F.R.D. at 355.

[7] 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. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980).

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, 1078-79 (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 (cleaned up).

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); *Glover v. Conn. General Life Ins. Co.*, 2024 WL 4036721, at *1 (D. Conn. Sept. 4, 2024). This standard is satisfied here.

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.[8]

[8] The Rule 23(e) factors "supplement rather than displace the[] '*Grinnell*' factors" previously applied in this circuit. *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332, at *1 (S.D.N.Y. Dec. 16, 2019). 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), a*brogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) (citations omitted). Consistent with the intent of the 2018 amendments, only those *Grinnell* factors that are relevant to this Settlement are addressed here.

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." *Glover*, 2024 WL 4036721, at *9 (quoting Fed. R. Civ. P. 23(e)(2)(A)). This adequacy standard is more than met here.

Plaintiff Andrew-Berry has adequately represented the Settlement Class. At the outset of the case, she signed a written acknowledgement of her duties as class representatives, and she has sought to fulfill those duties throughout the course of this case. *See* Plaintiff's Decl. ¶¶ 4-6. Among other things, Plaintiff has: (1) assisted Class Counsel in the investigation of this matter; (2) provided documents to Class Counsel for the drafting of the Complaint; (3) reviewed the allegations in the Complaint; (4) communicated with Class Counsel about strategy for and mediation of the case; (4) produced documents to Defendants as part of Plaintiff's initial disclosures; (5) discussed the proposed Settlement with Class Counsel and reviewed the terms of the Settlement Agreement. *Id.* ¶ 4. Plaintiff falls within the proposed Settlement Class and is not aware of any conflicts between herself and any other class members. *Id.* ¶¶ 2, 3, 6.

Class Counsel is also more than adequate. Cohen Milstein Sellers & Toll PLLP ("Cohen Milstein") is a leader in class action litigation generally and has a premier ERISA class action practice that is nationally recognized. Yau Decl. ¶ 4. Based on its many successes, Cohen Milstein was named as one of the ten "Most Feared Plaintiffs Firms" by Law360, and Forbes has called my firm a "class action powerhouse." *Id.* In 2024, Cohen Milstein was named by The National Law Journal as an "Elite Trial Lawyer" finalist in numerous practice areas including "Plaintiffs' Law Firm of the Year" and "Class Action – Practice of the Year. *Id.* Cohen Milstein has had a dedicated ERISA class litigation practice for over twenty years and has played a significant role in the development of employee benefits law. *Id.* ¶ 5. Based on these successes, Cohen Milstein's ERISA

practice was named by Law360 as "Practice Group of the Year – Benefits" in 2019, 2021, and 2022. As seasoned class action practitioners, Class Counsel has successfully achieved hundreds of millions of dollars in recovery for ERISA classes asserting similar claims, including recent cases against New York Life, Wells Fargo, T. Rowe Price, and BlackRock arising from use of proprietary funds in their 401(k) plans. *Id.* ¶ 6.

Here, Class Counsel thoroughly investigated the claims, litigated the motion to dismiss, vigorously sought discovery from Defendants, engaged a financial expert to determine the amount of damages suffered by the Class, and skillfully negotiated the present settlement based on their recognized ERISA experience and the record that was developed. *See supra* at 2-4; Yau Decl. ¶¶ 16-23.

B. The Settlement was Negotiated at Arm's-Length

The second Rule 23(e) factor examines whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Negotiations with the assistance of an experienced mediator are indicative of such procedural fairness. *See Glover*, 2024 WL 4036721, at *9 ("That the negotiations included active participation by an experienced mediator supports finding that the Settlement is procedurally fair." (citing *In re Synchrony Fin. Sec. Litig.*, 2023 WL 4992933, at *5 (D. Conn. Aug. 4, 2023)); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) ("The involvement of Ruth D. Raisfeld, Esq., an experienced and well-known employment and class action mediator, is . . . a strong indicator of procedural fairness.")). 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. The Settlement of this matter occurred after Plaintiff's counsel conducted a thorough investigation, analyzed documents and data produced in discovery, and engaged a financial expert to calculate class-wide damages. Yau Decl. ¶¶ 17-21.

Their negotiations were conducted at arm's length and were facilitated by a seasoned JAMS mediator who has mediated dozens of ERISA class actions. *Id.* ¶ 26. Accordingly, this factor also favors settlement approval.

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 $7.9 million settlement amount is a robust monetary recovery that represents a significant portion of the alleged losses sustained by the Plan. Specifically, Plaintiff's financial expert consultant estimated that the total losses associated with Plaintiff's breach of fiduciary duty claims was between $21.8 - $46.9 million. Yau Decl. ¶ 21. Based on this estimate, the $7.9 million recovery represents approximately 17% - 36% of the total estimated losses. *Id.* Under either calculation, Plaintiff's percentage of recovery is on par with numerous other ERISA class action settlements across the country. *See e.g.*, *Krohnengold*, No. 1:21-cv-01778, ECF 176 ¶ 5 (S.D.N.Y. Feb. 26, 2024), *approved* ECF 202 (S.D.N.Y. July 18, 2024); *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 (S.D.N.Y. 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 (S.D.N.Y. Feb. 3, 2021) (settlement represented 21-22% of disputed fees paid to McKinsey affiliate), *approved* ECF 110 (S.D.N.Y. Feb. 17, 2021).[9]

[9] *See also Toomey v. DeMoulas Super Mkts., Inc.*, No. 1:19-cv-11633, ECF 95 at 10 (D. Mass. 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. 1:18-cv-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,

Moreover, the average gross recovery per Class Member of about $40,000 is an exceptional result when compared to other similar ERISA class settlements. For example, parties in ERISA class actions have collected data concerning the individual recoveries per class members and reported that, among 18 similar ERISA class settlements the per average gross recovery ranged from $27.34 to $2,291 per Class Member. The instant settlement provides Class Members more than 17 times the amount of the very high end of the range of average gross recoveries per class member. *See* Decl. in Supp. of Final Approval, *Ahrendsen v. Prudent Fiduciary Servs., LLC*, No. 2:21-cv-02157, ECF 92-1 ¶ 24 (E.D. Pa. Apr. 28, 2023) (collecting data on the average gross recovery per class member from 18 similar ERISA class settlements)

Finally, the amount recovered as a percentage of the Plan's assets also compares favorably to other settlements. The Gross Settlement Amount in this case ($7.9 million) represents approximately 8.7% of the Plan's year-end assets as of the most recent reported Form 5500 filings in 2022. Yau Decl. ¶ 22. Settlements in 25 similar ERISA cases involving 401(k) plans ranged from 0.083% to 3.3% of Plan assets. *See* Declaration ISO Preliminary Approval, *Baker v. John Hancock Life Ins. Co. (U.S.A.)*, No. 1:20-cv-10397, ECF 64 ¶ 6 (S.D.N.Y. June 1, 2021) (collecting cases).

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

2018), *judgement entered*, 2018 WL 8334847 (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).

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.

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

In the absence of a settlement, Plaintiff would have faced extreme risks— both the normal litigation risk and collectability risks because GWA had declared bankruptcy. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *7 (D. Conn. Nov. 3, 2016) ("Many courts recognize the particular complexity of ERISA breach of fiduciary duty cases such as this one" which "is in addition to the general risk inherent in litigating complex claims to their conclusion." (cleaned up)); *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. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."), *aff'd sub nom.*, 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, Plaintiff had not yet filed for class certification, which Defendants likely would have opposed. 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. 22-02689, ECF 162-1 (2d. Cir. Feb. 14, 2024). Although Plaintiff believes *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. N.Y.U.*, 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 Plaintiff 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 Plaintiff was confident in her 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). 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 *1, *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 Plaintiff 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 this current recovery.").

Finally, the risks of delay were particularly acute in this action. As discussed above, Defendant GWA has filed for bankruptcy, and is now subject to an automatic stay under the bankruptcy code. Had this action not settled, Plaintiff faced the risk that Defendants would also argue that the stay should extend to Defendant George A. Weiss, the founder of GWA (formerly George Weiss Associates). *See Stih v. Rockaway Farmers Mkt., Inc.*, 656 B.R. 308, 312 (E.D.N.Y. 2024) ("The automatic stay can apply to non-debtors . . . when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate" including "a claim to establish an obligation of which the debtor is a guarantor, a claim against the debtor's insurer, and actions where there is such identity between the debtor and a third party defendant that the debtor may be said to be the real party defendant." (cleaned up) (quoting *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287-88 (2d Cir. 2003)). And if Plaintiff and the Class were ultimately successful in winning a monetary judgment years from now, that the Company is now bankrupt and winding down its operations means it would be difficult (at best) to collect that judgment.

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

The proposed method of distributing the Settlement proceeds is fair and reasonable. Active Participants will have their Plan accounts automatically credited with their share of the Settlement, or receive a check, unless they elect a tax-qualified rollover of their distribution to an individual retirement account or other eligible employer plan. *See supra* at 5-6. 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. *Id.* This method of distribution is both effective and efficient, and similar methods have been approved in other 401(k) settlements. *See Krohnengold*, No. 1:21-cv-01778, ECF 176-1 at 16-18 (S.D.N.Y. Feb. 26, 2024), *approved* ECF 202 (S.D.N.Y. July 18, 2024); *Beach*, No. 1:17-cv-00563, ECF 211 at 17 (S.D.N.Y. May 22, 2020), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020). Any uncashed checks will paid as a *cy pres* award to the Council of Economic Education, *see Settlement* § 6.6, and will not revert to Weiss, GWA, or its insurers.[10]

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. Class Counsel will not receive any portion of their attorneys' fees unless and until the Settlement and their fees are approved by the Court.[11]

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

[10] A *cy pres* award to the Council of Economic Education was approved in a similar 401(k) settlement. *See Moitoso v. FMR LLC*, No. 1:18-cv-12122, ECF 274 (D. Mass. Sept. 21, 2021).

[11] Moreover, Class Counsel will voluntarily limit their request for Attorneys' Fees to one-third of the Gross Settlement Amount, *see Settlement* Ex. A at Question 10, consistent with the amounts approved in similar cases in this Circuit. *See Krohnengold,* No. 1:21-cv-01778, ECF 201 (S.D.N.Y. July 18, 2024) (approving 33% attorneys' fee award); *Jacobs*, No. 1:16-cv-01082, ECF 247 at 7 (S.D.N.Y. Nov. 21, 2023) (approving one-third fee); *Beach*, No. 1:17-cv-00563, ECF 232 (S.D.N.Y. Oct. 7, 2020) (approving 33% 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)).

Agreement or its exhibits other than those contained and memorialized in such documents." *Settlement* § 12.5. 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 the Weiss Funds. *See supra* at 5-6. This is equitable, and consistent with the manner of allocation approved by other courts in this circuit. *See e.g.*, *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). Moreover, these payments will be efficiently distributed to Class Members, without requiring them to submit a claim form. *See supra* at 6. Class Members only need to submit paperwork if they wish to request a rollover of their Settlement payment instead of a check made out to them personally.

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* § 3.1(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 6-7, 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 F. 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 7. 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.[12] To certify the class, Plaintiff must satisfy the requirements of Rule 23(a) and meet one of the prerequisites of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345-46 (2011). Here, all of the necessary requirements 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.

[12] 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).

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 200 Class Members. *See supra* at 4. This significantly 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 fact." *Alfonso v. FedEx Ground Package Sys., Inc.*, 2024 WL 1007220, at *12 (D. Conn. Mar. 8, 2024) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)). "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." *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 GWA) is also a common question. *See Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (granting motion for 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).[13]

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, 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)).

Courts in this and other Circuits have found the typicality requirement satisfied in similar ERISA cases alleging breach of fiduciary duty. *Garthwait v. Eversource Energy Co.*, 2022 WL 1657469, at *11 (D. Conn. May 25, 2022) (citing cases). Once again, this case is no exception:

> Here, the plaintiffs' claims arise from the same course of events and turn on the same legal issues as the claims of class members: the defendants' alleged breach of fiduciary duty harming the Plan. The factual circumstances supporting the

[13] *See also Sacerdote*, 2018 WL 840364, at *3 (Feb. 13, 2018) (finding common questions including, *inter alia*, "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….").

> plaintiffs' breach claims are also largely shared, as they concern the conduct of the defendants and the participation of each class member in the Plan.

Id. See also Leber, 323 F.R.D. at 162; *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 10-11. Plaintiff shares a common interest with all of the Class Members in connection with their common claims, has no conflicts of interest, and has 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 Plan. *See, e.g.*, *Beach*, 2019 WL 2428631, at *9; *Moreno*, 2017 WL 3868803, at *7-8. "'Because plaintiffs' allegations are brought with respect to breaches of fiduciary duties to the Plan[ ] as a whole, defendants' duties rise and fall with all plaintiffs." *Garthwait*, 2022 WL 1657469, at *15 (quoting *Cunningham v. Cornell Univ.*, 2019 WL 275827, at *8 (S.D.N.Y. Jan. 22, 2019)). "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)

"Where, as here, a putative class consists of thousands of ERISA plan participants, certification under 23(b)(1)(A) is appropriate, because allowing thousands of 'individual [ERISA] cases could result in varying adjudications over defendant's alleged breach and how to measure the damages.'" *Garthwait*, 2022 WL 1657469, at *15 (quoting *Sacerdote*, 2018 WL 840364, at *6). 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 Krueger v. Ameriprise Fin., Inc.*(""), 304 F.R.D. 559, 577 (D. Minn. 2014) ("[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., Garthwait*, 2022 WL 1657469, at *15; *Leber*, 323 F.R.D. at 165; *Beach*, 2019 WL 2428631, at *9; *Moreno*, 2017 WL 3868803, a *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 *13 (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 committee's note to 1966 amendment. "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, Plaintiff respectfully requests that the Court preliminarily approve the Settlement and enter the accompanying Preliminary Approval Order.

Dated: September 27, 2024

Respectfully submitted,

/s/ Daniel R. Sutter

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CERTIFICATE OF SERVICE

I, Jacob T. Schutz, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 27, 2024.

/s/ Jacob T. Schutz
Jacob T. Schutz