

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

In re Biogen, Inc. ERISA Litig.

Case No: 1:20-cv-11325-DJC

August 24, 2023

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

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Plaintiffs,¹ on behalf of the proposed Settlement Class and the Biogen Inc. 401(k) Savings Plan (the “Plan”), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement (“Motion”), requesting the Court issue an Order that: (1) preliminarily approves the Settlement Agreement dated August 24, 2023 with Defendants;² (2) preliminarily certifies the proposed Settlement Class; (3) preliminarily approves the proposed notice plan (“Notice Plan”) in the Settlement Agreement and proposed Preliminary Approval Order; and (4) sets a final approval hearing on a date convenient for the Court at least 140 days after the entry of an order preliminarily approving the proposed settlement (the “Settlement”).³

INTRODUCTION

The Parties have agreed to the Settlement in this representative action under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, for total relief of \$9,750,000.00, as well as valuable non-monetary relief aimed at improving the Plan’s fiduciary process, which will provide a substantial recovery to Class Members. In light of the favorable relief the Settlement provides, as well as the inherent risks and delays of continued litigation, Plaintiffs and Class Counsel submit that the Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class.

Plaintiffs and Class Counsel vigorously pursued relief on behalf of the Plan, and Defense

¹Plaintiffs are Sarah Gamble, David Covington, Tansy Wilkerson, and Daisy Santiago, (collectively, “Plaintiffs”). Defendants are Biogen Inc., the Board of Directors of Biogen Inc., and the Biogen Inc. 401(k) Retirement Committee (collectively, “Defendants,” and with Plaintiffs, the “Parties”).

²The Settlement Agreement and exhibits are attached to the accompanying Declaration of Alec J. Berin (“Berin Declaration”). Terms not defined herein have the same meaning as in the Settlement Agreement.

³A proposed Preliminary Approval Order is attached as Exhibit C to the Settlement Agreement.

Counsel vigorously defended against the allegations in the Complaint. The Parties agreed to the Settlement after meaningful motion practice, comprehensive fact discovery, and arm's-length negotiations by experienced counsel, including two private mediation sessions with an experienced neutral mediator. Resolving the Class Action at this juncture allows the Parties to avoid continued and costly litigation, which could result in recovery less than that provided by the Settlement, or none at all. As part of the settlement approval process, an Independent Fiduciary will be engaged on behalf of the Plan to review and authorize the Settlement, and the Independent Fiduciary's authorization of the Settlement and the Plan's release of claims will be submitted in a written opinion filed in advance of the fairness hearing. The anticipated Independent Fiduciary report will be based on all matter appearing on the record, the Parties' mediation submissions and expert analyses (if requested), as well as separate interviews with Plaintiffs' and Defendants' counsel. The Independent Fiduciary report will offer the Court an independent basis to judge the fairness of the Settlement.

All of the prerequisites for preliminary approval of the Settlement and certification of the Settlement Class are satisfied. Thus, Plaintiffs respectfully submit that the Motion should be granted, and notice should be provided to the Settlement Class.

BACKGROUND

Plaintiffs allege that Defendants are fiduciaries of the Plan and breached duties they owed to the Plan and its participants and beneficiaries under ERISA by failing to appropriately monitor the Plan's investments and, consequently, retaining unsuitable investments in the Plan instead of offering prudent, readily available alternative investments. *See* Consolidated Class Action Complaint ("Complaint," ECF No. 22) ¶¶ 25–59. Plaintiffs filed the Complaint on September 25, 2020, and Defendants moved to dismiss the Complaint on November 18, 2020 (ECF Nos. 28, 29).

The Court granted in part and denied in part Defendants' motion to dismiss on July 22, 2021 (ECF No. 80), and the Parties engaged in comprehensive discovery, including the exchange and review of thousands of pages of documents and the depositions of multiple witnesses. *See* Declaration of Alec J. Berin ("Berin Decl.") ¶ 7. Plaintiffs had also served subpoenas for documents and testimony on third parties. *See id.* The Parties stipulated to class certification on November 4, 2022 ("Class Certification Stipulation," ECF No. 103). The Court entered the Class Certification Stipulation on November 8, 2022, certifying the following class:

All participants and beneficiaries in the Biogen, Inc. 401(k) Savings Plan at any time on or after July 14, 2014, to the present, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period." ("Class Certification Order," ECF No. 104). The Class was divided into a "Release Subclass" and "Non-Release Subclass.

After the Court issued its order on Defendants' motion to dismiss, the Parties participated in a private mediation with Robert A. Meyer, Esquire of JAMS, a well-respected, neutral mediator with experience mediating claims of the kind at issue in the Class Action, which did not result in a resolution of any of the pending claims but enabled the Parties to candidly discuss their positions regarding the strengths and weaknesses of the Class Action and the Plan's losses alleged by Plaintiffs. Following the discovery period, the Parties agreed to participate in a second mediation with Mr. Meyer in an attempt to resolve the litigation and moved to stay proceedings pending mediation on March 16, 2023 (ECF No. 109). On March 20, 2023, the Court stayed the prior deadlines in the Class Action through June 29, 2023 (ECF No. 110). The Parties held the mediation session on June 22, 2023. Prior to and during the mediation, the Parties exchanged briefs and follow-up information concerning the merits of Plaintiffs' claims, Defendants' defenses, and potential damages, and reached an agreement in principle to resolve the Class Action. The Parties reported their agreement to the Court on June 29, 2023 (*see* ECF No. 112), and then worked

diligently to document the same in the Settlement Agreement.

The Settlement provides that, in exchange for dismissal of the Class Action and a release of claims, Defendants will pay \$9,750,000.00 into a Qualified Settlement Fund, to be allocated to Current Participants, Former Participants, Beneficiaries, and Alternate Payees of the Plan pursuant to the Plan of Allocation. *See* Settlement Agreement §§ 1.38, 4.4–4.5, 5.3, 7.1–7.2, Ex. B. In addition, the Settlement provides that the Retirement Committee will: (i) complete the ongoing request for proposal for investment advisory services for the Plan, including negotiating the advisor’s attendance at the Committee’s quarterly meetings and provision of quarterly investment reports; (ii) conduct quarterly meetings; (iii) receive annual fiduciary training; (iv) conduct a full review of the suitability of the MFS New Discovery Growth Fund for the Plan; (v) evaluate whether the a small cap value fund should be added to the Plan lineup; and (vi) evaluate whether the Committee should expand from three to five members. *See id.*, §§ 14.1–14.6. The Settlement Agreement and the proposed Preliminary Approval Order set forth the Notice Plan describe Plaintiffs’ anticipated requests for payment of Attorneys’ Fees and Costs to Class Counsel and for Case Contribution Awards, all of which are subject to the Court’s approval. *See* Settlement Agreement, §§ 1.4, 1.9, 2.2.7, 6.1, Ex. A. Further, as discussed above, the Settlement Agreement provides for the approval of the Settlement by an Independent Fiduciary. *See* Settlement Agreement, §§ 1.28, 2.1.

The Parties respectfully request that the Court schedule a Fairness Hearing, at or after which the Court will be asked to determine whether the Settlement is fair, reasonable, and adequate, and merits final approval. Plaintiffs propose the following schedule:

Event	Reference to Preliminary Approval Order	Proposed Deadline
Preliminary approval hearing		If the Court deems necessary, on a date convenient for the Court within 45 days of the Preliminary Approval filing
Settlement Administrator to set up settlement website and toll-free number	¶ 7	Within 45 days of entry of Preliminary Approval Order
Send Settlement Notice and Former Participant Claim Form to Class Members	¶ 7	Within 45 days of entry of Preliminary Approval Order
Final Approval papers and fee request	¶¶ 9, 10	45 days before Fairness Hearing
Independent Fiduciary Report	Settlement Agreement ¶ 2.1.2	Not later than 45 days before the Fairness Hearing
Deadline for filing of objections	¶ 11	Not later than 30 days before the Fairness Hearing
Deadline for Parties to respond to objections or file any additional papers in support of Settlement	¶ 11	Not later than 7 days before Fairness Hearing
Fairness Hearing	¶ 6	On a date convenient for the Court no sooner than 140 days after entry of the Preliminary Approval Order

STANDARD OF REVIEW

When the Court is presented with a proposed settlement in a class action, it must determine whether the proposed settlement class satisfies the Federal Rule of Civil Procedure 23 requirements for class certification. *See Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990); *see also Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 102 (D. Mass. 2010) (finding that despite the “cautionary approach” to class certification, “the law favors class action settlements”). Specifically, a proposed class must meet the four requirements of Rule 23(a) and the requirements of at least one subsection of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997); Fed. R. Civ. P. 23.

The Court must also find that a proposed settlement warrants preliminary approval. In evaluating whether preliminary approval should be granted, courts are guided by the Rule 23(e)(2) fairness inquiry, which evaluates the “(1) complexity, expense, and likely duration of litigation, (2) reaction of class to settlement, (3) stage of proceedings and amount of discovery completed, (4) risks of establishing liability, (5) risks of establishing damages, (6) risks of maintaining class action through trial, (7) ability of defendants to withstand greater judgment, (8) range of reasonableness of settlement fund in light of best possible recovery, and (9) range of reasonableness of settlement fund to a possible recovery in light of all the attendant risks of litigation.” *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 343–44 (D. Mass. 2015), *aff’d*, 809 F.3d 78 (1st Cir. 2015). Before approving a proposed settlement agreement, the Court must determine if the settlement is “fair, reasonable, and adequate; and not illegal, a product of collusion, or against the public interest.” *United States v. Massachusetts*, 869 F. Supp. 2d 189 (D. Mass. 2012) (citing *Voss v. Rolland*, 592 F.3d 342, 251 (1st Cir. 2010)) (approving class action settlement because it was fair, reasonable, and adequate). Courts within the First Circuit approach that analysis with the understanding that the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *City P’ship Co. v. Atl. Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996).

This “first step is merely to ascertain whether notice of the proposed settlement should be sent to the class.” *Sesto v. Prospect CharterCARE, LLC*, 2019 WL 2394251, at *1 (D.R.I. June 6, 2019) (internal quotations and citations omitted); *see also Lapan v. Dick’s Sporting Goods, Inc.*, 2015 WL 8664204, at *1 (D. Mass. Dec. 11, 2015) (granting preliminary approval of a proposed settlement “within the range of possible settlement approval, such that notice to the Class is appropriate.”). Indeed, the threshold requirement to survive the preliminary review stage is merely

that the settlement is within the range of reasonableness “[w]hen sufficient discovery has been provided and the parties have bargained at arms-length.” *City P’ship Co.*, 100 F.3d at 1043; *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32–33 (1st Cir. 2009).

ARGUMENT

I. CERTIFICATION OF THE CLASS SHOULD BE MAINTAINED FOR SETTLEMENT PURPOSES

The requirements of Federal Rule of Civil Procedure 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See Amchem*, 521 U.S. at 613. In certifying the Class, the Court previously found that each of the prerequisites of Federal Rule of Civil Procedure 23(a) were satisfied and that the Class Should be certified under Rule 23(b)(1). ECF No. 104, at 7. None of the facts supporting the Court’s Class Certification Order have changed. If anything, the circumstances of a settlement provide greater support for class certification. *See Hochstadt*, 708 F. Supp. 2d at 102 (noting that when “[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”) (quoting *Amchem*, 521 U.S. at 620). Plaintiffs assert claims on behalf of the Plan, participants 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 the plan as a whole. As the Settlement would provide relief to the Plan itself, which would then be distributed to participant accounts, the Court should maintain certification. *See also Clark v. Beth Israel Deaconess Med. Ctr.*, No. 22-10068-DPW, ECF No. 61, (D. Mass. May 5, 2023) (preliminarily certifying a settlement class in an ERISA class action alleging analogous investment monitoring claims).

A. The Settlement Class Satisfies Rule 23(a)

i. Numerosity

The numerosity requirement of Rule 23 requires that a putative class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). This requirement does not amount to a showing that it is impossible join all members of the putative class, but “the class representatives need only show that it is difficult or inconvenient to join all the members of the class.” *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54 (D. Mass. 1997) (citing *Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138 (D. Mass. 1988)). In conducting the impracticability inquiry, the court must consider the difficulty of joining the parties and ask whether “the damage claims of most individual class members would be relatively small compared to the cost of litigation, leaving individual class members with little incentive to litigate their own claims.” *Id.* While no “minimum number of plaintiffs is required to maintain a suit as a class action, [] generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.” *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009).

The Plan had over 12,000 participants and beneficiaries during the Class Period, and the members of the Settlement Class are geographically dispersed. Membership in the Settlement Class is ascertainable from the records of the Plan maintained by Defendants and the Plan’s recordkeeper. Both the size and dispersion of the Settlement Class, which is far more numerous than other classes certified in this Circuit, easily satisfy Rule 23(a)’s numerosity requirement. Indeed, joinder would be “difficult, inconvenient, and costly.” *In re Nexium (Esomeprazole) Antitrust Litig.*, 296 F.R.D. 47 (D. Mass. 2013) (certifying a class of 24 to 29 members); *see also Hochstadt*, 708 F. Supp. 2d at 102 (certifying settlement class of over 10,000 retirement plan participants and beneficiaries in ERISA breach of fiduciary duty action).

ii. Commonality

The commonality factor requires “questions of law or fact common to the class,” Fed. R. Civ. P. 23(a)(2), and a “common contention” that is “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Garcia-Rubiera*, 570 F.3d at 460 (internal quotations omitted). Commonality is a low hurdle, and class members need not present factual or legal situations that are “precisely identical.” *S. States Police Benevolent Ass’n, Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007). Indeed, “[a]s long as a sufficient constellation of common issues binds class members together, notwithstanding the existence of some individualized issues, a class may still be certified.” *Glass Dimensions, Inc. v. State St. Bank & Tr. Co.*, 285 F.R.D. 169 (D. Mass. 2012) (internal quotations omitted). “The threshold of commonality is not a difficult one to meet.” *Hochstadt*, 708 F. Supp. 2d at 102.

Courts in this District have found commonality satisfied for ERISA breach of fiduciary duty claims brought, as here, on behalf of a plan, because the legal claims are “the same with respect to every class member.” *Hochstadt*, 708 F. Supp. 2d at 102–04, 106. Plaintiffs allege Defendants breached fiduciary duties they owed to the Plan under ERISA § 404 and bring this Action in a representative capacity under ERISA §§ 409 and 502(a)(2). Thus, Plaintiffs’ Plan-wide claims involve legal and factual questions that inherently affect all participants and beneficiaries in the Plan. Indeed, “[b]ecause the fiduciary duties are owed to the [Plan] . . . common questions of law and fact are central to the case.” *Cunningham v. Cornell Univ.*, 2019 WL 275827, at *5 (S.D.N.Y. Jan. 22, 2019).

While a single common question is sufficient to meet this standard, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 359 (2011), the common questions here are numerous and include: (i)

whether Defendants are fiduciaries of the Plan; (ii) whether Defendants breached their fiduciary duties by causing the Plan to maintain imprudent and expensive investment options; (iii) whether the Plan suffered resulting losses; (iv) the proper manner in which to calculate the Plan's losses; and (v) what equitable relief, if any, is appropriate in light of these alleged breaches. *See Hochstadt*, 708 F. Supp. 2d at 102–03 (finding similar questions sufficient to satisfy commonality in an ERISA action). As these critical issues involve the acts and omissions of Defendants, they are “common questions of law or fact in the case.” *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382 (D. Mass. 2011). The evidence required to answer these contentions exists at the Plan-level and, consequently, is common to all Plan participants. Answers do not depend on the particular circumstances of any individual participant because, in ERISA fiduciary breach actions, “liability is determined based on Defendants’, not Plaintiff[’s], decisions.” *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *5 (S.D.N.Y. Sept. 5, 2017). Simply put, the central allegations in the Class Action concern Defendants’ administration of the Plan, and because Defendants’ duties ran to the Plan, common questions pervade the Action.

iii. Typicality

The typicality prerequisite ensures that representative plaintiffs’ claims are typical of those of the class. Fed. R. Civ. P. 23(a)(3). The inquiry requires that “the claims of the class representative and the class overall [] share essential characteristics.” *Swack v. Credit Suisse First Bos.*, 230 F.R.D. 250, 260 (D. Mass. 2005). This District has held that a plaintiff’s claims are typical when the plaintiff’s “injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiff’s claims and those of the class are based on the same legal theory.” *In re Credit Suisse–AOL Sec. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008).

Courts routinely find claims asserting breaches of fiduciary duty related to the selection and monitoring of retirement plan investments to be typical of all participants in a plan at issue. *See Hochstadt*, 708 F. Supp. 2d at 103. Further, Plaintiffs bring this Class Action in a representative capacity on behalf of the Plan, and any recovery will go to the Plan. *See Evans v. Akers*, 534 F.3d 65, 70 n.4 (1st Cir. 2008) (“those who bring suit do so on behalf of the plan and the plan takes legal title to any recovery”) (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985)). As Plaintiffs allege fiduciary breaches arising out of Defendants’ management and administration of the Plan, Plaintiffs’ claims are clearly typical of all Class Members.

iv. Adequacy

Representative plaintiffs must also show that they will “fairly and adequately protect the interests of this class.” Fed. R. Civ. P. 23(a)(4). This inquiry has two components: “First, there must be an absence of potential conflict between the named plaintiff and the potential class members, and second, the counsel chosen by the class representative must be qualified, experienced, and able to vigorously conduct the proposed litigation.” *Glass Dimensions*, 285 F.R.D. at 179 (internal quotations omitted). The First Circuit has noted that the first component ensures that the will of named plaintiffs does not “conflict with the interests of any of the class members,” and the second ensures class counsel are “qualified, experienced and able to vigorously conduct the proposed litigation.” *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985); *see also In re Credit Suisse*, 253 F.R.D. at 22 (noting that “[t]he requirements of typicality and adequacy tend to merge”).

Plaintiffs’ interests are tightly aligned with all other members of the Settlement Class by virtue of the representative nature of Plaintiffs’ claims on behalf of the Plan. Plaintiffs seek to enforce the duties Defendants owed to the Plan and to recover damages and equitable relief. *See*

Mass. Mut. Life Ins. Co., 473 U.S. at 142 n.9. Since Plaintiffs are pursuing claims on behalf of the Plan, there are no conflicts between Plaintiffs' individual interests and the interests of the Class. *See Andrews*, 780 F.2d at 130 (finding the adequacy requirement satisfied when "the interests of the representative party will not conflict with the interests of any of the class members"). Indeed, Plaintiffs and Class Members all share the same objectives, factual and legal positions, and interest in establishing Defendants' liability. Moreover, in order to effectuate the Settlement, Plaintiffs are proposing a Plan of Allocation that provides for *pro rata* distribution of the putative common fund to members of the Settlement Class based on their account balances in the Plans. The proposed Plan of Allocation safeguards against the potential of intraclass conflicts (though none exist here). *See Hochstadt*, 708 F. Supp. 2d at 104.

Finally, a class representative need only possess a basic understanding of the facts underlying the claims in the Class Action and an ability and willingness to participate in the litigation, requirements that Plaintiffs easily exceed. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Plaintiffs have demonstrated their commitment to pursuing this Class Action on behalf of the Settlement Class and have achieved a very favorable result, which does not favor any member of the Settlement Class at the expense of others. *See* Berin Decl. ¶ 3. Clearly, Plaintiffs adequately represent all members of the Settlement Class. Additionally, Plaintiffs have retained qualified and competent counsel, whose adequacy is discussed in greater detail below. *See Hochstadt*, 708 F. Supp. 2d at 107 (finding class counsel with experience prosecuting ERISA actions over the last four years to be adequate).

B. The Settlement Class Satisfies Rule 23(b)(1)

In addition to Rule 23(a), Plaintiffs need only satisfy one subsection of Rule 23(b). *See Amchem*, 521 U.S. at 613–14. Courts routinely grant certification under Rule 23(b)(1) in ERISA

fiduciary breach cases. *See, e.g., Hochstadt*, 708 F. Supp. 2d at 107 (“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 *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir.2009)). Since ERISA actions authorize plan-wide relief, there is risk that failure to certify the class would leave future plaintiffs without relief. *See Evans v. Akers*, No. 04–11380–WGY, slip op. at 4 (D. Mass. Oct. 7, 2009) (finding class certification appropriate under Rule 23(b)(1)(B) because “[g]iven the Plan-representative nature of Named Plaintiffs’ breach of fiduciary duty claims, there is a risk that failure to certify the Settlement Class would leave future plaintiffs without relief.”). Individual adjudication risks contradictory outcomes, and “defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan.” *Id.* This reasoning is rooted in the basic concepts of trust law, as a suit alleging a breach of trust by a fiduciary affecting a large class of beneficiaries and requiring an accounting or similar procedure to restore the subject of the trust is a classic example of a Rule 23(b)(1)(B) action. Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–34 (1999) (calling breach of trust actions a “classic example” of a Rule 23(b)(1) class) Plaintiffs’ claims on behalf of the Plan fall squarely within the Advisory Committee’s example, and thus satisfy Rule 23(b)(1).

C. Miller Shah and Capozzi Adler Should be Maintained as Class Counsel, and Whatley Kallas Should be Appointed Local Counsel for the Settlement Class

In appointing Class Counsel, this Court should consider the Rule 23(g) factors:

(i) the work counsel has done in identifying or investigating potential claims in this action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). Proposed Class Counsel, Miller Shah LLP (“Miller Shah”) and Capozzi Adler, P.C. (“Capozzi Adler” and, with Miller Shah, “Class Counsel”), are exceedingly

qualified under these factors. *See* Berin Decl. ¶¶ 5, 6. Class Counsel have leveraged their experience and resources to vigorously pursue recovery on behalf of the Plan and protect the interests of all Class Members, including by comprehensively investigating the claims forming the basis of the Action, filing detailed pleadings, briefing the motion to dismiss, and reviewing meaningful document productions. *Id.* ¶¶ 5, 7, 9. Class Counsel also have extensive experience litigating and overseeing the administration of settlements in ERISA fiduciary breach actions. *See id.* ¶ 5; *see also Clark*, No. 22-10068-DPW, ECF No. 61, at 3 (appointing Miller Shah and Capozzi Adler as class counsel in connection with an ERISA fiduciary breach class action settlement based on finding that the firms are experienced and qualified to represent the class); *Hochstadt*, 708 F. Supp. 2d at 107 (appointing class counsel experienced with ERISA actions); *Glass Dimensions*, 285 F.R.D. at 179 (explaining that class counsel must be “qualified, experienced, and able to vigorously conduct the proposed litigation.”). Class Counsel will continue to leverage their experience and resources on behalf of the Settlement Class through final resolution. The Court should appoint Miller Shah and Capozzi Adler as Class Counsel.⁴

II. THE SETTLEMENT, NOTICE PLAN, AND PLAN OF ALLOCATION WARRANT PRELIMINARY APPROVAL

The first step in approving any proposed class action settlement is preliminary approval. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 58 (D. Mass. 2005). At this stage, the Court reviews the proposed settlement to determine whether it is within the “range of reasonableness,” *id.*, and whether, taken as a whole, it is “fair, adequate and reasonable.” *Durrett*, 896 F.2d at 604 (1st Cir. 1990). The analysis begins with the premise that there is generally a presumption in favor of the settlement if the parties negotiated at arm’s-length and were sufficiently informed about the

⁴Whatley Kallas, LLP, which also has significant experience litigating ERISA class actions and has been serving Plaintiffs and the Plan in a local counsel capacity since the inception of the Class Action, should be appointed local counsel for the Settlement Class.

strengths of the claims and defenses and risks of continued litigation. *See Hochstadt*, 708 F. Supp. 2d at 107 (citing *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 32–33); *see also City P’ship Co.*, 100 F.3d at 1043 (“the law favors class action settlements”).

A. The Settlement Should be Preliminarily Approved

The First Circuit has enumerated various factors to consider in the preliminary approval analysis: “Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration.” *In re Relafen*, 231 F.R.D. at 72 (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003)). The most important factor is the “likelihood of success,” or “the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement.” *Schlusselberg v. Colonial Mgmt. Assoc., Inc.*, 389 F.Supp. 733, 735 (D. Mass. 1974). Courts are mindful that settlements are born out of compromise. *See Rolland v. Cellucci*, 191 F.R.D. 3, 15 (D. Mass. 2000).

In evaluating the first factor, the Court should also weigh the considerations listed in the sixth factor: the potential “risk, complexity, expense and duration” of the litigation. *In re Relafen*, 231 F.R.D. at 72. At the time the Parties agreed to the Settlement, they were engaged in vigorous litigation and further litigation promised to be lengthy and complex, involving numerous competing experts on liability issues concerning Plaintiffs’ claims and Defendants’ defenses, as well as the Plan’s alleged losses. The Parties likely would have filed dispositive motions and pretrial motions, including motions concerning the anticipated expert testimony. Thus, Plaintiffs faced meaningful challenges to their ability to obtain a recovery on behalf of the Plan, which strongly supports preliminary approval of the Settlement. *See Rolland*, 191 F.R.D. at 9 (approving

a settlement when it was “doubtful that Plaintiffs could have obtained relief at trial in the comprehensive and detailed manner ... [of the] the Settlement Agreement.”).

Plaintiffs and Class Counsel have achieved a favorable Settlement, including prospective relief for the Plan to bolster the fiduciaries’ investment and service provider monitoring processes, and have relieved the Class of the burdens and risks of further litigation. *See id.* at 10 (“When comparing the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation, there are clearly strong arguments for approving a settlement.”) (internal quotations and citation omitted). Here, the range of realistic and supportable damages ranged from \$5,375,238 to \$23,940,533 (depending on the damages methodology employed), Berin Decl. ¶ 10, and the recovery, therefore, amounts to 64.8% of the mid-point of potentially recoverable damages in this case—an excellent recovery under the circumstances. *See, e.g., In re Relafen*, 231 F.R.D. at 74 (approving a settlement representing “approximately 26% or 55% of the alleged damages” as calculated by opposing experts); *Clark*, No. 22-10068-DPW, ECF No. 61 (granting preliminary approval to a settlement representing 42.5% of the mid-point of potentially recoverable damages); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (approving a \$3.6 million settlement of an ERISA class action with plan losses estimated to be between \$7.5 million and \$111 million); *Hochstadt*, 708 F. Supp. 22d at 109 (approving settlement amounting to 27% of conservatively estimated loss in ERISA class action); *Bezdek*, 79 F. Supp. 3d at 345–46 (approving settlement providing relief amounting to 9% of the alleged price premium measure of damages). The Settlement provides substantial monetary relief, as well as meaningful non-monetary relief related to the ongoing management and administration of the Plan, which this Court has recognized as “a meaningful component of a settlement agreement.” *Bezdek*, 79 F. Supp. 3d at 346. The non-monetary relief directly addresses

the breaches of fiduciary duty alleged in the Class Action and would minimize the risk of future losses to the Plan. The non-monetary relief, thus, provides significant value above and beyond the monetary relief afforded by the Settlement. Accordingly, the first and sixth *Relafen* factors favors preliminary approval of the Settlement.

The second factor in the preliminary approval inquiry is opposition to the settlement, but as the Parties have not yet sent the notice, “the only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to . . . object to its terms at the Final Fairness Hearing.” *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010). The Court will have the opportunity to more comprehensively review the Settlement Class’s reception to the Settlement at the Fairness Hearing. Moreover, the report of the Independent Fiduciary will provide an additional touchstone for the Court’s review of this factor at the final approval stage.

The third factor courts in this Circuit consider is the “stage of the litigation and the amount of discovery completed.” *In re Relafen*, 231 F.R.D. at 73. This proposed Settlement Agreement comes after the parties substantially completed fact discovery, including the production of thousands of pages of documents and depositions of fact witnesses, allowing them to comprehensively evaluate the strengths and weaknesses of the action. Indeed, Class Counsel has extensively developed Plaintiffs’ claims on behalf of the Plan and Settlement Class. *See Hochstadt*, 708 F. Supp. 2d at 107 (explaining that “the applicable standard” asks “whether the parties conducted sufficient discovery to make an intelligent judgment about settlement.”).

Class Counsel conducted substantial investigation and analysis of Plaintiffs’ claims, commencing even before the filing of the initial pleading, and, throughout the course of the litigation and settlement efforts, reviewed and analyzed documents pertaining to the Plans’

administration and Defendants' fiduciary process, including, *inter alia*, chartering documents of the fiduciary committee, meeting minutes, materials provided to the committee to support its decision-making, disclosures by service providers, and disclosures made to participants in the Plans. *See* Berin Decl. ¶¶ 7, 11. Additionally, the Parties conducted numerous depositions of Committee members and sought discovery from service providers to the Plan. *Id.* The Parties also exchanged confidential information related to the claims and defenses at issue in the Class Action, and the Plan's alleged losses, in connection with the mediations. *See id.* Given this information, it is Class Counsel's opinion that the Settlement is fair, reasonable, and adequate to the Settlement Class. *See Hochstadt*, 708 F. Supp. 2d at 108 (granting preliminary approval to settle a case "at a stage where both the court and counsel are able to evaluate the merits of the claims."). Class Counsel have significant experience litigating ERISA breach of fiduciary duty actions, and the materials produced by Defendants enabled Class Counsel to meaningfully evaluate the merits of Plaintiffs' claims and assess the risks of continued litigation.

Finally, for the fourth and fifth factors (the opinion of competent counsel and the conduct of negotiations), Courts consider class counsel's background and whether the settlement is the result of "negotiation that occurred at arm[']s[-]length." *In re Lupron Mktg. and Sales Prac. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004). The Settlement is the product of an extensive arm's-length process involving an experienced neutral mediator. Berin Decl. ¶ 8. Further, Class Counsel and Defendants' counsel are experienced in complex ERISA litigation, thoroughly understand the factual and legal issues involved in the Class Action, and believe the Settlement is fair and reasonable. *Id.* ¶ 5. Therefore, the fourth and fifth factors weigh in favor of Settlement approval. *See Rolland*, 191 F.R.D. at 10; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims,

their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.”); *Hochstadt*, 708 F. Supp. 2d at 107 (granting preliminary approval based on finding of arm’s-length negotiations).

The Settlement is the product of vigorous litigation and arm’s-length negotiation by experienced and well-informed counsel, and it provides significant relief to the Settlement Class. The Court should find the Settlement is fair, reasonable, and adequate, and warrants approval.

B. The Notice Plan Should be Preliminarily Approved

The Court should approve the proposed Notice Plan. Due process and Rule 23(e) do not require that each Class Member receive notice, but rather that class notice be “reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). “Individual notice must be provided to those class members who are identifiable through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

The Notice Plan is designed to reach as many Settlement Class members as possible. The Settlement Notice will be sent by e-mail and/or first-class mail to the last known address of each Settlement Class member prior to the Fairness Hearing. All Class Members had Plan accounts, so the Plan’s recordkeeper has their addresses and other identifying information. Additionally, the Notice, Settlement Agreement, and other litigation documents will be posted on a website, and the Settlement Administrator will establish and monitor a toll-free number for Class Member inquiries. The Notice will also provide Class Counsels’ contact information. Finally, the Notice Plan clearly describes: (i) the terms and operation of the Settlement; (ii) the nature and extent of the Released Claims; (iii) the attorneys’ fees, litigation expenses, and case contribution award that may be sought; (iv) the procedure and timing for objections; and (v) subject to the Court’s schedule, the date and location of the Fairness Hearing. *See Hochstadt*, 708 F. Supp. 2d at 110 (finding a

proposed notice providing “background information on the ERISA Actions, accurately recit[ing] the legal rights and options of the Settlement Class and fully explain[ing] the Revised Plan of Allocation” to be appropriate). The Notice Plan clearly describes: (i) the terms and operation of the Settlement; (ii) the nature and extent of the Released Claims; (iii) the maximum attorneys’ fees, litigation expenses, and case contribution award that may be sought; (iv) the procedure and timing for objections; and (v) the date and location of the Fairness Hearing. Thus, the Notice Plan satisfies all due process considerations and meets the requirements of Rule 23(e).

C. The Plan of Allocation Should be Preliminarily Approved

The Plan of Allocation provides recovery to members of the Settlement Class on a *pro rata* basis, with no preferential treatment for Plaintiffs or any segment of the Settlement Class. This is substantially similar to plans approved by courts in analogous ERISA litigation. *See, e.g., Clark*, No. 22-10068-DPW, ECF No. 61 (finding settlement and plan of allocation warranted distribution of notice at preliminary approval stage); *Barcenas v. Rush Univ. Med. Ctr.*, No. 1:22-cv-00366, ECF No. 73 (N.D. Ill. Jan. 19, 2023); *Blackmon v. Zachary Holdings, Inc.*, No. 5:20-cv-00988-ESC, ECF No. 83 (W.D. Tex. Aug. 5, 2022); *Jones v. Coca-Cola Consolidated Inc.*, No. 3:20-cv-00654-FDW-DSC, ECF No. 98 (W.D.N.C. Aug. 2, 2022); *Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, ECF No. 268 (N.D. Cal. Sept. 8, 2020). The Plan of Allocation is consistent with ERISA’s obligation to treat plan participants alike, and obviates any potential intraclass conflicts. In addition, members of the Settlement Class with active accounts in the Plan will receive distributions of settlement proceeds to which they are entitled automatically in their Plan accounts. At bottom, the Plan of allocation treats Settlement Class members equitably and should be found to be fair, reasonable, and adequate.

CONCLUSION

Plaintiffs respectfully submit the Motion should be granted in its entirety.

DATED: August 24, 2023

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1(a)(2), I certify that I conferred in good faith with counsel for Defendants prior to filing this Motion. Counsel for Defendants stated that Defendants do not oppose the Motion.

/s/ Alec J. Berin _____
Alec J. Berin

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, I caused the foregoing document to be electronically filed with the Clerk of Court, and upon the counsel of record using the CM/ECF system.

/s/ Alec J. Berin _____

Alec J. Berin