UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Rita Kohari, John Radolec, and Mohani Jaikaran, individually and as representatives of a class of similarly situated persons, and on behalf of the MetLife 401(k) Plan (f/k/a the Savings and Investment Plan for Employees of Metropolitan Life and Participating Affiliates),

Plaintiffs,

v.

MetLife Group, Inc., Metropolitan Life Insurance Company, the MetLife Group Benefit Plans Investment Advisory Committee, the Employee Benefits Committee of MetLife Group, Inc., and John and Jane Does 1-20,

Defendants.

Case No. 1:21-cv-6146-JHR

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs, who are current and former participants in the MetLife 401(k) Plan ("Plan"), have sued the MetLife Defendants[1] for how they managed the Plan. Under ERISA,[2] Defendants are subject to "fiduciary obligations" to the Plan and its participants that are "the highest known to the law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), including the obligation to act "solely in the interest of the participants and beneficiaries," and to exercise "care, skill, prudence, and diligence" in managing the Plan's assets. 29 U.S.C. § 1104(a)(1). Defendants failed to live up to these obligations when they stocked the Plan's investment menu with their own proprietary index funds. This enabled MetLife[3] to collect millions in fees from these funds and reap millions more in tax benefits. Meanwhile, participants got the short end of the stick as these expensive proprietary funds depleted millions of dollars from their retirement savings.

Plaintiffs now bring this motion for class certification requesting that the Plan's participants receive the same opportunity for class-wide relief that courts routinely grant to plan participants in similar cases. ERISA gives participants the statutory right to bring suit in a representative capacity on behalf of a retirement plan. *See* 29 U.S.C. §§ 1109, 1132(a)(2). Thus, these cases are "a paradigmatic example of" a Rule 23(b)(1) class. *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012) (internal quotation omitted). Numerous courts in this district (and across the country) have granted class certification in similar single-plan ERISA cases involving breach of fiduciary duty claims.[4] In fact, it has become increasingly common for

[1] The named Defendants in this case are MetLife Group, Inc. ("MetLife Group"), Metropolitan Life Insurance Company ("Metropolitan Life"), the MetLife Group Benefit Plans Investment Advisory Committee ("Investment Advisory Committee"), and the Employee Benefits Committee of MetLife Group, Inc. ("Employee Benefits Committee"), (collectively, "Defendants").

[2] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[3] MetLife Group, Metropolitan Life, and their affiliates are collectively referred to herein as "MetLife."

[4] *See Falberg v. Goldman Sachs Grp., Inc.*, No. 19 Civ. 9910, 2022 WL 538146, at *1 (S.D.N.Y. Feb. 14, 2022), *appeal denied sub nom. Goldman Sachs 401(k) Plan Ret. Comm. v. Falberg*, No. 22-404, 2022 WL 4126112 (2d Cir. June 29, 2022); *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2019 WL 275827 (S.D.N.Y. Jan. 22, 2019),

defendants to either stipulate to class certification or to not oppose such motions in these types of cases.[5]

This case is no exception, as the requirements for class certification under Fed. R. Civ. P. 23 are easily satisfied. With regard to Rule 23(a): (1) The thousands of class members are too numerous to join; (2) Plaintiffs' claims involve several questions related to how Defendants managed the Plan as a whole, which are common to the class; (3) Plaintiffs' claims are typical of the class because their injuries arise out of Defendants' Plan-wide conduct and their claims arise from the same legal theories as the class; and (4) Plaintiffs are adequate to represent the class because they are actively involved and have no conflicts with other class members, and they have

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reconsideration denied, No. 16 Civ. 6524, 2021 WL 964417 (S.D.N.Y. Mar. 15, 2021); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 17-CV-563, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Cates v. Trs. of Columbia Univ. in the City of N.Y.*, 1:16-cv-06524, ECF No. 210 (S.D.N.Y. Nov. 13, 2018); *Sacerdote v. N.Y. Univ.*, No. 16-cv-6284, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145 (S.D.N.Y. 2017); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936, 2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017), *appeal denied*, 2017 WL 6506349 (2d Cir. Dec. 19, 2017); *In re Marsh ERISA Litig.*, 265 F.R.D. 128 (S.D.N.Y. 2010); *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004); *Koch v. Dwyer*, No. 98 Civ. 5519, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001); *see also Boley v. Universal Health Servs., Inc.*, No. 20-2644, 2021 WL 859399 (E.D. Pa. Mar. 8, 2021); *Pizarro v. Home Depot, Inc.*, No. 1:18-cv-01566, 2020 WL 6939810 (N.D. Ga. Sept. 21, 2020); *Vellali v. Yale Univ.*, No. 3:16-cv-1345, 2019 WL 5204456 (D. Conn. Sept. 24, 2019); *Cassell v. Vanderbilt Univ.*, No. 3:16-cv-2086, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Tracey v. MIT*, No. 16-11620, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Henderson v. Emory Univ.*, No. 1:16-cv-2920, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Fuller v. SunTrust Banks, Inc.*, No. 1:11-cv-784, 2018 WL 3949698 (N.D. Ga. June 27, 2018); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Clark v. Duke Univ.*, No. 1:16-cv-1044, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Daugherty v. Univ. of Chi.*, No. 17-C-3736, 2018 WL 1805646 (N.D. Ill. Jan. 10, 2018); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017); *Wildman v. Am. Century Servs., LLC*, No. 4:16-cv-00737, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *Cryer v. Franklin Templeton Res., Inc.*, No. C 16-4265, 2017 WL 4023149 (N.D. Cal. July 26, 2017); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, 2017 WL 2655678 (C.D. Cal. June 15, 2017); *Rozo v. Principal Life Ins. Co.*, No. 4:14-cv-000463, 2017 WL 2292834 (S.D. Iowa May 12, 2017); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825, ECF No. 88 (D. Mass. Dec. 13, 2016) (text order); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559 (D. Minn. 2014); *In re Northrup Grumman Corp. ERISA Litig.*, No. CV 06-06213, 2011 WL 3505264 (C.D. Cal. Mar. 29, 2011); *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59 (M.D.N.C. 2008); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102 (N.D. Cal. 2008); *Tussey v. ABB, Inc.*, No. 06-04305-CV, 2007 WL 4289694 (W.D. Mo. Dec. 3, 2007);

[5] *See Cunningham v. Wawa, Inc.*, 387 F. Supp. 3d 529 (E.D. Pa. 2019); *Wehner v. Genentech, Inc.*, No. 3:20-cv-06894-RS, ECF No. 98 (N.D. Cal. Sept. 22, 2022); *Johnson v. The PNC Financial Servs. Grp., Inc.*, No.2:20-cv-1493-CCW, ECF No. 80 (W.D. Pa. Sept. 16, 2022); *In re Medstar ERISA Litig.*, No. 1:20-cv-01984-DLB, ECF. 64 (D. Md. July 12, 2022); *Reetz v. Lowe's Cos., Inc.*, No. 5:18-cv-00075, ECF 97 (W.D.N.C. Nov. 5, 2020); *Velazquez v. Mass. Fin. Srvs. LLC*, No. 1:17-cv-11249, ECF No. 94 (D. Mass. June 25, 2019); *Feinberg v. T. Rowe Price Group, Inc.*, No. 1:17-cv-00427, ECF 83 (D. Md. May 17, 2019); *Moitoso v. FMR LLC*, No. 1:18-cv-12122, ECF No. 83 (D. Mass. May 7, 2019); *Pledger v. Reliance Tr. Co.*, No. 1:15-cv-4444, Dkt. No. 101 (N.D. Ga. Nov. 7, 2017); *accord Baker v. John Hancock Life Ins. Co.*, No. 1:20-cv-10397, Dkt. No. 53 at 1 (D. Mass. Feb. 12, 2021) (noting that "Defendants do not oppose Plaintiffs' motion for class certification").

retained class counsel experienced in ERISA class-action litigation. Further, class certification under Rule 23(b)(1) is necessary to: (A) avoid creating incompatible standards of conduct for how Defendants manage the Plan; and (B) protect absent class members' interests as adjudicating claims on an individual basis would, as a practical matter, be dispositive of other class members' interests of other class members (or, at least, substantially impair their ability to bring separate claims). Accordingly, Plaintiffs respectfully request that the Court certify the proposed class.

BACKGROUND

I. PLAINTIFFS HAVE PARTICIPATED IN ONE OF THE LARGEST 401(K) PLANS IN THE COUNTRY.

The Plan is a 401(k) plan that covers eligible employees of MetLife and certain affiliates. *See, e.g.*, *Declaration of Brock Specht* ("*Specht Decl.*") *Ex. 1 at 165696* (2021 Plan Form 5500); [redacted] Since 2015, the Plan has had between 33,000 and 42,000 participants and has held between approximately $6.4 billion and $7.3 billion in participants' retirement savings. *See, e.g.*, *Specht Decl. Ex. 1 at 165621 (line 6g), 165683 (line 1l)*; *Specht Decl. Ex. 3 at 165536 (line 6g), 165598 (line 1l)* (2020 Plan Form 5500); *Specht Decl. Ex. 4 at 165342 (line 6g), 165408 (line1l)* (2019 Plan Form 5500); *Specht Decl. Ex. 5 at 165434 (line 6g), 165500 (line 1l)* (2018 Plan Form 5500); *Specht Decl. Ex. 6 at 165257 (line 6g), 165319 (line 1l)* (2017 Plan Form 5500); *Specht Decl. Ex. 7 at 165166 (line 6g), 165232 (line 1l)* (2016 Plan Form 5500); *Specht Decl. Ex. 8 at 165070 (line 6g), 165140 (line 1l)* (2015 Plan Form 5500). With this, the Plan ranks among the largest 401(k) plans in the country: the 113th largest out of a total of 739,905 401(k) plans. *See Specht Decl. Ex. 9* (BrightScope Plan Export). The Plan's investment menu consists of nine investments—eight of which are "proprietary" funds managed by MetLife—and a self-directed brokerage account. *See Specht Decl. Ex. 1 at 165696-*

165697, 165705; [redacted].

This lawsuit challenges Defendants' selection and retention of all seven of the Plan's proprietary index funds ("MetLife Index Funds").[7] Plaintiffs Rita Kohari, John Radolec, and Mohani Jaikaran are current and former plan participants that have been invested in the MetLife Index Funds during the relevant period. *See Declaration of Rita Kohari* ("*Kohari Decl.*") ¶¶ *2-3*; *Declaration of John Radolec* ("*Radolec Decl.*") ¶¶ *2-3*; *Declaration of Mohani Jaikaran* ("*Jaikaran Decl.*") ¶¶ *2-3*.

II. DEFENDANTS SERVE AS THE PLAN'S ERISA FIDUCIARIES.

[redacted]. But the Employee Benefits Committee has further delegated responsibility for all of its Plan "administrative responsibilities" to the Plan Administrator. Deposition of Andrew Bernstein[9] ("Bernstein Depo.") Ex. 3, *Specht Decl. Ex. 14 at 54741* (MetLife Employee Benefits Committee

[6] Kevin Liau was a Pension Investment Unit member from July 2015 to May 2022. *See Specht Decl. Ex. 11* (Defs' First Supplemental Responses to Plfs' First Set of Interrogatories) at Response No. 1.

[7] The MetLife Index Funds are the MetLife Bond Index Fund, Balanced Index Fund, Large Cap Equity Index Fund, Large Cap Value Index Fund, Large Cap Growth Index Fund, Mid Cap Equity Index Fund, and Small Cap Equity Index Funds. *Am. Compl.*, ECF No. 53, ¶ 5. In addition to being a stand-alone option on the Plan's menu, the MetLife Bond Index Fund is also one of the underlying funds that make up the MetLife Fixed Income Fund, which is also included on the Plan's investment menu. *Id.* at n.6.

[8] Nancy Mueller Handal has been an Investment Committee member from July 2015 to the present. *See Specht Decl. Ex. 11 at Response No. 1.*

[9] Andrew Bernstein has been the Plan Administrator from February 2017 to the present. *See Specht Decl. Ex. 11 at Response No. 1.*

Designation of and Delegation of Responsibilities to Administrator). [redacted]

[redacted]; *see also* Handal Depo. *Specht Decl. Ex. 16 at 47:12-16.*[10]

III. DEFENDANTS FAVORED THE METLIFE INDEX FUNDS AT PARTICIPANTS' EXPENSE.

A. If Defendants had selected lower cost, non-proprietary index funds for the Plan, participants would have retained a significant amount of their retirement savings.

An index fund is a passively managed, pooled-investment product designed to mirror the performance of a particular benchmark index, such as the S&P 500 Index or the Russell 2000 Index, among many others. *See* United States Securities and Exchange Commission, Office of Investor Education and Advocacy, *Investor Bulletin: Index Funds* (Aug. 6, 2016).[11] The index fund marketplace is highly competitive, with many reputable companies offering index funds that track benchmark indices with a high degree of precision, while charging very low fees. *Am. Compl.*, ECF No. 53, ¶ 46.

MetLife is not a leading manager of index funds, as many of its products are not competitive on the open market. The MetLife Index Funds cost several times more than otherwise identical index funds that were offered by leading index fund managers such as BlackRock,

[10] (Q: "Currently, EBCs authority for day-to-day administration of the plan has been delegated to the Plan Administrator and IACs authority for Plan's investments has been delegated to the Pension Investment Unit. Is that accurate?" A. "That is accurate.").

[11] Available at: https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-26.

Northern Trust, State Street, Vanguard, and Fidelity. *Id.* ¶ 47. And the MetLife Index Funds also tend to do an inferior job of tracking their underlying index. *Id.* ¶ 50. As a result, while many of the index funds offered by the managers listed above are commonly used in other large 401(k) plans, MetLife's share of the market for index funds is a small fraction of the leading managers. *Id.* ¶¶ 47, 51. With the Plan holding more than $2 billion in index fund assets at all times during the relevant period, Defendants could have negotiated competitive rates with these leading index fund managers in line with other similarly sized plans. *Id.* ¶ 46. Overall, the use of the MetLife Index Funds has resulted in significant losses for participants, as each index fund underperformed comparable alternatives by roughly the difference in costs. *Id.* ¶ 49.

B. Defendants never considered removing the MetLife Index Funds from the Plan because MetLife benefitted from this arrangement.

MetLife benefitted in at least two ways from keeping the MetLife Index Funds in the Plan. First, MetLife collected significant fees tied to Plan's investment in the MetLife Index Funds. *See* [redacted]. Second, Defendants claimed over $7.6 million through a tax deduction (called the dividend received deduction) on the dividends received on the assets owned by MetLife on the Plan's behalf. *See Specht Decl. Ex. 11 at First Supplemental Response No. 5* (showing that Defendants claimed $7,696,744 in dividend received deductions related to the MetLife Index Funds for 2016 through 2021). If Defendants had not selected and retained the MetLife Index Funds in the Plan, MetLife would have collected significantly less money from fees and tax benefits.

Because of these benefits, Defendants allowed the expensive MetLife Index Funds to reside in the Plan for years without appropriate scrutiny. [redacted]

[redacted]

[redacted]; *Specht Decl. Ex. 16 at* 62:17-63:7; Bernstein Depo. *Specht Decl. Ex. 18 at 27:18-30:19, 64:21-65:8*. But, despite their high fees, the Investment Advisory Committee never considered removing any of the MetLife Index Funds from the Plan or firing MetLife as the investment manager for the index funds. *See Specht Decl. Ex. 16 at 119:14-16, 120:7-9, 120:23-25, 122:15-18, 123:5-22, 124:17-19, 125:10-12, 125:22-24* (testifying that the Investment Advisory Committee never discussed removing any of the MetLife Index Funds from the Plan other than swapping out the MetLife Small Cap Equity Fund for the MetLife Small Cap Equity Index Fund). The Pension Investment Unit also never formally investigated hiring a different investment manager for the Plan's index funds. *See* Liau Depo. *Specht Decl. Ex. 19 at 95:22-96:6* ("While I was at MetLife, we did not have a formal -- we did not launch any formal process to find another manager."). Similarly, the Plan Administrator never discussed with anyone whether MetLife should be removed as the investment manager for the index funds. *See Specht Decl. Ex. 18 at 54:3-6*.

And, in general, Defendants lacked formal processes for managing the Plan. For example, Defendants failed to establish an Investment Policy Statement ("IPS") for the Plan until 2020. *See Specht Decl. Ex. 20* (April 1, 2020 Investment Policy Statement). This is highly unusual for a large retirement plan. *See Trial Decl. of Marcia Wagner, Moreno v. Deutsche Bank Americas Holding*

Corp., No. 1:15-cv-09936, Dkt No. 250-11 at ¶ 12 (S.D.N.Y. June 7, 2018) ("[T]he process and criteria for investment selection and monitoring will generally be stated in a document called the Investment Policy Statement ("IPS") which is treated as one of a plan's governing instruments. Because of the complexity of investment decisions, the majority of plan committees, and almost all large plan 401(k) committees, make use of an IPS to ensure that their decisions are compliant from a fiduciary perspective." (internal footnote omitted)); *Vellali*, 2022 WL 13684612, at *19 ("[I]t is an accepted practice in the industry to have an investment policy statement to guide investment review." (internal quotation omitted)).

Another example of MetLife's deficient processes is the Plan's relationship with an internal MetLife entity called Retirement Income Solutions. For approximately two decades, Retirement Income Solutions provided the Plan with administrative and trustee services. [redacted]; Deposition of Graham Cox ("Cox Depo.")[12] *Specht Decl. Ex. 21 at 142:12-144:4, 153:2-154:5.* [redacted]

C. When Defendants were forced to make a change, participants saved millions of dollars in fees.

Around the time of the audit, Retirement Income Solutions decided it would no longer

[12] Graham Cox has been an Employee Benefits Committee Member from July 2015 to the present. *Specht Decl. Ex. 11 at Response No. 1.*

provide administrative and trustee services to the Plan. *See Specht Decl. Ex. 21* at 155:19-25, *157:19-158:2*; *Specht Decl. Ex. 16* at 92:4-23. As a result, eight of the nine investment options—including all of the MetLife Index Funds—were transferred from their former group annuity contract structure to a new collective investment trust structure [redacted]. *See* [redacted]; *Specht Decl. Ex. 16 at* 95:23-96:9; *Specht Decl. Ex. 21* at 176:8-18. [redacted]. If Defendants had prudently and loyally monitored the fees before this, they would have recognized the need to make this change much sooner.

IV. PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on July 19, 2021, alleging that Defendants breached their ERISA fiduciary duties by imprudently and disloyally favoring their expensive proprietary index funds. *ECF No. 1*. On October 6, 2021, Defendants moved to dismiss the Complaint. *ECF No. 34*. The Court denied Defendants' motion to dismiss on August 1, 2022. *ECF No. 44*. Plaintiffs filed an Amended Complaint (the operative complaint) adding the Employee Benefits Committee as a defendant and adding information regarding the Bond Index Fund, *ECF No. 53*, and Defendants answered the Amended Complaint on September 30, 2022, *ECF No. 60*.

V. NATURE OF ACTION AND SCOPE OF THE PROPOSED CLASS

Plaintiffs bring this action on behalf of the Plan under 29 U.S.C. § 1132(a) to recover losses to the Plan under 29 U.S.C. § 1109(a) and obtain other appropriate relief under ERISA. *See ECF No. 53 ¶ 11*. Plaintiffs assert claims against Defendants for breaching their fiduciary duties of loyalty and prudence (Count One); and against MetLife Group, Metropolitan Life, and the

Employee Benefits Committee for failing to monitor fiduciaries (Count Two). Plaintiffs assert these claims on behalf of the following class:

> All participants and beneficiaries of the MetLife 401(k) Plan who were invested in the MetLife Index Funds at any time on or after July 19, 2015, excluding any persons with responsibility for the Plan's investment or administrative functions.

Id. ¶ *55.*

ARGUMENT

I. STANDARD OF REVIEW

District courts have "broad discretion" to certify a proposed class and traditionally take a "liberal rather than restrictive" approach in determining whether Rule 23's requirements are met. *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405, 2013 WL 12224042, at *7 (S.D.N.Y. July 12, 2013) (quotations omitted). Indeed, the Second Circuit has cautioned that "'if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.'" *In re MF Glob. Holdings Ltd. Inv. Litig.*, No. 11 Civ. 7866, 2015 WL 4610874, at *3 (S.D.N.Y. July 20, 2015) (quoting *Green vs. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968)). While district courts must conduct a "rigorous analysis" of Rule 23's requirements, *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12 Civ. 0256, 2017 WL 3608298, at *3 (S.D.N.Y. Aug. 22, 2017) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)), "Rule 23 grants courts no license to engage in free-ranging merits inquiries," *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013). "The dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met." *Jacobs v. Verizon Comms., Inc.*, No. 16 Civ. 1082, 2020 WL 5796165, at *8 (S.D.N.Y. Sept. 29, 2020) (quotation omitted). Plaintiffs here have met these requirements.

II. THE COURT SHOULD CERTIFY THE PROPOSED CLASS.

A. The Proposed Class Satisfies Rule 23(a).

Rule 23(a) sets forth four requirements applicable to all class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a). Each of these criteria are satisfied here.

1. The thousands of class members are too numerous to join.

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The Second Circuit has held that 'numerosity is presumed at a level of 40 members[.]'" *Hicks v. Cannon Corp.*, 35 F. Supp. 3d 329, 351 (W.D.N.Y. 2014) (quoting *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995)). Here, the total number of participants invested in the MetLife Index Funds from July 19, 2015 to the present is 27,275. *Specht Decl. ¶ 15; Specht Decl. Ex. 11 at First Supplemental Response No. 6.* With thousands of potential class members, Plaintiffs far exceed the threshold for numerosity.

2. Plaintiffs' claims involve several questions related to how Defendants managed the Plan as a whole, which are common to the class.

Commonality requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This is a "low hurdle[.]" *Cunningham*, 2019 WL 275827, at *5 (quoting *Mcintire v. China MediaExpress Holdings, Inc.*, 38 F. Supp. 3d 415, 424 (S.D.N.Y. 2014)). "Commonality does not demand that every question of law or fact be common to every class member, but instead merely requires that the claims arise from a common nucleus of operative facts." *In re Marsh ERISA Litig.*, 265 F.R.D at 142. Thus, "[c]ourts have generally construed the commonality requirement liberally and require that only one issue be common to all class members." *Odom v. Hazen Transp., Inc.*, 275 F.R.D. 400, 407 (W.D.N.Y. 2011); *see also Beach*, 2019 WL 2428631, at *6 (individual issues do "not defeat class certification when the underlying

harm derives from the same common contention — that the investment lineup made available to all participants violated ERISA" (quotation omitted)). "In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *Cunningham*, WL 275827, at *5. Thus, "[b]y their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as class actions." *In re Marsh ERISA Litig.*, 265 F.R.D. at 142-43.

Plaintiffs' claims here are no exception as they relate to how Defendants managed the Plan as a whole. Several common questions of law and fact exist as to all class members, including but not limited to: (1) Whether Defendants are fiduciaries with respect to the Plan; (2) Whether Defendants breached their fiduciary duty of loyalty by improperly selecting and retaining the MetLife Index Funds to benefit themselves at plan participants' expense, (3) Whether Defendants breached their duty of prudence by failing to properly monitor and remove the MetLife Index Funds; (4) Whether Defendants' breaches injured the Plan and its participants and beneficiaries; (5) The proper form of equitable and injunctive relief; (6) The proper measure of monetary relief.[13] Resolution of these issues "would not only generate answers applicable to all class members, but would also address the heart of the claims at issue in this litigation." *Leber*, 323 F.R.D. at 160. "Ultimately, because the fiduciaries allegedly owed and breached duties to the Plan[]—not to individuals—commonality must be satisfied." *Sacerdote*, 2018 WL 840364, at *3.

[13] *See Leber*, 323 F.R.D. at 160 (finding commonality where there were "at least two questions that are capable of classwide resolution: whether defendants improperly favored proprietary funds in order to benefit [themselves] at the expense of Plan participants, and whether defendants failed to prudently and loyally monitor the Plan's investments." (internal citations omitted)); *Falberg*, 2022 WL 538146, at *7 (same); *Beach*, 2019 WL 2428631, at *6 ("Here, the questions of law and fact — including '(1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages' — are 'common questions [that] satisfy Plaintiffs' burden under Rule 23(a)(2).'" (quoting *In re Marsh ERISA Litig.*, 265 F.R.D. at 143)); *Moreno*, 2017 WL 3868803, at *5 ("[N]umerous questions [] are capable of classwide resolution, such as whether each Defendant was a fiduciary; [and] whether Defendants' process for assembling and monitoring the Plan's menu of investment options, including the proprietary funds, was tainted by a conflict of interest or imprudence[.]").

3. Plaintiffs' claims are typical of the class because their injuries arise out of Defendants' Plan-wide conduct and their claims arise from the same legal theories as the class.

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality does not require that "the factual background of each named plaintiff's claim be identical to that of all class members," *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999), but only that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability," *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quotation omitted). Like commonality, "[t]he Typicality Requirement is 'not demanding.'" *In re MF Glob. Holdings Ltd. Inv. Litig.*, 2015 WL 4610874, at *5 (quoting *Tsereteli v. Residential Asset Securitization Trust 2006*–A8, 283 F.R.D. 199, 208 (S.D.N.Y. 2012)).

Here, Plaintiffs' claims are typical of the class because their injuries arise out of Defendants' Plan-wide conduct and their claims are based on identical legal theories as the class. Plaintiffs do not base their claims on any facts unique to them or the funds they each invested in. Instead, Plaintiffs assert their claims on behalf of the Plan as a whole under 29 U.S.C. §§ 1109(a) and 1132(a), based on an overarching course of self-interested, imprudent conduct by Defendants that permeated the Plan's investment menu. To the extent that Defendants breached their duty of loyalty, that duty was breached with respect to the Plan as a whole. To the extent that Defendants lacked a prudent process for managing the Plan's investments, that process was also defective with respect to the Plan as a whole. So, the very nature of Plaintiffs' injuries and claims makes plain that typicality is satisfied here. *See Leber*, 323 F.R.D. at 162 (finding typicality where "both the named plaintiffs and the class members they seek to represent participated in the same Plan and

invested in proprietary funds" and were "subject to the same course of conduct by the same defendants in managing the Plan").

4. Plaintiffs are adequate to represent the class because they are actively involved and have no conflicts with other class members, and they have retained class counsel experienced in ERISA class-action litigation.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This entails inquiry as to whether: (1) Plaintiffs' interests are antagonistic to the interest of other members of the class; and (2) Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007). Both elements are satisfied here. First, Plaintiffs are not aware of any conflicts of interest with other class members. *Kohari Decl. ¶ 8*; *Radolec Decl. ¶ 8*; *Jaikaran Decl. ¶ 8*. They understand their duties as class representatives, and they will represent the interests of the class members as they would their own. *Kohari Decl. ¶¶ 6, 8*; *Radolec Decl. ¶¶ 6, 8*; *Jaikaran Decl. ¶¶ 6, 8*. Plaintiffs have also been actively involved in the case: (1) They have reviewed the Complaint and Amended Complaint; (2) They have provided documents and information in response to Defendants' discovery requests; (3) They have made themselves available to answer questions from counsel and to stay informed on the status of the action; and (4) They have each either already appeared for their depositions or have dates scheduled to appear for their depositions. *Kohari Decl. ¶ 5*; *Radolec Decl. ¶ 5*; *Jaikaran Decl. ¶ 5*. Plaintiffs are willing to undertake any responsibilities required of them as class representatives and are prepared to testify at trial if necessary. *Kohari Decl. ¶ 7*; *Radolec Decl. ¶ 7*; *Jaikaran Decl. ¶ 7*. Plaintiffs will therefore adequately represent the class.[14]

[14] *See Falberg*, 2022 WL 538146, at *9 (finding adequacy where plaintiff represented by Nichols Kaster "submitted a declaration attesting that he [w]as actively participated in the litigation to date, [wa]s unaware of any conflicts with the proposed class, underst[ood] his responsibilities as class representative, and w[ould] faithfully represent the interests of the class"); *In re Northrup Grumman Corp. ERISA Litig.*, 2011 WL 3505264, at *15 ("Here, the class

Second, Plaintiffs' counsel are well-qualified to vigorously prosecute the class's interests. The attorneys at Nichols Kaster "have a great deal of experience in handling class actions, particularly in cases alleging breach of fiduciary duty." *Falberg*, 2022 WL 538146, at *12. Indeed, "[Nichols Kaster] is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this." *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021). Nichols Kaster has achieved favorable rulings in many ERISA cases, including several orders granting class certification. *See Specht Decl.* ¶¶ *5-6*.

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

In addition to meeting the requirements of Rule 23(a), the proposed class also satisfies Rule 23(b)(1).[15] Under Rule 23(b)(1), a class may be certified if prosecution of separate actions by individual class members would create a risk of:

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1). Here, the elements of both Rule 23(b)(1)(A) and Rule 23(b)(1)(B) are satisfied. *Cf.* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:12 (6th ed.) (ERISA cases may be certified "under both (b)(1)(A) and (b)(1)(B) simultaneously.").

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representatives participated actively in discovery, met with counsel, sat for deposition, and reviewed the complaint before it was filed. … [They] testified that they would be willing to travel to Los Angeles to testify at trial if necessary. This kind of participation comports with what courts expect of class representatives.").

[15] Plaintiffs only address class certification under Rule 23(b)(1) because certification is proper under Rule 23(b)(1), and Rule 23(b)(3) is intended to address "situations in which class-action treatment is not as clearly called for as it is in Rule 23(b)(1) …" *Amchem Prod. V. Windsor*, 117 S. Ct. 2231, 2245 (1997). But in the event that further analysis is required, the proposed class also satisfies Rule 23(b)(3) because the common questions in this case "predominate" and class treatment is "superior." Fed. R. Civ. P. 23(b)(3).

1. The proposed class satisfies Rule 23(b)(1)(a).

The fiduciary duties imposed by ERISA § 404(a) are "duties with respect to a plan" that are intended to protect the "interest of the participants and beneficiaries" collectively. 29 U.S.C. § 1104. "The language of subdivision (b)(1)(A), addressing the risk of inconsistent adjudications, speaks directly to ERISA suits, because the defendant has a statutory obligation, as well as a fiduciary responsibility, to treat the members of the class alike." *Sacerdote*, 2018 WL 840364, at *6. Here, certification under Rule 23(b)(1)(A) is appropriate because "allowing multiple individual cases risks incompatible results and issues of administration of the Plan[] that may have inconsistent effects across all [P]laintiffs." *Cunningham*, 2019 WL 275827, at *8.

2. The proposed class satisfies Rule 23(b)(1)(b).

For similar reasons, class certification is also appropriate under Rule 23(b)(1)(B). The Advisory Committee Notes to Rule 23 expressly recognize that class certification is proper under Rule 23(b)(1)(B) in "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23, Adv. Comm. Note to 23(b)(1)(B); *see also Sacerdote*, 2018 WL 840364, at *6. Because resolution of Plaintiffs' claims regarding how Defendants managed the Plan will dispose of other participants' interests, class certification should be granted under Rule 23(b)(1)(B). *Falberg*, 2022 WL 538146, at *11; *see, e.g.*, Rubenstein, *supra*, at § 4:12 n.8 (collecting ERISA cases that have been certified under Rule 23(b)(1)(B)).

CONCLUSION

As Plaintiffs meet all the class certification requirements, Plaintiffs respectfully request that the Court grant their motion for class certification.

Respectfully Submitted,

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