

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

KIMBERLY GARTHWAIT, *et al.*,

Plaintiffs,

v.

EVERSOURCE ENERGY SERVICE  
COMPANY, *et al.*,

Defendants.

Case No: 3:20-cv-00902-JCH

---

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

---

## **TABLE OF CONTENTS**

Table of Authorities .....	ii
I. INTRODUCTION .....	1
II. BACKGROUND .....	4
A. The Parties, the Plan, and Plaintiffs’ Claims .....	4
B. Procedural History .....	4
1. Discovery Efforts .....	6
2. Settlement Negotiations .....	7
3. The Proposed Settlement .....	7
4. The Notice Plan and Settlement Administration .....	8
III. ARGUMENT .....	9
A. The Settlement Warrants Preliminary Approval.....	9
1. Standard of Review.....	9
2. The Court is Likely to Grant Final Approval of the Proposed Settlement .....	9
i. The Rule 23(e)(2) Factors Weigh in Favor of Preliminary Approval .....	11
a. Adequacy of Representation .....	11
b. The Settlement is the Result of Good Faith, Arm’s-Length Negotiations by Well-Informed and Experienced Counsel .....	11
c. Adequacy of Relief .....	12
ii. The Remaining <i>Grinell</i> Adequacy Factors Weigh In Favor Of Preliminary Approval.....	16
a. The Reaction of the Class to the Settlement .....	16
b. The Ability of Defendants to Withstand a Great Judgment	

Does Not Weigh Against Preliminary Approval ..... 17

        c.        The Range of Reasonableness of the Settlement in  
                Light of the Best Possible Recovery and Attendant  
                Risks support Preliminary Approval..... 17

B.        The Proposed Notice Plan Should be Approved..... 19

C.        Certification of the Class Should be Maintained for Settlement Purposes ..... 21

        1.        The Settlement Class Satisfies Rule 23(a) ..... 21

                i.        Numerosity..... 21

                ii.        Commonality..... 22

                iii.        Typicality ..... 23

                iv.        Adequacy ..... 24

        2.        Certification Remains Appropriate Under Rule 23(b)(1) ..... 25

D.        The Plan of Allocation Should be Approved..... 25

IV.        CONCLUSION..... 27

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b><u>Cases</u></b>	
<i>Amchem Prods, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	20
<i>Caridad v. Metro-N. Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 1999).....	23
<i>Central States Se. &amp; Sw. Areas Health &amp; Welfare Fund v. Merck-Medco Managed Care, L.L.C.</i> , 504 F.3d 229 (2d Cir. 2007).....	21
<i>City of Detroit v. Grinell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	10, 12, 19
<i>Consol. Rail Corp. v. Town of Hyde Park</i> , 47 F.3d 473 (2d Cir. 1995).....	21
<i>Garthwait v. Eversource Energy Co.</i> , 2022 WL 1657469 (D. Conn. May. 25, 2022).....	passim
<i>Gen. Tel. Co. of the Sw. v. Falcon</i> , 457 U.S. 147 (1982).....	22
<i>Griffin v. Flagstar Bancorp, Inc.</i> , 2013 WL 4779017 (E.D. Mich. July 29, 2013) .....	20
<i>Guevoura Fund Ltd. v. Silverman</i> , 2019 WL 6889901 (S.D.N.Y. Dec. 18, 2019) .....	25
<i>In re AOL Time Warner ERISA Litig.</i> , 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) .....	17, 26
<i>In re AOL Time Warner</i> , 2006 WL 2789862 (S.D.N.Y. Sept. 27, 2006).....	27
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006).....	19
<i>In re EVCI Career Colls. Holding Corp. Sec. Litig.</i> , 2007 WL 2230177 (S.D.N.Y. Jul. 27, 2007) .....	23
<i>In re Facebook, Inc., IPO Secs. and Derivative Litig.</i> , 343 F. Supp. 3d 394 (Nov. 26, 2018).....	25, 26

<i>In re Flag Telecom Holdings, Ltd. Sec. Litig.</i> , 574 F.3d 29 (2d Cir. 2009).....	23, 24
<i>In re Flag Telecom Holdings Ltd. Sec. Litig.</i> , 2010 WL 4537550 (S.D.N.Y. Nov 8, 2010).....	11, 17
<i>In re Global Crossing Sec. &amp; ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004) .....	13, 19
<i>In re GSE Bonds Antitrust Litig.</i> , 414 F. Supp. 3d 686 (S.D.N.Y. 2019).....	passim
<i>In re Interpublic Sec. Litig.</i> , 2004 WL 2397190 (S.D.N.Y. Oct. 26, 2004) .....	19
<i>In re IPO Sec. Litig.</i> , 243 F.R.D. 79 (S.D.N.Y. 2007) .....	10
<i>In re LIBOR-Based Fin. Instruments Antitrust Litig.</i> , 327 F.R.D. 483 (S.D.N.Y. 2008) .....	17
<i>In re Marsh ERISA Litig.</i> , 265 F.R.D. 128 (S.D.N.Y. 2010) .....	20, 26
<i>In re Oxford Health Plan, Inc.</i> , 191 F.R.D. 369 (S.D.N.Y. 2000) .....	23
<i>In re PaineWebber Ltd. P'ships Litig.</i> , 171 F.R.D. 104 (S.D.N.Y. 1997) .....	12, 26
<i>In re Prudential Sec. Inc. Ltd. P'ships Litig.</i> , 163 F.R.D. 200 (S.D.N.Y. 1995) .....	9, 10, 13, 16, 19
<i>In re Schering-Plough Corp. Enhance ERISA Litig.</i> , 2012 WL 1964451 (D.N.J. May 31, 2012) .....	13
<i>In re Sturm, Ruger, &amp; Co., Inc. Sec. Litig.</i> , 2012 WL 3589610 (D. Conn. Aug. 20, 2012) .....	19
<i>In re US FoodService Pricing Litig.</i> , 729 F.3d 108 (2d Cir. 2013).....	20
<i>In re Veeco Instruments Inc. Sec. Litig.</i> , WL 4115809 (S.D.N.Y. Nov. 7, 2007).....	12
<i>In re Wachovia Corp. ERISA Litig.</i> , 2011 WL 7787962 (W.D.N.C. Oct. 24, 2011).....	13

<i>In re Warner Chilcott Ltd. Sec. Litig.</i> , 2008 WL 5110904 (S.D.N.Y. Nov. 20, 2008) .....	16
<i>In re Worldcom, Inc. ERISA Litig.</i> , 2004 WL 2338151 (S.D.N.Y. Oct. 18, 2004) .....	27
<i>Kemp-DeLisser v. Saint Francis Hosp. &amp; Med. Ctr.</i> , 2016 WL 6542707 (D. Conn. Nov. 3, 2016) .....	9
<i>Larson v. Allina Health System</i> , 2019 WL 6208648 (D. Minn. Nov. 21, 2019) .....	26
<i>Leber v. Citigroup 401(k) Plan Inv. Comm.</i> , 323 F.R.D. 145 (S.D.N.Y. 2017) .....	23
<i>Maley v. Del Global Techs. Corp.</i> , 186 F. Supp. 2d 358 (S.D.N.Y. 2002) .....	13
<i>Mass. Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985) .....	25
<i>Mehling v. New York Life Ins. Co.</i> , 246 F.R.D. 467 (E.D. Pa. 2007) .....	20
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950) .....	19
<i>Newman v. Stein</i> , 464 F.2d 689 (2d Cir. 1972) .....	18
<i>Oppenlander v. Standard Oil Co.</i> , 64 F.R.D. 597 (D. Colo. 1974) .....	13
<i>Plummer v. Chem. Bank</i> , 668 F.2d 654 (2d Cir. 1982) .....	14
<i>Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.</i> , 2015 WL 6964973 (E.D.N.Y. Nov. 10, 2015) .....	26
<i>Robidoux v. Celani</i> , 987 F.2d 931 (2d Cir. 1993) .....	23
<i>Torres v. Gristedes Operating Corp.</i> , 2010 WL 2572937 (S.D.N.Y. June 1, 2010) .....	10
<i>Urakhchin v. Allianz Asset Mgmt. of Am., L.P.</i> , 2018 WL 3000490 (C.D. Cal. Feb. 6, 2018) .....	26

*Vellali v. Yale Univ.*,  
333 F.R.D. 10 (D. Conn. 2019)..... 21, 23

*Wal-Mart Stores, Inc. v. Dukes*,  
564 U.S. 338 (2011)..... 22

*Wal-Mart Stores, Inc. v. Visa U.S.A. Sores*,  
396 F.3d 96 (2d Cir. 2005)..... 9, 11

*Wilson v. DirectBuy, Inc.*,  
2011 WL 2050537 (D. Conn. May 16, 2011)..... 19

**Statutes**

29 U.S.C. § 1104..... 4

29 U.S.C. § 1109..... 14

29 U.S.C. § 1132..... 14

**Rules**

Fed. R. Civ. P. 23(a) ..... passim

Fed. R. Civ. P. 23(b) ..... 3, 21, 24, 25

Fed. R. Civ. P. 23(c) ..... 19

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

Fed. R. Civ. P. 23(i) ..... 20

Plaintiffs, Kimberly Garthwait, Cumal T. Gray, Kristine T. Torrance, and Michael J. Hushion (collectively, “Plaintiffs”), on behalf of the proposed Settlement Class (defined below) and the Eversource 401(k) Plan (the “Plan”), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Settlement (“Motion”),<sup>1</sup> requesting the Court issue an Order that: (1) preliminarily approves the Class Action Settlement Agreement dated April 14, 2023 (“Settlement Agreement”)<sup>2</sup> with Defendants, Eversource Energy Service Company (“Eversource”), the Board of Directors of Eversource Energy Service Company (“Board”), the Eversource Plan Administration Committee (“Administrative Committee”), and the Eversource Investment Management Committee (“Investment Oversight Committee,” the Administrative Committee, “Committees,” collectively, “Defendants,” and together with Plaintiff, the “Parties”); (2) finds that the Class may be maintained through such time as the Court enters an order granting final approval of the Settlement; (3) preliminary approves of the proposed notice plan (“Notice Plan”) set forth in the Agreement and proposed Preliminary Approval Order; and (4) schedules a fairness hearing at a date convenient for the Court no sooner than 140 days from the entry of the proposed Preliminary Approval Order.

## **I. INTRODUCTION**

Following several years of thorough and active litigation in this complex ERISA action, including numerous dispositive and procedural motions, full discovery, and preparation for a twelve-day jury trial originally scheduled for April 2023, the Parties negotiated a proposed

---

<sup>1</sup>Plaintiffs conferred with Defendants prior to the filing the Motion and confirmed that Defendants do not oppose the Motion.

<sup>2</sup>The Settlement Agreement and its exhibits are attached as Exhibit 1 to the concurrently-filed Declaration of Laurie Rubinow (“Rubinow Declaration”). Terms not otherwise defined herein are also defined in the Agreement.

settlement (“Settlement”) that would provide total relief of fifteen million dollars (\$15,000,000.00) to the Settlement Class. The proposed Settlement would provide significant and immediate benefit to the Settlement Class, while recognizing the complexity, risk, and delay associated with continued litigation. Indeed, the Parties have confronted numerous complex and novel factual and legal issues in the litigation to date, including around class certification, theories of liability and damages, and plan participants’ Seventh Amendment right to a jury trial for certain relief sought under ERISA. The road ahead for the Parties would have been similarly complex. Plaintiffs and Class Counsel submit that the Settlement represents an exceptional result for the Plan and Settlement Class under all of the circumstances and warrants preliminary approval.

Consistent with the Class previously certified by the Court, the scope of the relief provided by the Settlement, and well-established principles applicable to representative actions under ERISA, the Settlement Class is defined as:

All persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

Settlement Agreement, § 1.47. Certification of the action should be maintained through the entry of a final judgment, as none of the circumstances supporting the Court’s prior certification order have changed, and the class action device provides the appropriate means to administer the relief accorded by the Settlement.

The proposed Settlement, if approved, will resolve all claims asserted by Plaintiffs on behalf of the Settlement Class and the Plan against Defendants in this action. The release of claims, in this regard, is tailored to the actual and potential claims at issue in the litigation. In

light of the substantial relief to the Plan that would be provided by the Settlement and the substantial risks and delay of continued litigation (as to both liability and damages), Plaintiffs and Class Counsel believe the proposed Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class. As such, the Court should preliminarily approve the Settlement and direct the commencement of the Notice Plan.

Plaintiffs and Class Counsel have, for nearly three years, vigorously pursued relief on behalf of the Plan and the Settlement Class. The Parties agreed to the Settlement only after extensive briefing of substantive and procedural motions, fact and expert discovery, substantial trial preparation (including the preparation of factual stipulations, proposed jury instructions, and verdict forms, among other pretrial submissions), and arm's-length negotiations by experienced counsel under the auspices of an experienced neutral mediator, including at a day-long private mediation and numerous follow up sessions over the course of several months with the mediator as well as an independent expert retained by the mediator to assist the Parties in assessing issues related to liability and damages. Resolving the case at this juncture allows the Parties to avoid continued and costly litigation that would deplete resources which could otherwise be used for the resolution of this action, and which might result in a recovery of less than that provided by the Settlement, or no recovery.

The Court previously certified this action as a class action based upon findings that each of the prerequisites of Rule 23(a) and 23(b)(1) were met. None of the circumstances that warranted certification at that stage have changed. In fact, the circumstances of the proposed Settlement on behalf of the Plan and its participants and beneficiaries comprising the Settlement Class counsel further for class action treatment, and warrant the entry of an order maintaining certification through the entry of a final judgment.

As set forth below, all prerequisites for preliminary approval of the Settlement are satisfied. As such, Plaintiffs' preliminary approval should be granted and notice should be provided to members of the Settlement Class in accordance with the proposed Notice Plan. The proposed Notice Plan—which consists of: (1) an individual notice to be e-mailed and/or mailed to Settlement Class members at their last known addresses; (2) the creation of a dedicated website to share information with Settlement Class members, as well as a toll-free telephone number to which Settlement Class members can direct questions about the Settlement—satisfies the requirements of Rule 23<sup>3</sup> and due process and is consistent with notice plans approved by courts and implemented in similar ERISA action class settlements.

The Court should grant Plaintiffs' Motion, which would enable notice of the Settlement and related applications to be provided to members of the Settlement Class, and schedule a fairness hearing during which the Court may fully and finally determine whether the Settlement and related applications should be finally approved and a final judgment entered.

## **II. BACKGROUND**

### **A. The Parties, the Plan, and Plaintiffs' Claims**

The Plan is a large 401(k) defined contribution retirement plan, with thousands of participants and billions of dollars in invested assets. *See* Second Amended Complaint (“SAC”), ECF No. 110, ¶ 4. Large plans, like the Plan, have significant bargaining power in the marketplace for retirement plan services, and the ability to demand low-cost administrative and investment management services. *See id.* Plaintiffs are current and former participants of the Plan. *See id.*, ¶¶ 9–12. Eversource is the sponsor of the Plan. Eversource established the Committees and appointed their members to manage and administer the Plan. The

---

<sup>3</sup>References to a “Rule” refer to the Federal Rules of Civil Procedure, unless otherwise indicated.

Administrative Committee oversees administration of the Plan and selection of the Plan's administrative service providers. The Investment Oversight Committee establishes and implements investment policies, selects investments available to Plan participants and beneficiaries, and is charged with monitoring the performance of the Plan's investment options. *See id.*, ¶¶ 14–16.

Defendants are fiduciaries of the Plan and were at all times during the Class Period. *See id.*, ¶ 5. As fiduciaries of the Plan, Defendants are obligated to act for the exclusive benefit of participants, invest the assets of the Plan in a prudent manner, and ensure that the Plan's expenses are fair and reasonable in relation to the services obtained by the Plan. *See id.* Defendants retained service providers, including Fidelity, on behalf of the Plan to perform certain administrative and investment functions. *See id.*, ¶ 55.

Plaintiffs principally claim Defendants breached fiduciary duties owed to the Plan and its participants and beneficiaries under ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A), (B) and (D), by failing to discharge their duties with respect to the Plan: (a) solely in the interest of the Plan's participants and beneficiaries; (b) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan; and (c) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. In addition, Plaintiffs claim Defendants violated their respective obligations to monitor other fiduciaries of the Plan in the performance of their duties. *See SAC*, ECF No. 110, ¶ 143. Defendants dispute Plaintiffs' claims and deny that they breached any fiduciary duties. *See ECF* No. 115 (Answer of Eversource Defendants to Plaintiffs' Second Amended Complaint).

**B. Procedural History**

Plaintiffs filed the initial Complaint in this class action on June 30, 2020 (ECF No. 1), and amended the complaint on September 22, 2020 (ECF No. 26). Plaintiffs filed the SAC on October 18, 2021. The Court denied Defendants' motion to dismiss Plaintiffs' recordkeeping and administrative ("RK&A") fees claim, and granted, without prejudice, Defendants' motion to dismiss Plaintiffs' claims concerning the imprudent mismanagement of the Active Suite, the MSI Emerging Markets Fund, the MSI Inception Fund, and the FR Small Cap CIT for lack of Article III standing. Plaintiffs addressed these standing issues in the Second Amended Complaint and each of their claims proceeded.

On May 25, 2022, the Court issued its Ruling on Motion to Certify Class (ECF No. 153). The Court granted Plaintiffs' motion to certify the proposed Class. The Court also granted Plaintiffs' motion to appoint the named plaintiffs as representatives of the Class and their counsel as counsel for the Class.

Defendants moved for summary judgment on each of Plaintiffs' claims and, on July 29, 2022, the Court issued its Ruling on Defendants' Motion for Summary Judgment and the Parties' respective *Daubert* motions (ECF No. 155). The Court denied Defendants' motion for summary judgment in full, finding genuine issues of material fact as to all of Plaintiffs' claims regarding the reasonableness of the Committees' monitoring process, the Plan's challenged investments, and the Plan's RK&A fees. The Court also denied the Parties' respective *Daubert* motions.

The SAC demanded a jury as to each of Plaintiffs' claims. Defendants moved to strike Plaintiffs' jury demand, which motion Plaintiffs opposed. On December 7, 2022, the Court denied Defendants' motion to strike Plaintiffs' jury demand as to Counts I and II of the SAC, which seek monetary relief. *See* ECF No. 169. Defendants moved to certify the Court's jury

right determination for appeal, *see* ECF No. 170, which Plaintiffs opposed and the Court also denied. *See* ECF Nos. 172, 174.

The Parties were scheduled to proceed to trial beginning on April 3, 2023. Prior to reaching agreement about the Settlement, the Parties prepared several pretrial submissions, including factual stipulations, jury instructions, and verdict forms. The Parties each filed motions *in limine* concerning the anticipated trial presentations. *See* ECF Nos. 178–180.

On January 31, 2023, the Parties reported the Settlement to the Court. *See* ECF No. 184.

### **1. Discovery Efforts**

The Parties engaged in significant discovery efforts in this action, including, *inter alia*, the exchange of document requests and interrogatories and the production of documents and communications exceeding 25,000 pages, which relate to the administration of the Plan, relationships between and among fiduciaries, and the Plan’s investment and recordkeeping monitoring processes. *See* Rubinow Decl., ¶¶ 6. Plaintiffs deposed a corporate representative of Eversource and numerous members of the Committees and others charged with aspects of Plan management and administration, and Defendants deposed Plaintiffs. *See id.* The Parties also disclosed expert reports and anticipated testimony at trial by experts bearing on issues of fiduciary process standards, the retirement plan recordkeeping marketplace and recordkeeping fee rates, fiduciary investment principles, and damages. *See id.* The Parties deposed the experts anticipated to testify at trial on behalf of the adverse party. *See id.*

In addition to formal discovery taken in the course of the litigation, the Parties exchanged additional information concerning Plaintiffs’ claims and Defendants’ defenses within the context of the mediation and follow-up sessions. *See id.*, ¶ 7. These additional exchanges enabled the Parties to further evaluate the strengths and weaknesses of their respective positions.

## **2. Settlement Negotiations**

The Parties agreed to and held a mediation on November 14, 2022 with Jed D. Melnick, Esquire, of JAMS, and exchanged mediation briefs regarding their respective positions prior to the mediation. Although the Parties were unable to reach a resolution at the mediation, counsel for the Parties continued to engage in follow-up exchanges of information and sessions with the mediator, as well as informal communications, for several months following the mediation. During the pendency of these negotiations, the Parties communicated their positions regarding the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, and the Plan's alleged losses. As part of this process, Plaintiffs and Class Counsel continued to confer with experts to analyze their claims and the Plan's losses. The Parties were ultimately able to reach an agreement in principle at the end of January.

The Parties worked over the ensuing months to memorialize their agreement in writing, concluding those efforts with the execution of the Settlement Agreement on April 14, 2023.

## **3. The Proposed Settlement**

The Settlement Agreement provides that Defendants will make payment in an aggregate amount of \$15,000,000.00 into a Qualified Settlement Fund to be allocated to participants, former participants, beneficiaries, and alternate payees of the Plan pursuant to the Plan of Allocation. Settlement Agreement, § 1.27, Ex. B (Plan of Allocation). In exchange, Plaintiffs' claims on behalf of the Plan and the Settlement Class will be released, as set forth more fully in the Agreement. Settlement Agreement, § 7.1. The Settlement Agreement and the proposed Preliminary Approval Order also set forth a proposed Notice Plan, and the Settlement Agreement provides for a request of attorneys' fees, expenses, and for Class Representatives' case contribution award, all of which are subject to the Court's approval. Agreement, §§ 2.4 (Settlement Notice), 6.1 (Application for Attorneys' Fees and Expenses and Class

Representatives' Case Contribution Awards), Ex. C (proposed Preliminary Approval Order). In addition, the Settlement Agreement requires, as a condition of effectiveness, that Defendants retain an independent fiduciary on behalf of the Plan to review the Settlement and related applications and approve of the release of claims on behalf of the Plan. Settlement Agreement, § 2.1.

#### **4. The Notice Plan and Settlement Administration**

The Parties respectfully request that the Court schedule a Fairness Hearing, at or after which the Court will be asked to make a determination, pursuant to Rule 23, as to whether the Settlement is fair, reasonable, and adequate to settle Plaintiffs' Released Claims against Defendants, and whether the Court should approve the proposed Settlement.

Plaintiffs respectfully propose the following schedule associated with the Notice Plan and Fairness Hearing:

<b>Event</b>	<b>Reference to [Proposed] Preliminary Approval Order</b>	<b>Proposed Deadline</b>
Preliminary approval hearing		To the extent the Court deems necessary, on a date convenient for the Court within 30 days from the date the motion for preliminary approval is filed)
Distribute Settlement Notice and Former Participant Claim Forms	¶ 8	Within 45 calendar days of preliminary approval order
Final approval papers and fee request	¶ 9	45 calendar days before Fairness Hearing
Independent Fiduciary report	Settlement Agreement § 2.1.2	Not later than 30 calendar days before the Fairness Hearing
Deadline for filing of objections	¶ 11	At least 30 calendar days before the Fairness Hearing

Deadline for Parties to respond to objections	¶ 11	Not later than 7 calendar days before Fairness Hearing
Fairness Hearing	¶ 6	On a date convenient for the Court but no sooner than 140 calendar days after the date the motion for entry of the Preliminary Approval Order is filed

### III. ARGUMENT

#### A. The Settlement Warrants Preliminary Approval

“Courts in this Circuit recognize a strong judicial policy in favor of settlements, particularly in the class action context.” *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at \*6 (D. Conn. Nov. 3, 2016) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A.* (“*Wal-Mart Stores*”), 396 F.3d 96, 116 (2d Cir. 2005)) (internal quotation marks omitted); *In re Prudential Sec. Inc. Ltd. P’ships Litig.* (“*Prudential*”), 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (“It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.”). The Settlement is emblematic of the compromise favored by courts in this District and Circuit.

#### 1. Standard of Review

Rule 23(e) requires judicial approval for the settlement of claims on behalf of a class. Judicial review of a proposed class action settlement consists of a two-step process: (1) preliminary approval; and (2) a subsequent fairness hearing and final approval. *See* Fed. R. Civ. P. 23(e). In determining whether to grant preliminary approval, the Court must determine whether “giving notice is justified by the parties’ showing that the court 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)(i-ii); *In re GSE Bonds Antitrust Litig.* (“*GSE Bonds*”), 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019).

Preliminary approval is not a final determination; a full evaluation is made at the final approval stage, following notice of the settlement to class members. *See Prudential*, 163 F.R.D. at 210. Plaintiffs now simply request that the Court take the first step in the settlement approval process and preliminarily approve the Settlement so that notice of the Settlement can be given to the Settlement Class. *See, e.g., Torres v. Gristedes Operating Corp.*, No. 04 Civ. 3316, 2010 WL 2572937, at \*2 (S.D.N.Y. June 1, 2010).

## **2. The Court is Likely to Grant Final Approval of the Proposed Settlement**

“To be likely to approve a proposed settlement under Rule 23(e)(2), the Court must find ‘that it is fair, reasonable, and adequate.’” *GSE Bonds*, 414 F. Supp. 3d at 692. This inquiry includes four explicit factors enumerated in Rule 23(a)—*i.e.*, (1) adequacy of representation; (2) existence of arm’s-length negotiations; (3) adequacy of relief; and (4) equitableness of treatment of class members—as well as the familiar *Grinnell* factors.<sup>4</sup> *See id.*; *see also In re IPO Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (“Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.”).

---

<sup>4</sup>The *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. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

**i. The Rule 23(e)(2) Factors Weigh in Favor of Preliminary Approval**

**a. Adequacy of Representation**

“Rule 23(e)(2)(A) requires a Court to find that ‘the class representatives and class counsel have adequately represented the class’ before preliminarily approving a settlement.” *GSE Bonds*, 414 F. Supp. 3d at 692. The adequacy determination includes inquiries into both the plaintiff and his or her counsel. *See id.* Here, it is clear that Plaintiffs and Class Counsel satisfy the requirements of Rule 23(e)(2)(A). First, Plaintiffs’ interests are neatly aligned with all other members of the Settlement Class because they all suffered injuries of the same kind as a result of Defendants’ alleged Plan-level conduct. Second, Class Counsel are “qualified, experienced, and able” to conduct the litigation, as demonstrated by their successful prosecution of numerous complex ERISA actions and the outstanding result achieved here. *See id.*

**b. The Settlement is the Result of Good Faith, Arm’s-Length Negotiations by Well-Informed and Experienced Counsel**

Under Rule 23(e)(2)(B), “[i]f a class settlement is reached through arm’s-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, [a settlement] will enjoy a presumption of fairness.” *GSE Bonds*, 414 F. Supp. 3d at 693; *see also Wal-Mart Stores*, 396 F.3d at 116 (noting strong “presumption of fairness” where settlement is product of arm’s-length negotiations conducted by experienced, capable counsel after meaningful discovery); *In re Flag Telecom Holdings Ltd. Sec. Litig.* (“*Flag Telecom II*”), No. 02-CV-3400, 2010 WL 4537550, at \*13 (S.D.N.Y. Nov 8, 2010) (same). Here, the Agreement was negotiated at arm’s-length, over the course of several months, by adverse parties, each represented by counsel experienced in complex ERISA litigation. As discussed above, the parties engaged in a process in which they communicated their respective positions and conducted independent analyses to support the Settlement. *See Rubinow Decl.*, ¶ 7. As

demonstrated by the substantial motion practice, full discovery, trial preparation, and extensive settlement negotiations, there has been no collusion or complicity of any kind in connection with the Settlement or related negotiations. *Id.*, ¶¶ 6–7.

Moreover, in determining the good faith of the Agreement, the Court should consider the judgment of Class Counsel. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695, 2007 WL 4115809, at \*12 (S.D.N.Y. Nov. 7, 2007) (courts should “consider the opinion of experienced counsel with respect to the value of the settlement”); *In re PaineWebber Ltd. P’ships Litig.* (“*PaineWebber P’ships*”), 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.”), *aff’d*, 117 F.3d 721 (2d Cir. 1997). Class Counsel have significant experience in similar litigation, and are well-informed as to the specifics of this Action. *See* Rubinow Decl., ¶ 5, 8. Accordingly, their judgment that the Settlement is in the best interest of the Settlement Class should be given considerable weight.

#### c. Adequacy of Relief

In assessing the adequacy of relief accorded by a proposed settlement, under Rule 23(e)(2)(C), courts must consider the following:

(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, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). The adequacy inquiry under Rule 23(e)(2)(C) overlaps, in significant measure, with several of the *Grinnell* factors, “which help guide the Court’s application of Rule 23(e)(2)(C)(i).” *See GSE Bonds*, 414 F. Supp. 3d at 693.

*The costs, risks, and delay of trial and appeal.* ERISA breach of fiduciary duty actions are difficult to prosecute and “involve a complex and rapidly evolving area of law.” *In re*

*Schering-Plough Corp. Enhance ERISA Litig.*, No. 08- cv-1432, 2012 WL 1964451, at \*5 (D.N.J. May 31, 2012); *In re Wachovia Corp. ERISA Litig.*, No. 09-cv-0262, 2011 WL 7787962, at \*4 (W.D.N.C. Oct. 24, 2011). New precedents are frequently issued, and the demands on counsel and courts are complex, requiring the devotion of significant resources. The prosecution of this action and the risks that Plaintiffs faced in establishing liability and damages as well as maintaining a class action through trial overwhelmingly support preliminary approval. Indeed, absent settlement, the Parties would proceed to a complex trial, and even if Plaintiffs prevailed, it could be years before any recovery would be received in light of the likelihood of appeals. Because of “the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class,” and “it may be preferable ‘to take the bird in the hand instead of the prospective flock in the bush.’” *Prudential*, 163 F.R.D. at 210 (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)). Moreover, because continued litigation increases litigation expenses, it could result in a smaller recovery ultimately to the class, even ignoring the time value of money.

Plaintiffs’ pursuit of the Plan’s alleged losses resulting from the course of conduct asserted in this Action began nearly three years ago in June 2020. Since then, the Parties have acquired extensive knowledge and information about the claims and defenses relevant to this action, sufficient to evaluate the “the merits of Plaintiff[’s] claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiff[’s] causes of action for purposes of settlement.” *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002); *see also In re Global Crossing Sec. & ERISA Litig.* (“*Global Crossing*”), 225 F.R.D. 436, 458 (S.D.N.Y. 2004). Here, Class Counsel’s thorough investigation, coupled with the significant document discovery conducted in this action, has afforded Class Counsel a significant

understanding of the merits of the claims asserted, the strength of Defendants' defenses, and the values of theoretical outcomes of the case, which is reflected by, *inter alia*, the rounds of briefing and extensive settlement negotiations. In addition, the Class Counsel's reliance upon expert consultation in assessing the claims, defenses and potential damages supports a finding that the Parties had adequate information in connection their negotiations and evidentiary support for the Settlement. *See GSE Bonds*, 414 F. Supp. 3d at 699; *Plummer v. Chem. Bank*, 668 F.2d 654, 659 (2d Cir. 1982).

The record in these proceedings and the law confirm the risks of establishing liability and damages. In order to succeed on the merits, Plaintiffs would need to establish not only that Defendants' investment and recordkeeping monitoring processes were deficient, but Defendants would certainly assert affirmative defenses. Such defenses would have include, *inter alia*, arguments based upon the substantive and procedural prudence of Defendants' monitoring processes. The trial stage was set to feature additional motion practice, including *motions in limine*, and significant competing expert testimony, all of which pose risks to Plaintiffs' ability to establish liability. Moreover, even if Plaintiffs are successful in establishing liability at trial, there is a substantial risk that a jury could accept Defendants' damages arguments and award far less than the funds secured by the Settlement, or nothing at all.

In addition to the risks of establishing liability and damages, Plaintiffs face a risk of maintaining this Action as a class action through trial. Consistent with ERISA §§ 409 and 502(a)(2), Plaintiffs brings their claims on behalf of the Plan and pleads the same as class claims. *See* 29 U.S.C. §§ 1109, 1132(a)(2); SAC. While Plaintiffs are confident this Action would satisfy Rule 23, there is an extant risk that circumstances or the law could change, and the Court could find a reason to deny class certification or decertify the class at a later stage. The

Agreement recognizes and alleviates that risk.

*The effectiveness of the proposed method of distributing relief.* Here, the Settlement Agreement and Plan of Allocation provide for a notice and claims process designed to ensure relief is effectively accorded to Settlement Class members. Because the Settlement Class is comprised of participants, former participants, beneficiaries, and alternate payees of a company benefits plan, much of the data necessary to administer the Settlement is in the possession of the Plan's recordkeepers. Indeed, Participants with active accounts in the Plan need not even submit a claim form to receive the relief to which they are entitled. Administration of the Settlement here will effectively "deter or defeat unjustified claims," without being "unduly demanding." *GSE Bonds*, 414 F. Supp. 3d at 694 (citing Fed. R. Civ. P. 23, Adv. Comm. Note, 2018 amend., sub. (e)(2)(c)). Additionally, "while the plan of allocation must be fair and adequate, it need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Id.* (internal quotation marks omitted). As discussed in greater detail below, the Plan of Allocation is designed to provide *pro rata* recovery to Settlement Class members according to the average size of their Plan accounts during the Class Period. The Plan of Allocation represents a reasonable method of ensuring "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *Id.* at 695.

*The terms of the proposed award of attorneys' fees.* As stated in the proposed long form notice, Class Counsel will request one-third of the Gross Settlement as an award of attorneys' fees. Class Counsel will also seek reimbursement for litigation expenses actually incurred, not to exceed \$500,000.00, also to be recovered from the Gross Settlement Amount. These anticipated applications are subject to Court approval and are consistent with amounts regularly awarded in

complex litigation of this type. In addition, the independent fiduciary retained on behalf of the Plan will consider these additional anticipated applications in connection with its review of the Settlement and approval of releases by the Plan. In addition, Class Counsel are aware of no agreements required to be disclosed under Rule 23(e)(3).

**ii. The Remaining *Grinnell* Adequacy Factors Weigh In Favor Of Preliminary Approval**

As discussed above, the Second Circuit has traditionally relied upon the nine *Grinnell* factors to guide a district court's determination of whether to finally approve a class action settlement. To the extent that they are applicable at this stage, they can be used as guidelines for considering preliminary approval. *See In re Warner Chilcott Ltd. Sec. Litig.* (“*Warner Chilcott*”), No. 06 Civ. 11515, 2008 WL 5110904, at \*2 (S.D.N.Y. Nov. 20, 2008). Complete analysis of these factors is not required for preliminary approval to be granted. *See id.* (citing *Prudential*, 163 F.R.D. at 210). Moreover, because several of these factors are addressed in the analysis under Rule 23(e)(2), the discussion that follows will focus on the relevant non-overlapping factors under *Grinnell*: (i) the reaction of the class to the settlement; (ii) the ability of Defendants to withstand a greater judgment; and (iii) the range of reasonableness of the Settlement in light of the best possible recovery and attendant risks.

**a. The Reaction of the Class to the Settlement**

“The Court need not consider [this factor], which requires the Court to evaluate the reaction of the settlement class, because consideration of this factor is generally premature at the preliminary approval stage.” *GSE Bonds*, 414 F. Supp. 3d at 699 (citing *Warner Chilcott*, 2008 WL 5110904, at \*2). Members of the Settlement Class will have the opportunity to share their reactions to the Settlement, including by filing objections, pursuant to the Notice Plan and final approval procedures. In addition, an independent fiduciary will review the

Settlement and related applications, as well as any objections or comments regarding the Settlement that may be filed prior to the issuance of its report, before determining whether to approve of the release of claims on behalf of the Plan. Accordingly, this factor is better assessed at the final approval stage.

b. The Ability of Defendants to Withstand a Great Judgment  
Does Not Weigh Against Preliminary Approval

While there is no evidence that Defendants could not withstand a greater judgment, courts have regularly held that, “against the weight of the remaining factors, this fact alone does not undermine the reasonableness of [a settlement].” *GSE Bonds*, 414 F. Supp. 3d at 696; *see also In re AOL Time Warner ERISA Litig.* (“*AOL Time Warner*”), 2006 WL 903236, at \*12 (S.D.N.Y. Apr. 6, 2006) (finding “the mere ability to withstand a greater judgment does not suggest that the Settlement is unfair,” rather this factor “must be weighed in conjunction with all of the Grinnell factors, most notably the risk of the class prevailing and the reasonableness of the settlement fund”) (internal quotation marks omitted). Accordingly, the Court need not find that Defendants could not withstand a greater judgment in order to conclude the Settlement is fair, reasonable, and adequate, and warrants preliminary approval.

c. The Range of Reasonableness of the Settlement in Light of the  
Best Possible Recovery and Attendant Risks support  
Preliminary Approval

“In considering these facts, the settlement amount’s ratio to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement’s fairness.” *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 327 F.R.D. 483, 495 (S.D.N.Y. 2008). In fact, courts in this Circuit have approved of settlements where the plaintiffs did not offer a damages estimate at all. *See id.* This is because “some risks would be attendant upon continuing to litigate.” *GSE Bonds*, 414 F. Supp. 3d at 696; *Flag Telecom II*, 2010 WL

4537550, at \*20 (“[T]he issue for the Court is not whether the Settlement represents the ‘best possible recovery,’ but how the Settlement relates to the strengths and weaknesses of the case.”). “[I]n any case, there is a range of reasonableness with respect to a settlement.” *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). In any event, the range of reasonableness “recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman*, 464 F.2d at 693.

Plaintiffs estimated the Plan’s losses attributable to excessive RK&A fees by comparing the Plan’s actual fees to the periodic reasonable market rate throughout the Class Period determined by Plaintiffs’ experts based on a benchmark group of comparable plans. In addition, Plaintiffs estimated the Plan’s losses attributable to the challenged investments by calculating the difference in terminal aggregate wealth actually achieved by the Plan with the terminal aggregate that would have been achieved assuming replacement with suitable alternative investments. *See Rubinow Decl.*, ¶ 9. The damages awarded to Plaintiffs in the event they proved liability would be subject to the factfinder’s determinations with respect to several significant variables. First, the factfinder must determine the alternative investments against which the Plan’s losses should be measured, as well as the reasonable market rate for the Plan’s RK&A fees. Defendants would, of course, argue for the lower end, and may offer an alternative peer group that further reduces the damages calculation. Second, the factfinder must determine the appropriate interest rate to apply, ranging from the conservative 1-year Treasury rate to the more aggressive S&P 500-return rate. And all of these figures presuppose a finding of liability.

Plaintiffs and their experts have estimated realistically achievable damages as ranging from \$14,895,443.34 to \$26,842,926.28, based upon the comparator used and interest rate applied, and offsetting any potentially duplicative losses suffered by the Plan. Accordingly, the

Settlement recovery is quite significant, as it would represent approximately 72% of the midpoint of the reasonable damages calculations of Plaintiffs and their experts. *See* Rubinow Decl., ¶ 9. This recovery rate range sits comfortably within those accepted by other courts in this Circuit. *See, e.g., GSE Bonds*, 414 F. Supp. 3d at 697 (13-17%); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at \*6 (S.D.N.Y. Nov. 8, 2006) (10-15%); *In re Interpublic Sec. Litig.*, No. 02 CIV.6527(DLC), 2004 WL 2397190, at \*8 (S.D.N.Y. Oct. 26, 2004) (10-20%); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293 VLB, 2012 WL 3589610, at \*7 (D. Conn. Aug. 20, 2012) (3.5%). *See also Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590JCH, 2011 WL 2050537, at \*13 (D. Conn. May 16, 2011) (“the Second Circuit has long held that even settlements which represent a fraction of the best possible result may be appropriate in light of the risks associated with bringing such claims”) (citing *Grinnell*, 495 F.2d at 455 n.2). Detailed calculations and backup information concerning the Plan’s losses was exchanged in connection with the mediation process and will be made available to the Independent Fiduciary. In sum, the Court should find that the Settlement falls well within the range of reasonable outcomes.

#### **B. The Proposed Notice Plan Should be Approved**

In addition to preliminarily approving the proposed Settlement, the Court must approve the proposed means of notifying Settlement Class members. *See* Fed. R. Civ. Proc. 23(c)(2); *see also Global Crossing*, 225 F.R.D. at 448. “Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action.” *Id.* In order to satisfy due process considerations, notice to Settlement Class members must be “reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central*

*Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Prudential*, 163 F.R.D. at 368.

The Notice Plan includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Notice will be sent by email and/or first-class mail to the last known address of each Settlement Class member prior to the Final Approval Hearing. Notably, all Settlement Class members had Plan accounts, so the Plan recordkeeper(s) has addresses for them, at least as of the Settlement Class Period, and has their Social Security numbers which can be used to do an address update if Notices are returned as undeliverable. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477-78 (E.D. Pa. 2007). Additionally, the Notice will be posted on a website established by the Settlement Administrator at the direction of Class Counsel, along with other documents related to the litigation such as a list of frequently asked questions and the Agreement with all of its exhibits. The Notice will also provide contact information for Class Counsel. The Settlement Administrator, at the direction of Class Counsel, will also establish and monitor a dedicated, toll-free telephone number for the purpose of fielding any inquiries by member of the Settlement Class.

The Notice Plan agreed upon by the Parties satisfies all due process considerations and meets the requirements of Rule 23. It describes in plain English: (i) the terms and operation of the Settlement; (ii) the nature and extent of the released claims; (iii) the maximum attorneys' fees, expenses, and Plaintiffs' case contribution awards that may be sought; (iv) the procedure and timing for objecting to the settlement; and (v) subject to the Court's schedule, the date and location of the Final Approval Hearing. Numerous district courts across the country have approved as fair similar notices and/or notice plans. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (concluding that "notice forms and methods employed [we]re substantially similar to those successfully used in many previous ERISA class settlements");

*Griffin v. Flagstar Bancorp, Inc.*, 2:10-cv-10610, 2013 WL 4779017, at \*3 (E.D. Mich. July 29, 2013) (adopting a substantially similar notice plan).

### **C. Certification of the Class Should be Maintained for Settlement Purposes**

The requirements of Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *In re US FoodService Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013). In certifying the Class for litigation purposes, this Court previously found that each of the prerequisites of Rule 23(a) were satisfied and that the Class should be certified under Rule 23(b)(1). *See generally Garthwait v. Eversource Energy Co.*, CIVIL 3:20-CV-00902(JCH), 2022 WL 1657469 (D. Conn. May. 25, 2022) (certifying class, appointing Plaintiffs as class representatives, and appointing Plaintiffs' counsel as counsel on behalf of the Class). None of the facts or circumstances supporting the Court's certification order have changed; in fact, the circumstances of a settlement provide even greater support for class certification. This is because, as discussed herein, Plaintiffs assert claims on behalf of the Plan, participants and beneficiaries have uniform theories of liability and relief, and the structure of ERISA requires that participants and beneficiaries bringing actions for breach of fiduciary duty must do so on behalf of a plan as a whole. Moreover, the Settlement would provide relief to the Plan as a whole, which would then be distributed to individual participant accounts pursuant to the Plan of Allocation. The Court should find that certification of the Class should be maintained for settlement purposes.

#### **1. The Settlement Class Satisfies Rule 23(a)**

##### **i. Numerosity**

The numerosity requirement of Rule 23 dictates that a putative class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

Impracticability does not equate to impossibility, but merely means that the difficulty of joining all class members makes the use of the class action device appropriate. *See Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244–45 (2d Cir. 2007). Numerosity may be presumed when a class consists of 40 or more members. *See Vellali v. Yale Univ.*, 333 F.R.D. 10, 16 (D. Conn. 2019); *see also Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the Plan had more than 11,000 participants at all times during the Class Period. *See Garthwait*, 2022 WL 1657469, at \*2 (finding the proposed class has more than 11,000 members); *see also* Rubinow Decl., ¶ 4. Accordingly, the proposed Settlement Class easily meets Rule 23(a)’s numerosity requirement.

## ii. Commonality

The commonality prerequisite requires that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).<sup>5</sup> Commonality involves “the capacity of a class[-]wide proceeding to generate common *answers* apt to drive resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotation marks omitted). This occurs when there is at least one common question, the determination of which “will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350. The Court has already recognized that, because Plaintiffs allege Defendants breached duties to Plan through their uniform conduct directed at the Plan, there are numerous common questions among members of the Class:

While the defendants argue that class members’ complaints about separate funds or investment options will not raise common questions, *see* Opp’n at 17-19, several common questions of law and fact that could be resolved “in one stroke” are central

---

<sup>5</sup>“The commonality and typicality requirements of Rule 23(a) tend to merge.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting also that these requirements often merge with adequacy of representation). While the requirements are discussed separately herein, each element is related and arguments supporting one requirement frequently support the others.

to the validity of the plaintiffs' claims. For instance, the plaintiffs' claims depend on whether the defendants breached their fiduciary duties by selecting and retaining underperforming investments and by charging excessive fees. The evidence necessary to answer these questions will "generate common *answers* apt to drive the resolution of the litigation." *See Wal-Mart*, 564 U.S. at 359. Moreover, Plan participants selected from the same menu of allegedly pricy investment options and paid recordkeeping fees, thus the alleged Plan-wide mismanagement similarly affected all putative class members. *See, e.g.*, Second Am. Compl. at ¶¶ 115, 34.

*Garthwait*, 2022 WL 1657469, at \*10. Should this action proceed to trial, the focus of the Parties' trial presentations and the application of the law would implicate the same common questions the Court found at the time it certified the Class.

### iii. Typicality

The typicality prerequisite mandates that the claims of the representative plaintiffs be typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). "Typicality does not require that the situations of the named representatives and the class members be identical." *In re Oxford Health Plan, Inc.*, 191 F.R.D. 369, 375 (S.D.N.Y. 2000) (citation omitted); *see also Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at \*13 (S.D.N.Y. Jul. 27, 2007) (acknowledging that Courts in this District "have emphasized that the typicality requirement is not demanding."<sup>6</sup> Typicality is satisfied where plaintiffs demonstrate 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." *Vellali*, 333 F.R.D. at 17 (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)) (internal quotation marks omitted). "[W]hen it is alleged

---

<sup>6</sup>Questions of efficiency and economy are also inherent in analyzing these requirements. District courts in the Second Circuit have described typicality, like commonality, as a "guidepost for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 162 (S.D.N.Y. 2017).

that the same unlawful conduct was directed at or affected both the named plaintiffs and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.” *Id.* (quoting *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993)).

In certifying the Class, the Court addressed Defendants’ arguments about the application of several affirmative defenses and Class members who invested in different options within the Plan. *See Garthwait*, 2022 WL 1657469, at \*10–\*11. Ultimately, the Court found “following the lead of a majority of courts in this Circuit and determining that the plaintiffs’ claims arise from the same course of events and depend upon similar legal theories of imprudent conduct impacting all class members in a similar manner, the court concludes that the typicality requirement has been met as to Plan participants who invested in the challenged funds or suites of funds.” *Id.*, 2022 WL 1657469, at \*12. The same reasoning holds and supports maintenance of the Class through entry of a final approval order.

#### **iv. Adequacy**

The representative plaintiffs must also show that they will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy prerequisite is met where: (1) the proposed class representative’s interests are to vigorously pursue the claims of the class and are not antagonistic to the interests of other class members; and (2) proposed class counsel are qualified, experienced, and able to conduct the litigation. *See Flag Telecom*, 574 F.3d at 35.

In certifying the Class, the Court found that Plaintiffs’ interests and incentives are neatly aligned with members of the Class. *See Garthwait*, 2022 WL 1657469, at \*13. That has borne out, as Plaintiffs have remained actively involved in the litigation through its duration, including participating in Settlement discussions and beginning to undertake trial preparation. *See*

Rubinow Decl., ¶ 6–10. Further, Plaintiffs’ adequacy is demonstrated through the proposed Plan of Allocation, which would provide for *pro rata* distribution of Settlement proceeds based on Class members’ account balances in the Plan. *See* Settlement Agreement, Ex. B. The Plan of Allocation does not provide for any greater distribution to Plaintiffs than that to which any similarly situated Class members would be entitled. *See id.* The Court also previously found that Class Counsel are adequate as a result of their demonstrable competency in litigation through the time of Class certification and “substantial experience in class action litigation, including ERISA class actions.” *See Garthwait*, 2022 WL 1657469, at \*14.

## **2. Certification Remains Appropriate Under Rule 23(b)(1)**

Certification of the Class may be maintained through final approval under Rule 23(b)(1), which is the appropriate part of Rule 23 under which to grant certification in ERISA actions because any recovery, including the restoration of losses, must be paid into the Plan in the first instance, and any injunctive relief will obviously affect the Plan as a whole. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139–40 (1985). Indeed, the Court previously found that certification of the Class was appropriate under Rules 23(b)(1)(A) and 23(b)(1)(B), because separate adjudications could result in “varying adjudications over defendant’s alleged breach and how to measure the damages” and ““the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members . . . .” *Garthwait*, 2022 WL 1657469, at \*15 (citations omitted). So, too, at this stage.

## **D. The Plan of Allocation Should be Approved**

To warrant approval, a plan of allocation must be fair and adequate. *In re Facebook, Inc., IPO Secs. and Derivative Litig.*, 343 F. Supp. 3d 394, 414 (Nov. 26, 2018). “The formula established for allocation need only have a reasonable, rational basis, particularly if

recommended by experienced and competent class counsel.” *Id.*; *see also Guevoura Fund Ltd. v. Silverman*, Nos. 1:15-cv-07192-CM and 1:18-cv-09784-CM, 2019 WL 6889901, at \*10 (S.D.N.Y. Dec. 18, 2019) (“Courts have recognized that the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.”) (internal quotation marks omitted). “[W]hether the allocation plan is equitable is squarely within the discretion of the district court.” *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG) (VVP), 2015 WL 6964973, at \*7 (E.D.N.Y. Nov. 10, 2015) (citing *PaineWebber P’ships*, 171 F.R.D. at 132—33 (internal citations and punctuation omitted)).

Here, “[Plaintiff]’s] Plan of Allocation was prepared by experienced counsel along with a damages expert – both indicia of reasonableness.” *Facebook, Inc.*, 343 F. Supp. 3d at 414. Indeed, the Plan of Allocation provides for *pro rata* distribution of the Qualified Settlement Fund among Settlement Class members according to the average size of each Class Member’s account during the Class Period. Agreement, Ex. B § 1.5. Courts in this District regularly approve plans of allocation where, as here, “[a plan] provides recovery to [c]lass members, net of administrative expenses and attorneys’ fees and expenses, on a *pro rata* basis.” *In re Marsh ERISA Litig.*, 265 F.R.D. 128 at 145 (emphasis added); *see also AOL Time Warner*, 2006 WL 903236, at \*17 (plan of allocation provided “recovery to damaged investors on a pro- rata basis according to their recognized claims of damages.”).

As further detailed in the Plan of Allocation, distributions to Settlement Class members who are active participants of the Plan will be made by allocating recovery amounts into their active Plan accounts, while distributions to former Plan participants, beneficiaries, and alternate payees will be made by check or tax-qualified rollover to an individual retirement account or

other qualified employer plan. The Plan of Allocation is substantially similar to plans of allocation approved and utilized similar ERISA actions.<sup>7</sup>

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court enter an order that: (1) preliminarily approves the Settlement; (2) maintains certification of the Settlement Class through such time as the Court enters an order granting final approval of the Settlement; (3) preliminary approves of the Notice Plan; and (4) schedules a fairness hearing at a date convenient for the Court no sooner than 140 days from the entry of the proposed Preliminary Approval Order.

Dated: April 14, 2023

Respectfully submitted,

/s/ Laurie Rubinow

James E. Miller

Laurie Rubinow

MILLER SHAH LLP

65 Main Street

Chester, CT 06412

Telephone: (860) 540-5505

Facsimile: (866) 300-7367

Email: [jemiller@millershah.com](mailto:jemiller@millershah.com)

[lrubinow@millershah.com](mailto:lrubinow@millershah.com)

---

<sup>7</sup>See, e.g., *Larson v. Allina Health System*, No. 17-cv-03835 (SRN/TNL), 2019 WL 6208648, at \*2 (D. Minn. Nov. 21, 2019); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV 15-1614-JLS (JCG), 2018 WL 3000490, at \*5 (C.D. Cal. Feb. 6, 2018); *In re Marsh ERISA Litig.*, 265 F.R.D. at 145-46 (approving plan of allocation that provided recovery to class members on *pro rata* basis, such that the amount received by each class member would depend on his or her calculated loss relative to other class members, and payments would be made by crediting accounts of active plan participants and creating or recreating an account for class members who were no longer active participants); *In re AOL Time Warner*, No. 02 Civ. 8853 SWK, 2006 WL 2789862, at \*10 (S.D.N.Y. Sept. 27, 2006); *In re Worldcom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2004 WL 2338151, at \*8 (S.D.N.Y. Oct. 18, 2004).

James C. Shah  
Alec J. Berin  
MILLER SHAH LLP  
1845 Walnut Street, Suite 806  
Philadelphia, PA 19103  
Telephone: (866) 540-5505  
Facsimile: (866) 300-7367  
Email: [jcshah@millershah.com](mailto:jcshah@millershah.com)  
[ajberin@millershah.com](mailto:ajberin@millershah.com)

Kolin C. Tang  
MILLER SHAH LLP  
19712 MacArthur Boulevard, Suite 222  
Irvine, CA 92612  
Telephone: (866) 540-5505  
Facsimile: (866) 300-7367  
Email: [kctang@millershah.com](mailto:kctang@millershah.com)

Mark K. Gyandoh  
CAPOZZI ADLER, P.C.  
132 Old Lancaster Road  
Merion Station, PA 19066  
Telephone: (610) 890-0200  
Facsimile: (717) 233-4103  
Email: [markg@capozziadler.com](mailto:markg@capozziadler.com)

*Attorneys for Plaintiff, the Plan,  
and the Settlement Class*