UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re M&T Bank Corporation ERISA Litigation	**Civil Action No.: 1:16-cv-375-FPG-JJM** **Consolidated Action**

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

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INTRODUCTION

Plaintiffs Jacqueline Allen, Russ Dixon, Sa'ud Habib, Kenneth Sliwinski, J. Marlene Smith, and Beverly Williams ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of Class Action Settlement. A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit A to the accompanying Declaration of Kai Richter ("*Richter Decl.*").[1] This Settlement resolves Plaintiffs' class action claims against M&T Bank Corporation ("M&T"), Manufacturers and Traders Trust Company ("M&T Bank"), Wilmington Trust Investment Advisors ("WTIA"), Wilmington Funds Management Corporation, Wilmington Trust Corporation, the M&T Bank Employee Benefit Plans Committee ("Committee"), the named Committee members, and the named members of the M&T and M&T Bank Board of Directors (collectively, "Defendants")[2] under the Employee Retirement Income Security Act ("ERISA"), concerning Defendants' administration and management of the M&T Bank Corporation Retirement Savings Plan ("Plan").

Under the terms of the proposed Settlement, M&T Bank or its insurers will pay a gross settlement amount of $20,850,000 into a common fund for the benefit of Class Members. This is a significant recovery for Class Members, and falls well within the range of negotiated settlements in similar ERISA cases. Moreover, the Settlement also provides for meaningful prospective relief. Specifically, M&T Bank has agreed that (1) an independent investment consultant will review the proprietary mutual funds in Plan (i.e., funds affiliated with M&T Bank) and provide a written opinion regarding whether those funds should be retained; (2) an independent investment consultant also will provide a written opinion regarding whether any of the existing mutual funds (both proprietary and non-proprietary funds) should be replaced with

[1] All capitalized terms have the meaning assigned to them in Article 2 of the Settlement Agreement, unless otherwise specified herein.

[2] The named Defendants are identified in Paragraph 2.20 of the Settlement Agreement.

alternative investment vehicles such as collective investment trusts or separate accounts for the same or equivalent mutual funds; (3) in the event that any proprietary funds are retained, those mutual funds shall rebate to the Plan (or its recordkeeper) the same percentage of investment management fees rebated to other retirement plans (or their recordkeepers) that hold the same share class of such proprietary funds; and (4) Defendants will issue a request for information to multiple potential recordkeepers to obtain the best combination of recordkeeping pricing and services available to the Plan.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed Settlement Notices can 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 well-respected mediator, Retired Judge Layn Phillips;
- The Settlement provides for significant monetary relief that compares favorably to settlements in other cases;
- The Settlement provides for automatic distribution of the settlement funds to the accounts of Class Members who are Current Participants in the Plan, and for a simple claim form to be submitted by Former Participants, which allows Former Participants to elect either to roll their distribution into another qualified retirement account or to receive a check;
- The Settlement provides for meaningful prospective relief;
- The Class Release is appropriately tailored to the claims that were asserted in the action;
- The proposed Settlement Notices provide fulsome information to Class Members about the Settlement, and will be distributed via first-class mail; and
- The Settlement Agreement provides Class Members the opportunity to raise any objections they may have to the Settlement and appear at the final approval hearing.

In addition, the proposed Settlement Class meets all necessary criteria under Fed. R. Civ. P. 23(a) and (b)(1). Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Settlement Notices and

authorizing distribution of the Notices; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the proposed Preliminary Approval Order submitted herewith. This motion is not opposed by Defendants.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Motion Practice

On May 11, 2016, Plaintiffs Sa'ud Habib, Beverly Williams, J. Marlene Smith, Kenneth Sliwinski, and Russ Dixon filed a Class Action Complaint (*ECF No. 1*), asserting claims under ERISA in relation to the management of the Plan. These Plaintiffs filed a First Amended Class Action Complaint on August 17, 2016. *ECF No. 25*. On September 1, 2016, Plaintiff Jacqueline Allen filed a related action asserting similar claims against M&T Bank and many of the same Defendants. A Consolidated Complaint was then filed on August 25, 2017. *ECF No. 35.*

On October 10, 2017, Defendants moved to dismiss certain claims in the Consolidated Complaint. *ECF No. 41*. On September 11, 2018, the Court granted in part and denied in part Defendants' partial motion to dismiss. *See ECF No. 68.*[3] Plaintiffs then moved to amend their Consolidated Complaint by naming an additional fiduciary defendant, and adding allegations related to Defendants' alleged failure to prudently monitor recordkeeping expenses. *See ECF No. 83*. Defendants opposed Plaintiffs' motion. *ECF Nos. 91, 114.* On August 12, 2019, the Court granted Plaintiffs' motion to amend. *ECF No. 132.* Plaintiffs then filed their First Amended Consolidated Complaint on August 15, 2019 (*ECF No. 135*), and Defendants filed an Answer on August 29, 2019 (*ECF No. 141*). On March 25, 2019, Plaintiffs filed a motion for class certification, which Defendants opposed. *See ECF Nos. 94, 116, 121*. That motion was not decided by the Court by the time the parties agreed to settle this matter.

[3] Plaintiffs' claims regarding alleged breaches of fiduciary duties and prohibited transactions with parties-in-interest survived the motion to dismiss. *Id.*

B. Discovery

During the course of the litigation, the parties engaged in extensive discovery. Defendants produced over 250,000 pages of documents, and Plaintiffs produced over 7,500 pages. *Richter Decl.* ¶ *16.* In addition, Class Counsel took the depositions of five witnesses, and Defendants deposed all six named Plaintiffs. *Id.* ¶ *18.* Plaintiffs also engaged in third-party discovery, through which they obtained over 3,800 pages of documents from three different entities. *Id.* ¶ *17.* Further, the Parties engaged in two pre-motion teleconferences with the Court regarding certain discovery disputes. *See ECF Nos. 90, 138.*[4]

C. Mediation

On February 18, 2019, the parties participated in a full-day mediation with the Honorable Layn Phillips, a retired United States district court judge. *ECF No. 120.* Although the parties did not reach a settlement at that time, they agreed to continue their negotiations with the assistance of Judge Phillips. *Richter Decl.* ¶ *21.* As a result of these continued negotiations, the parties reached a settlement-in-principle on September 26, 2019. *Id.* ¶ *22.* The terms of the parties' settlement are memorialized in the Settlement Agreement that is the subject of this motion. *Id.*

II. SETTLEMENT TERMS

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the M&T Bank Corporation Retirement Savings Plan, at any time during the Class Period from May 11, 2010 through September 30, 2019.

Settlement ¶ *2.47.* This class definition is consistent with the definition that Plaintiffs proposed in their class certification motion (*ECF No.* 93), and now contains an end date for the Class Period.

[4] At the time of settlement, Plaintiffs were pursuing a motion regarding privilege designations made by the Plan's outside counsel, Gordon Feinblatt LLC. *See ECF No. 142.*

B. Monetary Relief

Under the Settlement, M&T Bank or its insurers will contribute a Gross Settlement Amount of $20.85 million to a common settlement fund (the "Settlement Fund"). *Settlement* ¶¶ *2.30, 5.4-5.5.* After accounting for any attorneys' fees, expenses, and class representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id.* ¶¶ *2.38, 6.1.*

The Net Settlement Amount will be allocated among eligible Class Members in proportion to their weighted quarterly account balances in the Plan's investment options. *Id.* ¶ *6.4.* Consistent with the loss calculations of Plaintiffs' damages expert (Dr. Steve Pomerantz), Class Members' balances in (1) proprietary funds and (2) funds for which Plaintiffs alleged a less expensive investment vehicle was available, will be weighted more heavily than balances in the Plan's other investments. *Id.* ¶ *6.4.1*; *see also Richter Decl.* ¶ *9.*

Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Id.* ¶ *6.5.* Former Participants will be required to submit a claim form, which allows them to elect to have their distribution rolled over into an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.* ¶ *6.6.*[5] Under no circumstances will any monies revert to M&T Bank or its insurers. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan. *Id.* ¶¶ *6.11, 6.12.*

C. Prospective Relief

The Settlement also provides that the following procedures shall apply to the management of the Plan on a prospective basis:

[5] The Claim Form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks.

- The Committee shall retain an independent investment consultant (not related to M&T Bank or any of its affiliates) to provide a written opinion, within six months of the Settlement Effective Date, on the selection, retention, or evaluation of any proprietary mutual fund in the Plan listed in Group A of the Settlement Agreement, or the share class of any such proprietary mutual funds (if selected or retained), which the Committee shall consider in good faith;
- To the extent any proprietary mutual funds listed in Group A are retained in the Plan, those mutual funds shall rebate to the Plan (or its recordkeeper) the same percentage of investment management fees rebated to other retirement plans (or their recordkeepers) that hold the same share class of such proprietary mutual funds;
- The Committee shall retain an independent investment consultant (not related to M&T Bank or any of its affiliates) to provide a written opinion, within six (6) months of the Settlement Effective Date, regarding whether any of the existing proprietary or non-proprietary mutual funds in the plan should be replaced with alternative investment vehicles (e.g., separate accounts or collective trusts) for the same or equivalent mutual funds, which the Committee shall consider in good faith; and
- Within sixty (60) days of the Settlement Effective Date, Defendants shall issue a request for information to multiple potential vendors for recordkeeping services, and shall consider any information received in response in good faith to choose the best recordkeeping services available to the Plan, which consideration shall include the amount of recordkeeping expenses paid by the Plan, whether directly or indirectly through revenue sharing, and quality of services provided to Plan participants.

Settlement, ¶ 7.1(a)-(d). Subject to the foregoing, the Investment Committee shall retain the responsibilities and authority vested to it by the Plan Document. *Id. ¶ 7.1(e).*

D. Review by Independent Fiduciary

As required under ERISA, M&T Bank will retain a separate independent fiduciary to review the Settlement on behalf of the Plan. *Settlement ¶ 3.1.1; see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, *as amended*, 75 Fed. Reg. 33830 ("PTE 2003-39"). The independent fiduciary will issue its report prior to the final approval hearing, so the Court may consider it. *Settlement ¶ 3.1.2*.

E. Release of Claims

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

2.42.1 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 alleged, asserted, or set forth in the Action…;

2.42.2 That would be barred by res judicata based on entry by the Court of the Final Approval Order;

2.42.3 That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund pursuant to the Plan of Allocation; or

2.42.4 That relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone.

See Settlement ¶¶ *2.41, 2.42.*

F. Class Notice and Settlement Administration

Class Members will be sent a direct notice of the settlement ("Settlement Notice") via U.S. Mail. *Id.* ¶¶ *2.49, 3.3.1, & Exs. 1 & 2.* The Settlement Notice sent to Former Participants also will include a Claim Form enabling them to make the elections described above. *Id.* ¶ *3.3.2 & Ex. 3.* These Settlement Notices provide: (1) a summary of the claims; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a claim (for Former Participants); (6) instructions as to how to object to the Settlement and the date by which Settlement Class members must object; (7) the identity of Class Counsel and the amount of compensation they may seek in connection with the Settlement; (8) the amount of requested Class Representatives' compensation; (9) the date, time, and location of the final approval hearing; and (10) contact information for the Settlement Administrator.[6] *Id.* ¶ *2.49 & Exs. 1-2.*

To the extent that Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website which will post or include links to

[6] Based on the bids that Class Counsel received from various candidates, Analytics Consulting, LLC has been chosen as the Settlement Administrator. *Richter Decl.* ¶ *31.*

the following documents: the operative First Amended Consolidated Complaint, Settlement Agreement and exhibits thereto, the Settlement Notices, Former Participant Claim Form, Preliminary Approval Order and any other Court orders related to the Settlement, and any other documents or information mutually-agreed upon by the Parties. *Id.* ¶ *12.1.* When filed, the Settlement Administrator also will post or include links to Plaintiffs' Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representatives' Compensation. *Id.*

G. Attorneys' Fees and Expenses

The Settlement Agreement requires that any motion for attorneys' fees and costs shall be filed at least 30 days before the deadline for objections to the proposed Settlement. *Settlement* ¶ *8.1.* Under the Settlement, attorneys' fees are subject to Court approval and are capped at no more than one-third of the Gross Settlement Fund ($6,950,000). *Id.* ¶ *8.2.* The Settlement also provides for reimbursement of litigation costs and settlement administration expenses, and service awards up to $10,000 per Class Representative, subject to Court approval. *Id.* The Settlement is not conditioned upon Court approval of these fees or service awards. *Id.* ¶ *11.3.*

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. The decision whether to approve a proposed class-action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). This involves a "two-step process." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). In the first step, the court considers whether the settlement warrants preliminary approval, such that notice of the settlement may be sent to the class members. *NASDAQ Market-Makers Antitrust Litig.*,

176 F.R.D. at 102. In the second step, after notice of the proposed settlement has been issued and class members have had an opportunity to be heard, the court considers whether the settlement warrants final court approval. *Id*.

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) (citing 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 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*, 627 F.2d 631, 634 (2d Cir. 1980). The court is not required to answer the ultimate question of whether the settlement is fair, reasonable, and adequate. *See* 5 MOORE'S FEDERAL PRACTICE § 23.83[a], at 23-336.2 to 23-339. Instead, the court simply evaluates whether the settlement "appears to fall within the range of possible approval[.]" *Clark*, 2009 WL 6615729, at *3; NEWBERG § 11:25. Thus, "preliminary approval should be granted and notice of the proposed settlement given to the class if there are no obvious deficiencies in the proposed settlement." *In re Medical X-ray Film Antitrust Litig*., 1997 WL 33320580, *6 (E.D.N.Y. Dec. 26, 1997); *see also In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

The Second Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted) (*citing* 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41, at 87 (4th ed. 2002)). 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 v. Ecolab Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citations omitted).

Rule 23(e) was amended in December 2018 to specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory committee notes (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether settlement notices should be distributed to class members by considering whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (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 "criteria overlap almost entirely with existing Second Circuit precedent. . . ." *Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 23 (E.D.N.Y. 2019).[7]

[7] *See also* Fed. R. Civ. P. 23(e) advisory committee notes to 2018 amendments ("The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. . . . The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.")

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Here, the settlement was negotiated at arm's length by experienced counsel after significant discovery and motion practice, and the relief provided is fair and equitable to all Settlement Class Members. Accordingly, this Court should preliminarily approve the Settlement under Rule 23(e)(2).

A. The Settlement is the Product of Arms-Length Negotiations Between Experienced Counsel After Significant Discovery

A proposed class action settlement enjoys a "presumption of fairness, adequacy, and reasonableness" if "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116; *see also In re Excess Value Ins. Coverage Litig.*, 2004 WL 1724980, *10 (S.D.N.Y. July 30, 2004); MANUAL FOR COMPLEX LITIGATION § 30.42 ("[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel."). That is precisely the situation presented here. Counsel for Plaintiffs are knowledgeable and experienced in complex class actions, particularly actions involving allegations of breaches of fiduciary duties under ERISA. *See Richter Decl.* ¶¶ *26-28, 30* & *ECF Nos. 95-96*. Moreover, the Settlement was reached after Class Counsel conducted a thorough investigation, prepared a series of detailed complaints, briefed numerous motions, and retained multiple experts. *Richter Decl.* ¶¶ *14, 19-20.* The parties produced over 250,000 pages of documents and took a total of 11 depositions. *Id.* ¶ *16, 18.* As a result, each party had ample opportunity to assess each other's case. Further, the parties were assisted in their negotiations by an experienced and well-regarded mediator. All of these factors lend the Settlement a presumption of fairness.

B. The Settlement Provides Substantial Relief to Class Members

The product of these serious and informed negotiations was a Settlement that provides significant relief to the Class. The $20.85 million recovery speaks for itself. Indeed, the amount of this recovery is impressive not only in the aggregate, but also when measured as a percentage of Plan assets (approximately 0.82% of total Plan assets). *Richter Decl.* ¶ *6*. By either of these measures, the Settlement compares favorably to other recent 401(k) settlements. *Id.*

An excellent case in point is the settlement that was recently approved in another 401(k) lawsuit involving Deutsche Bank in the Southern District of New York. *See Moreno v. Deutsche Bank Americas Holding Corp.*, 1:15-cv-09936, ECF No. 347 (S.D.N.Y. Mar. 1, 2019). Like the present case, that case also involved a 401(k) plan lineup with some proprietary funds and some non-proprietary funds, and allegations relating to the expenses of the plan's recordkeeper. *See Moreno*, 2017 WL 3868803, at *2 (recounting allegations relating to proprietary funds and failure to control recordkeeping expenses). The recovery here is similar to *Deutsche Bank* on an absolute basis ($20.85 million vs. $21.9 million), and higher on a percentage-of-assets basis (0.82% here, versus 0.65% in *Deutsche Bank*). *Richter Decl.* ¶ *6*.

The negotiated settlement amount also represents a significant portion of the damages that Plaintiffs alleged were caused by Defendants' alleged fiduciary breaches. *Id.* ¶ *7*. Plaintiffs' damages expert calculated the following losses associated with the following alleged breaches:

- Losses from Retention of Proprietary Funds
  Model 1 – Benchmark Index Analysis= $38,405,763
  Model 2 – Fiduciary Based Analysis= $25,988,445

- Losses from Failure to Consider Separate Account and CIT Alternatives to Funds: $34,400,000

- Losses from Excess Recordkeeping Expenses: $14,165,743

Richter Decl. ¶ *7*. The $20.85 million recovery represents over half of the damages associated with the proprietary funds in the Plan under Dr. Pomerantz's Model #1, and nearly 80% of those damages using Dr. Pomerantz's second model. Considering all three categories of damages, the monetary recovery is approximately 28% of total estimated damages under Plaintiffs' best-case scenario ($74 million), after accounting for the overlap in the first and second damages categories.[8] *Id.* These recovery percentages compare favorably to other class action settlements. *See Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185 (C.D. Cal. July 30, 2018) (approving $12 million ERISA 401(k) settlement that represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages."); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (recovery of 16.5% of maximum recoverable damages was within range of reasonableness); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (approving recovery of approximately 13% of maximum provable damages); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Moreover, in addition to the foregoing monetary compensation, the Settlement provides for meaningful prospective relief. *Richter Decl.* ¶ *10.* As noted above, M&T Bank has agreed that (1) the proprietary funds in the Plan will be evaluated by an independent investment consultant, (2) the investment vehicle for all Plan funds also will be evaluated, (3) the Plan will

[8] For proprietary mutual funds, the losses associated with failure to consider separate account alternatives to mutual funds overlapped with the losses associated with the retention of proprietary mutual funds. *Id.* at n.5.

be treated no less favorably than other plans with respect to fee rebates on proprietary funds, and (4) a request for information will be issued with respect to recordkeeping. This prospective relief directly addresses the issues that Plaintiffs raised in the lawsuit (self-interested retention of proprietary funds, failure to consider alternative investment vehicles, and excessive recordkeeping fees), and further supports approval of the Settlement. *See Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *4 (S.D.N.Y. Mar. 31, 2009) (noting settlement provided for "meaningful injunctive relief", and concluding that settlement was "fair, reasonable, and adequate"); *Reyes v. Buddha-Bar NYC*, 2009 WL 5841177, at *3 (S.D.N.Y. May 28, 2009) (same).

C. Plaintiffs Would Have Faced Potential Litigation Risks and Substantial Delay in the Absence of the Settlement

In the absence of a Settlement, Plaintiffs would have faced litigation risks. *See In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (noting that there is a "general risk inherent in litigating complex claims such as these to their conclusion"); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). These risks are demonstrated by a judgment entered in favor of the defendants following the trial of another recent ERISA action in the Southern District of New York involving the NYU retirement plan. *See Sacerdote v. New York Univ.*, 2018 WL 3629598 (S.D.N.Y. July 31, 2018). While the facts of that case differed from those here, two recent ERISA 401(k) cases involving proprietary funds also resulted in trial judgments in favor of the defendants. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017).[9] Thus, although

[9] Although the trial court's decision in *Brotherston* was vacated in part by the First Circuit, 907 F.3d 17 (1st Cir. 2018), the defendants in *Putnam* have filed a petition for writ of certiorari with the Supreme Court, highlighting the ongoing risk and uncertainty associated with that action.

Plaintiffs believe there is strong support for their case, it is uncertain whether they would have prevailed at trial.

Moreover, even if Plaintiffs proved a fiduciary breach, Plaintiffs still faced potential hurdles in proving losses. As the Second Circuit has noted, there are inherent "uncertainties in fixing damages" in cases such as this. *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989); *see also Donovan v. Bierwirth*, 754 F.2d 1049, 1058 (2d Cir. 1985) (such determinations are "of necessity somewhat arbitrary"). Once again, the *Sacerdote* case illustrates the risks that plaintiffs face in attempting to prove losses caused by a fiduciary breach. The trial court in *Sacerdote* found that "while there were deficiencies in the Committee's 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." 2018 WL 3629598, at *2; *see also Cunningham v. Cornell Univ.*, 2019 WL 4735876, at *7 (S.D.N.Y. Sept. 27, 2019) (concluding on summary judgment that plaintiffs had failed to prove losses related to allegedly excessive recordkeeping expenses); *Wildman*, 362 F. Supp. 3d at 710 (finding that "Plaintiffs failed to prove a loss to the Plan"); *Brotherston*, 2017 WL 2634361, at *12 (finding that plaintiffs "failed to establish a prima facie case of loss," despite making a persuasive showing that the fiduciaries were "no paragon of diligence" and the defendants had failed to monitor the plan's investments). Although Plaintiffs believed that their damages expert developed appropriate loss models under governing law, it was uncertain how the Court would have ruled on this issue or what amount of damages (if any) would have been awarded.

At a minimum, continuing the litigation would have resulted in complex and costly proceedings before this Court, which would have significantly delayed any relief to Class Members, and might have resulted in no relief at all. It is well-recognized that ERISA 401(k)

cases "often lead[] to lengthy litigation." *See Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, it is not unusual for ERISA cases to extend a decade or longer before final resolution. *See Tussey v. ABB Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on "September 11, 2006"); *Richter Decl.* ¶ *12* (noting that "the *Boeing* litigation lasted nearly a decade before it was settled"). Given the risks, cost, and delay of further litigation, it was reasonable for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways").

D. Other Factors Also Favor Settlement Approval

Other relevant factors also favor settlement approval. As noted above, the monies in the Settlement Fund will be distributed equitably pursuant to a common formula based on the estimated losses calculated by Plaintiffs' damages expert. *See supra* at 5. Similar methods of distribution have been approved in other ERISA cases. *See, e.g., Moreno*, ECF No. 322-1 at ¶ 6.4.1 (allocating settlement fund based on participants' weighted quarterly account balances during the class period, with proprietary funds weighted more heavily than non-proprietary funds) & ECF No. 347 (approving settlement); *Main v. American Airlines, Inc.*, No. 4:16-cv-00473, ECF No. 127-2 at ¶ 6.4.1 (providing for similar weighted distribution) & ECF No. 137 (approving settlement). Likewise, the procedure whereby current participant accounts are automatically credited, and former participants submit a claim to obtain their share of the

Settlement and specify the manner in which their proceeds should be distributed, is also consistent with previously-approved settlements. *See Moreno*, ECF No. 322-1 at ¶¶ 6.5-6.6; *Main*, ECF No. 127-2 at ¶¶ 6.5-6.6; *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 478-79 (E.D. Pa. 2007). Notably, none the monies in the Settlement Fund will revert to Defendants. *See supra* at 5. Finally, the Settlement is not conditioned upon approval of attorneys' fees in any particular amount, and the cap that is placed on attorneys' fees (one-third of the Settlement Fund) is consistent with the standard fee that applies in ERISA class actions such as this. *See 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[.]") (citing numerous cases); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010). For these reasons as well, the Settlement should be approved.

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

In addition to reviewing the substance of the parties' Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the proposed settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here.

The Settlement Agreement provides that the Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via U.S. Mail. *Settlement* ¶¶ *2.49, 3.3.1.* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Settlement Notices is also reasonable. As noted above, the Settlement Notices include, among other things: (1) a summary of the claims; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the

release of claims; (5) instructions for submitting a claim (for Former Participants); (6) instructions as to how to object to the Settlement and the date by which Settlement Class members must object; (7) the identity of Class Counsel and the amount of compensation they will seek in connection with the Settlement; (8) the amount of requested Class Representatives' compensation; (9) the date, time, and location of the final approval hearing; and (10) contact information for the Settlement Administrator. *Settlement Exs. 1 & 2.* This information "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." *See Lomeli v. Sec. & Inv. Co. Bahrain*, 546 Fed. App'x 37, 41 (2d Cir. 2013) (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007)) (internal citations omitted).

IV. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE.

In addition to approving the Settlement and Settlement Notice, the Court should certify the Settlement Class under Federal Rule of Civil Procedure 23(b)(1) for settlement purposes.[10]

To certify the class, Plaintiffs must satisfy the requirements of Rule 23(a) and meet one of the prerequisites of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345-46 (2011). In the context of settlement, however, the court need not inquire whether a trial of the action would be manageable on a class-wide basis because "the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 117 S.Ct. 2231, 2248 (1997). Thus, "[t]he requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation." *White v. Nat'l Football League*, 822 F. Supp.

[10] "[T]he Second Circuit's general preference is for granting rather than denying class certification." *Gortat v. Capala Bros., Inc.*, 257 F.R.D. 353, 361 (E.D.N.Y.2009) (citation omitted). Thus, any doubts as to whether or not to certify a class action should be resolved "in favor of allowing the class to go forward." *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002); *see also Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) ("Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

1389, 1402 (D. Minn. 1993) (citations omitted).

A. The Requirements of Rule 23(a) are Satisfied

Rule 23(a) sets forth four requirements applicable to class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem*, 117 S. Ct. at 2245; Fed. R. Civ. P. 23(a). Each of these requirements are met here.

1. Numerosity

Numerosity requires that the number of persons in the proposed class is so numerous that joinder of all class members would be impracticable. Fed. R. Civ. P. 23(a)(1). This standard is easily met for the Settlement Class, which consists of tens of thousands of Class Members. *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."); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 339 (S.D.N.Y. 2012) ("Because joinder of the thousands of [participants] would obviously be impracticable, we conclude that numerosity is satisfied.").

2. Commonality

Commonality requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(1).[11] "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." *In re Global Crossing*, 225 F.R.D. 436, 452 (S.D.N.Y.2004). This case was no exception, and presented "numerous questions … capable of classwide resolution, such as whether each Defendant was a fiduciary; whether Defendants' process for assembling and monitoring the Plan's menu of investment options, including the proprietary funds, was tainted

[11] This requirement is "generally considered a 'low hurdle' easily surmounted." *Davis v. Eastman Kodak Co.*, 2010 WL 11558014, *9 (W.D.N.Y. Sep. 3, 2010) (*quoting In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 206 n.8 (S.D.N.Y.1995)). Commonality does not mean that all issues must be identical as to each class member, but simply requires that plaintiffs identify some unifying thread among the members' claims that warrants class treatment. *Odom v. Hazen Transp., Inc.*, 275 F.R.D. 400, 407 (W.D.N.Y. 2011).

by a conflict of interest or imprudence and whether Defendants acted imprudently by failing to control recordkeeping expenses." *Moreno*, 2017 WL 3868803, at *5; *see also, e.g., Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014) (whether defendants breached fiduciary duties by selecting imprudent investment options and whether plan suffered losses were questions "common to all Plan participants' claims"); *In re Northrup Grumman Corp. ERISA Litig.*, 2011 WL 3505264, at *8 (C.D. Cal. Mar. 29, 2011) (noting common questions regarding "whether the Plans' fees and expenses are reasonable; [and] whether the investment options selected by Defendants have been prudent").

3. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).[12] This requirement "tend[s] to merge" with the commonality requirement, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982), and is met here. As was the case in *Moreno*, each named Plaintiff has done "one or more of the following: (1) invested in at least one proprietary mutual fund; (2) participated in the Plan during the time period when the recordkeeping fees were allegedly excessive; [or] (3) invested in a proprietary or non-proprietary fund for which cheaper alternatives were allegedly available." 2017 WL 3868803, at *7.[13] "This is sufficient to show typicality." *Id.*; *see also Ameriprise*, 304 F.R.D. at 573 ("typicality is satisfied" where "Plan participants … are seeking redress of similar grievances under the same legal and remedial theories").

[12] Typicality does not require that "the factual background of each named plaintiff's claim be identical to that of all class members," *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), but only that "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." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)).

[13] The circumstances of the named Plaintiffs are set forth in their earlier declarations (ECF Nos. 98-103) and their declarations submitted herewith.

4. Adequacy

Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." 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. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Each of those requirements are satisfied here.

The attorneys at Nichols Kaster, PLLP ("Nichols Kaster") "are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans." *Moreno*, 2017 WL 3868803, at *11; s*ee also Richter Decl. ¶¶ 26-28*. Likewise, Kessler Topaz Meltzer & Check, LLP ("KTMC") "is one of the most experienced ERISA litigation firms in the country, with particular expertise in the area of ERISA breach of fiduciary duty class actions." *In re Chesapeake Energy Corp. 2012 ERISA Class Litig.*, 286 F.R.D. 621, 624 (W.D. Okla. 2012); *see also ECF No. 96*. Both are clearly adequate to represent the class.

The named Plaintiffs also are adequate class representatives. As set forth in their declarations, each of them have actively participated in the litigation, and there are no known conflicts that would impede their ability to represent the Class.

B. The Prerequisites of Rule 23(b)(1) are Met

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.*, *Moreno*, 2017 WL 3868803, at *8 (certifying class under Rule 23(b)(1) where plaintiffs "challenge[d] the investment lineup that the [p]lan offered to all participants, and the recordkeeping fees imposed on the [p]lan"). "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. at 342 (quoting *Global Crossing*, 225 F.R.D. at 453).[14]

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

ERISA's fiduciary duties apply "with respect to a plan" and protect the "interest of the participants" collectively. *See* 29 U.S.C. § 1104. Thus, "class certification in this case is properly granted under Rule 23(b)(1)(A)" as "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible standards to govern Defendants conduct . . . ." *Ameriprise*, 304 F.R.D. at 577. "In light of this risk, Plaintiffs have successfully satisfied the requirements of Rule 23(b)(1)(A)." *Kanawi v. BechtelCorp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008).

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

For similar reasons, class certification is also appropriate under Rule 23(b)(1)(B). "Because 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." *Moreno*, 2017 WL

[14] *See also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) ("In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held.") (citing cases).

3868803, at *8; *see also Banyai v. Mazur*, 205 F.R.D. 160, 165 (S.D.N.Y. 2002) ("Because plaintiffs, as a Fund participant and a Fund beneficiary, seek to remedy an alleged breach of fiduciary duty, and because any recovery here would benefit the Fund as a whole, the Court finds that there is a risk that separate prosecutions by individual Fund participants or beneficiaries would be dispositive of the interests of other members not parties to those prosecutions."). 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 notes (1966); *see also Banyai*, 205 F.R.D. at 165. Accordingly, numerous similar cases have been certified under Rule 23(b)(1)(B).[15]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) approve the proposed Settlement Notices and authorize distribution of the Notices; (3) certify the Settlement Class; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

[15] *See, e g., Cunningham v. Cornell Univ.*, 1:16-cv-6525, ECF No. 219 (S.D.N.Y. Jan. 22, 2019); *Cates v. The Trustees of Columbia Univ.*, 1:16-cv-06524, ECF No. 210 (S.D.N.Y. Nov. 13, 2018); *Cassell v. Vanderbilt Univ.*, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Tracey v. MIT*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Sacerdote v. New York Univ.*, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Daugherty v. Univ. of Chicago*, 2018 WL 1805646 (N.D. Ill. Jan. 10, 2018); *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *Moreno*, 2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678 (C.D. Cal. June 15, 2017); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559 (D. Minn. 2014) ("*Ameriprise*"); *In re Northrup Grumman Corp. ERISA Litig.*, 2011 WL 3505264 (C.D. Cal. Mar. 29, 2011); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102 (N.D. Cal. 2008); *Tussey v. ABB, Inc.*, 2007 WL 4289694 (W.D. Mo. Dec. 3, 2007); *In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004); *Koch v. Dwyer*, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001).

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Respectfully submitted,

By: /s/ Kai Richter
NICHOLS KASTER, PLLP
Paul J. Lukas, MN Bar No. 022084X*
Kai Richter, MN Bar No. 0296545*
Carl F. Engstrom, MN Bar No. 0396298*
Jacob Schutz, MN Bar No. 0395648*
Chloe A. Raimey, MN Bar No. 0398257*
*admitted in W.D.N.Y.
4600 IDS Center
80 S 8th Street
Minneapolis, MN 55402
Telephone: 612-256-3200
Facsimile: 612-338-4878
Email: krichter@nka.com
lukas@nka.com
cengstrom@nka.com
jschutz@nka.com
craimey@nka.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Donna Siegel Moffa (admitted *pro hac vice*)
Joseph H. Meltzer (admitted *pro hac vice*)
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: dmoffa@ktmc.com
jmeltzer@ktmc.com

CAPOZZI ADLER, P.C.
Mark K. Gyandoh (admitted *pro hac vice*)
2933 North Front Street
Harrisburg, PA 17110
Tel: (717) 233-4101
Email: mgyandoh@ktmc.com

Interim Co-Lead Counsel

TREVETT CRISTO
Lucinda Lapoff, Esq.
2 State Street, Suite 1000

Rochester, NY 14614
Tel: (585) 454-2181
Fax: (585) 454-4026
Email: clapoff@trevettcristo.com