UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHELLE BILELLO, KAR YEE S. LAW, EMANUELE CAROLEO and PALMER MCGUINNESS, individually and on behalf of all others similarly situated, Plaintiffs v. ESTEE LAUDER, INC., et al. Defendants	CIVIL ACTION NO.: 20-cv-4770 (JMF)
KATHY L. GANDY, et al., Plaintiffs v. ESTEE LAUDER, INC., et al. Defendants	CIVIL ACTION NO.: 20-cv-5779 (JMF) **The Honorable Jennifer L. Rochon**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF FORM AND MANNER OF CLASS NOTICE AND SCHEDULING OF FAIRNESS HEARING

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I. INTRODUCTION

Plaintiffs Kathy Gandy and Emanuele Caroleo (collectively "Plaintiffs"), by and through their undersigned counsel on behalf of the Estee Lauder Companies 401(k) Savings Plan (the "Plan"), respectfully submit this Memorandum of Law in support of their motion for preliminary approval of the proposed Settlement of this ERISA[1] class action.[2] The Settling Parties[3] are pleased that after years of hard-fought litigation, they are able to present a proposed settlement of a cash payment of $975,000.00 (nine hundred seventy-five thousand dollars) in addition to other non-monetary relief for preliminary approval. The Settling Parties agreed to the proposed Settlement only after vigorous arms-length negotiations between counsel experienced in ERISA class actions and under the auspices of Robert A. Meyer, Esq. of JAMS, a third-party private mediator with extensive experience mediating ERISA actions.

Plaintiffs believe the Settlement is an excellent result, providing a substantial, immediate payment to Settlement Class members and eliminating the risks and cost of trial. A trial could result in a reduced recovery or no recovery at all. Hence, "[t]here is a 'strong judicial policy in favor of settlements, particularly in the class action context.'" *In re Marsh ERISA Litig*., 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (quoting *In re PaineWebber Ltd. P'ships Litig*., 147 F.3d 132, 138 (2d Cir. 1998)). As set forth below, the settlement is fair, reasonable, and adequate under governing

[1] Employee Retirement Income Security Act of 1974.

[2] The Settlement Agreement is attached to the Gyandoh Decl. as Exhibit 1 and has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); and D (Final Approval Order and Judgment). Undefined terms herein shall have the meaning ascribed to them in the Settlement Agreement.

[3] Defined in the Settlement Agreement as Defendants (Estee Lauder Inc., "Estee Lauder", the Board of Directors of Estee Lauder Inc., the Estee Lauder Inc. Fiduciary Investment Committee, the "Committee"), and the Estee Lauder Inc. Employee Benefits Committee ("Benefits Committee") and the Named Plaintiffs, on behalf of themselves, the Plan, and each of the Settlement Class members.

law, and meets all prerequisites for preliminary approval and dissemination of the Class Notice. "At the first step, the court preliminarily certifies the class and approves the settlement terms, class notices, and administrative procedures proposed by the parties." *Rodriguez v. CPI Aerostructures, Inc*., No. 20-CV-0982 (ENV) (CLP), 2023 WL 2184496, at *9 (E.D.N.Y. Feb. 16, 2023) (internal citations omitted).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Proposed Settlement Class

Plaintiffs Kathy Gandy and Emanuele Caroleo, former participants in the Plan, are the proposed Class Representatives. *See* ECF No. 119, First Amended Consolidated Class Action Complaint "Complt." ¶¶ 17,18. 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." Settlement Agreement, ¶ 1.48.[4] Further, the Class Period is defined as "September 22, 2014, through the date the Court enters the Preliminary Approval Order" *Id.*, ¶ 1.14.

Defendant Estee Lauder Inc. ("Estee Lauder") is the Plan sponsor and fiduciary. The Estee Lauder Inc. Fiduciary Investment Committee ("Committee Defendants") were appointed by Estee Lauder through its Board of Directors (the "Monitoring Defendants") to "choose the investments into which Participants may direct the investment of their Accounts." Complt. ¶ 31 (citing Plan

[4] Following the filing of Plaintiffs' motion for class certification (ECF No. 90), the Parties stipulated to certifying a class which excluded any class member that had executed an applicable release (ECF No. 105). The Court approved the stipulation (ECF No. 106). As part of the settlement negotiations the Parties agreed to modify the stipulated class to allow members who had previously executed releases to partake in the settlement so long as they otherwise meet the definition of a settlement class member.

Doc. at 54).

B. Procedural History and Settlement Negotiations[5]

On June 23, 2020, Plaintiffs Michelle Bilello, Kar Yee S. Law, Emanuele Caroleo, and Palmer McGuinness filed a Class Action Complaint in *Bilello, et al. v. Estee Lauder, Inc., et al*., No. 1:20-cv-04770 (ECF No. 1) (S.D.N.Y.). On July 24, 2020, a similar complaint was filed by Plaintiff Kathy Gandy in *Gandy, et al. v. Estee Lauder, Inc., et al.*, No. 1:20-cv05779-JMF (ECF No. 1) (S.D.N.Y. July 24, 2020). The two actions were consolidated by the Court on August 10, 2020, and a Consolidated Class Action Complaint was filed by Plaintiffs on September 22, 2020. (ECF No. 13). The Consolidated Class Action Complaint alleged violations of fiduciary duties of prudence and a derivative claim of failure to adequately monitor other fiduciaries (asserted against Estee Lauder and the Board Defendants) imposed by ERISA § 404(a), 29 U.S.C. § 1104(a). Defendants moved to dismiss the Amended Complaint on December 7, 2020. On January 6, 2021, Plaintiffs filed an opposition to Defendants' motion to dismiss, and on January 27, 2021, Defendants filed a reply in support of their motion to dismiss. The Court denied Defendants' motion to dismiss in its entirety on June 7, 2021. (ECF No. 67).

On July 22, 2021, Defendants filed a Motion asking the Court for reconsideration of its Order denying the motion to dismiss based on a standing decision issued by the Supreme Court in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). (ECF Nos. 76 and 77). On July 26, 2021, after a conference with the Parties, the Court denied the motion for reconsideration. (ECF No. 78). The following month, on August 12, 2021, Defendants filed a letter motion asking the Court to stay the proceedings pending the Supreme Court's decision in *Hughes v. Nw. Univ.*, 142 S. Ct.

[5] The full procedural history of this matter is recounted in the Declaration of Mark K. Gyandoh ("Gyandoh Decl."), filed contemporaneously with this memorandum, at ¶¶ 3-34.

737, 211 L. Ed. 2d 558 (2022), in which the Supreme Court reviewed a motion to dismiss decision in an analogous ERISA breach of fiduciary duty matter. (ECF No. 79). On August 19, 2021, Plaintiffs filed their opposition, and on August 22, 2021, the Court denied Defendants' motion to stay (ECF Nos. 80 and 81).

Thereafter, the Court granted the stipulated dismissal of Plaintiffs Michelle Bilello, and later, Plaintiffs Law and McGuinness. (ECF Nos. 89 and 114). On March 23, 2023, Plaintiffs were granted leave to amend the Consolidated Class Action Complaint to reflect Ms. Gandy and Mr. Careolo as the two remaining Plaintiffs as well as adding a new Defendant, the Estee Lauder Employee Benefits Committee. (ECF Nos. 116 and 117). The First Amended Consolidated Class Action Complaint (hereinafter referred to as the "Complaint" or "Complt.") did not add any new claims. ECF No. 119.

On August 24, 2022, pursuant to a class definition stipulated by the Parties, the Court granted Plaintiffs' Motion for Class Certification and appointed Capozzi Adler, P.C., as Lead Counsel for the certified Class, and appointed Edelson Lechtzin LLP as Class Counsel Executive Committee Member for the Class. (ECF No. 106). The Settling Parties also conducted extensive discovery. Discovery led to the production of approximately 7,399 pages of documents and four depositions. Gyandoh Decl., ¶ 28. Plaintiffs Gandy and Caroleo were deposed in January 2023, Committee Member Tim Iris was deposed in Juny 22, 2023, and Judy Verbeke, Executive Director of Pensions for Estee Lauder, was deposed on March 10, 2023. *Id*. Additionally, Plaintiffs produced an expert report from expert Michael DiCenso.

On July 21, 2023, the Settling Parties attended a voluntary mediation session with Robert A. Meyer of JAMS who is well-versed and experienced in mediating ERISA matters. Gyandoh Decl., ¶¶ 33-35; *see also* curriculum vitae of Mr. Meyer at https://www.jamsadr.com/meyer/.

Although the Settling Parties did not reach an agreement during the mediation session, the Settling Parties continued to discuss settlements with each other and Mr. Meyer. The Settling Parties reach a resolution to the litigation in principle on August 2, 2023. Gyandoh Decl., ¶ 35.

C. Claims for Relief

Plaintiffs' claims concern Defendants' alleged breaches of fiduciary duty as Plan fiduciaries by, *inter alia*, (1) failing to investigate and select lower cost alternative funds; (2) failing to investigate and select lower cost alternative funds; (3) a failing to include a stable value fund among the Plan's investment options; and (4) failing to monitor or control the Plan's recordkeeping expenses. (Complt. ¶¶ 73-139). The claims alleged in the operative complaint are as follows:

COUNT I: Breaches of Fiduciary Duty of Prudence (asserted against the Committee)

COUNT II: Failure to Adequately Monitor Other Fiduciaries (asserted against Estee Lauder and the Board).

Defendants deny each of these claims and deny that they ever engaged in any wrongful conduct.

D. The Settlement Amount and Non- Monetary Relief

The Settlement provides for $975,000.00 (nine hundred seventy-five thousand dollars) in cash plus other non-monetary relief which Plaintiffs believe is a fair and adequate settlement. Plaintiffs evaluated numerous damages scenarios involving the amounts paid for recordkeeping and the potentially excessive fees of the Plan's investment options and the Settlement amount likely represents anywhere from 10% to 34% of the best case outcome for Plaintiffs. The non-monetary provisions under Article 12 of the Settlement Agreement state that "Within three years after the Settlement Effective Date, if the Plan's fiduciaries have not already done so, the Plan's fiduciaries will conduct or cause to be conducted a request for proposal relating to the Plan's recordkeeping services," and "To the extent not already in place, the Plan's fiduciaries shall

institute two (2) hours of mandatory fiduciary training for all members of the Estee Lauder Inc. Fiduciary Investment Committee to take place on an annual basis." These provisions address the allegations at the heart of this litigation and, as such, add significant value to the settlement. *See* Gyandoh Decl., ¶35.

E. Class Notice and Administration of Claims

Plaintiffs have selected Analytics LLC ("Analytics") to be the Settlement Administrator. Analytics is highly experienced in class action claims administration. Upon preliminary approval, Analytics will mail, by first class mail, the Court-approved Class Notice to Settlement Class members using addresses from employment records and documents associated with the Plan. Analytics will administer a skip trace and receive updated address information for any notices that are returned for lack of a forwarding address and re-mail the notices to the updated addresses. Additionally, Analytics will establish a settlement website providing Settlement Class members with important case documents, pertinent information, and contact information for the Settlement Administrator, Class counsel, and Defense counsel. Lastly, Analytics will institute a case-specific toll-free number for members to listen to an Interactive Voice Response ("IVR") system or speak with a live agent. The Notice, website, and telephone number will inform Settlement Class members of their rights to object, deadline to object, their inability to opt-out, claims administration procedures for Former Participants, Plaintiffs' incentive awards, and Class Counsel's request for attorney's fees and expenses.

F. Fees and Expenses

The Gross Settlement Amount is inclusive of an attorney fees award not to exceed thirty-three and one third percent (33 1/3%) of the Gross Settlement Amount. Put differently, the attorney fee award has a maximum of $325,000. The Settlement Agreement also provides for a

reimbursement of attorney expenses up to $100,000.00 and a maximum of $10,000 incentive awards for each of the Class Representatives (Named Plaintiffs) for their work in bringing the case forward. These amounts are to be paid from the Gross Settlement Amount.

III. ARGUMENT

A. The Proposed Class Meets all Rule 23 Requirements

Given that the Court has previously certified a Class, appointed class counsel and class representatives, it is unnecessary for the Court to re-evaluate the basis for granting class certification in the first instance, particularly where there is no challenge from any party regarding the appropriateness of a class.[6] However, as noted above, the Parties seek a slightly modified settlement class definition, which would allow for all Class members to participate in the Settlement regardless of whether they signed a release. 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.

Settlement Agreement, Art. 1.48.[7] The Parties believe this adds to the overall fairness of the Settlement and the amended class definition meets the requirements of Rules 23(a) and (b).

B. The Settlement Meets All Rule 23 Requirements

Pursuant to FED. R. CIV. P. 23(e), at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii)

[6] The basis for certifying a class, including the adequacy of Plaintiffs and their counsel, were set forth in Plaintiffs' memorandum and supporting declarations in support of their motion for class certification which are incorporated here by reference. *See* ECF No. 92-94.

[7] The prior certified class was defined as: "All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Plan, at any time between September 22, 2014 through the date of judgment (the "Class Period"), excluding any class member who executed an applicable release." ECF No. 105.

certify the class for purposes of judgment on the proposal." FED. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies factors the court must ultimately consider at the final approval stage:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3) [8]; and
>
> (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2).

Here, as discussed above (1) the settlement was negotiated at arm's length by experienced counsel with the assistance of an experienced mediator after significant litigation, (2) the Settlement Class was adequately represented by Plaintiffs and Class Counsel, and (3) the relief provided is adequate and equitable to all Settlement Class members as the proposed Plan of Allocation provides for a *pro rata* distribution and each Settlement Class member will be entitled to at least the minimum amount of $10. As explained in *In re Global Crossing Securities and ERISA Litig.*, finding fairness in an ERISA settlement is easy when the parties engage "the active

[8] Rule 23(e)(3) requires that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3). There are no agreements, other than the Settlement itself, in this case.

and patient participation of an experienced Magistrate Judge" and a review by an independent fiduciary. 225 F.R.D. 436, 462 (S.D.N.Y. 2004).

In addition, the Settlement Agreement ensures a substantial and prompt payment to the Plan, and ultimately to Class members. This substantial relief is far preferable to the possibility of a smaller recovery or none at all. In short, the proposed Settlement is an excellent result and merits preliminary approval.

C. The Settlement Satisfies Second Circuit Requirements of Fairness and Adequacy

In determining if a preliminary settlement satisfies FED. R. CIV. P. 23(e)(1)(C), the Second Circuit evaluates nine *Grinnell* factors: "(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; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (quoting *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 463 (2d Cir. 1974)). An analysis of the nine *Grinnell* factors supports preliminary approval of the Settlement.

1. The complexity, expense, and likely duration of the litigation weighs in favor of settlement approval.

The history of this case spans over three years, including three dismissal attempts by Defendants, and the Parties have spent significant costs and time on discovery. If this case were to go to trial both sides would face burdensome litigation involving intricate fact presentation and the

costs to retain experts in areas such as ERISA duties, damages, and defined contribution investing. The likely appeal from a trial would exacerbate the expense, duration, and complexity of the litigation to the determinant of the Plaintiffs. *See*, *e.g.*, *In re Global Crossing*, 225 F.R.D. at 456 (approving a settlement because, "[i]f plaintiffs' claims survived for trial, plaintiffs would have to spend much time and money mastering the immense documentary records and developing fact and expert testimony on complicated technology, accounting, economic, securities, ERISA, and damages issues. And even if plaintiffs prevailed at trial, defendants likely would file post-trial motions and appeals on a variety of difficult issues" that would "significantly delay any recovery Plaintiffs might eventually obtain.")

Furthermore, ERISA breach of fiduciary duty cases such as this have been recognized as being especially complex. *See*, *e.g.*, *Pledger v. Reliance Trust Co*., No. 1:15-CV-4444-MHC, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021) ("Effectively and successfully litigating an ERISA breach of fiduciary action requires a specialized knowledge and expertise that was demonstrated by Class Counsel. This litigation involved highly technical knowledge of investment plans, investment knowledge, and industry practices."); *Jander v. Retirement Plans Committee of IBM*, No. 15cv3781, 2021 WL 3115709, at *3 (S.D.N.Y. July 22, 2021) (same); *Dover v. Yanfeng US Automotive Interior Systems I LLC*, No. 2:20-CV-11643-TGB-DRG, 2023 WL 2309762, at *5 (E.D. Mich. Mar. 1, 2023) ("ERISA class actions are complex, and the record shows that counsel fought ably to vindicate their clients' interests in the face of rapidly evolving law regarding fiduciary duties under ERISA.")

There is no doubt continuing to summary judgment and possibly a trial would exacerbate an already complex, expensive, and lengthy litigation. This factor weighs in favor of approving the settlement.

2. Preliminary approval will allow absent class members a chance to object.

"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." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 699 (S.D.N.Y. 2019) (citing *In re Warner Chilcott Ltd. Sec. Litig*., 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20 2008)). However, If the settlement is preliminarily approved, dissemination of Notice will inform absent class members of the fairness hearing and deadlines for objections so their reactions may be addressed before final approval proceedings. *See Nolan v. Detroit Edison Co.*, 2022 WL 2813013, at * 6 (E.D. Mich. July 14, 2022) ("the views of absent class members are not yet known, but the notice period will provide ample opportunity for them to weigh in or object.").

3. The stage of the proceedings and the amount of discovery completed indicate the Settlement is fair and reasonable.

"The third *Grinnell* factor—the stage of the proceedings and the amount of discovery completed—is intended to assure the Court that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *In re Global Crossing*, 225 F.R.D. at 458 (internal citations omitted). Each side entered the negotiations with a full understanding of the issues and potential pitfalls related to litigation of the claims. The original complaints and the Consolidated Complaint were filed after a thorough investigation by Plaintiffs' counsel. The mediation session occurred after almost three years of litigation, depositions, formal, expert, and informal fact discovery. "The advanced stage of the litigation and extensive amount of discovery completed weigh heavily in favor of approval." *In re Marsh ERISA Litig*., 265 F.R.D. at 140 (noting depositions, voluminous fact discovery, exchange of expert reports, and a full briefing on Class Certification satisfied this factor). At this stage, Plaintiffs have ample information to evaluate

the merits of their case and assess the risk versus reward of proceeding to trial. This factor is thus satisfied.

4. The risks of establishing liability, establishing damages, and maintaining class certification through the trial weigh in favor of preliminary settlement approval (factors 4, 5 and 6).[9]

Although Plaintiffs are confident in their case, the potential upcoming trial brings real uncertainties for both sides. Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions, the risk is even more considerable. *See*, *e.g.*, *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 496-97 (E.D. Mich. 2008) ("Plaintiffs admit that risk is inherent in any litigation, particularly class actions. The risk is even more acute in the complex areas of ERISA law"); *In re BellSouth Corp. ERISA Litig.*, No. 1:02-CV-2440, 2006 WL 431178, at *5 (N.D. Ga. Dec. 5, 2006) ("the rapid influx of new [ERISA] precedents presents an ever changing legal landscape, and there is a constant risk that the law will change before judgment."). Without this settlement, Plaintiffs would have to defeat Defendants' anticipated motion for summary judgment, and if successful, spend a significant amount of resources to prosecute this case, all with no guarantee of any recovery.

Moreover, even if Plaintiffs were to prevail on liability, there is no guarantee the amount of damages proven would be worth the costs associated with trial. "In short, the legal and factual complexities and uncertainties of the ERISA damages case also militate in favor of settlement." *In re Global Crossing Securities and Erisa Litigation*, 225 F.R.D. at 460. This is because, "[e]ven if Plaintiffs established a fiduciary breach, it is 'difficult' to measure damages in cases alleging imprudent or otherwise improper investments." *Karpik*, 2021 WL 757123, at *5 (quoting

[9] "Courts generally consider the fourth, fifth, and sixth *Grinnell* factors together." *Jander*, 2021 WL 3115709, at *3 (internal citations omitted).

Restatement (Third) of Trusts § 100 cmt. b (1)). Without this Settlement, Plaintiffs would endure lengthy and expensive litigation at the risk of less or no recovery at all.

Lastly, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Nunez v. B. Braun Medical Inc.,* No. 5:20-cv-04195 (E.D. Pa. July 13, 2023).

5. The ability of Defendants to withstand a greater judgment is not a bar to settlement.

When "'other *Grinnell* factors weigh heavily in favor of settlement,' the Court may still approve of the settlement as being fair, reasonable, and adequate" even if Defendants are able to pay more than the settlement amount. *Kemp-DeLisser,* 2016 WL 6542707, at *10 (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). *See also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 698 ("[A]gainst the weight of the remaining factors, this fact alone does not undermine the reasonableness of [a settlement]."); *In re AOL Time Warner ERISA Litig.,* 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," because this factor "must be weighed" alongside the other *Grinnell* factors). The Court need not closely scrutinize Defendants' ability to withstand a greater judgement, because all other *Grinnell* factors weigh in favor of preliminary approval of the Settlement.

6. The range of reasonableness of the settlement fund in light of all the attendant risks of litigation support a finding of fairness weigh in favor of preliminary approval (factors 8 and 9).[10]

"In analyzing the size of the settlement compared to the best possible recovery and in view of the attendant risks, the issue for the Court is not whether the Settlement represents the 'best

[10] "The final two *Grinnell* factors are typically considered together." *Jander*, 2021 WL 3115709 at *4 (internal citations omitted).

possible recovery,' but how the Settlement relates to the strengths and weaknesses of the case." *Jander*, 2021 WL 3115709 at *4 (quoting *In re Flag Telecom Holdings Ltd. Sec. Litig.*, 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010)). Courts may approve settlements even when the amount "is not rich in comparison to the vast damages Plaintiffs claim to have suffered" because "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 Global Crossing*, 225 F.R.D. at 460-61 (noting the risks and complexity of litigation justify smaller settlements). Here, the range of reasonableness is impacted by "the parties disagree[ing] on the amount of potential recovery even if plaintiffs were to prevail on liability." *Id*. Plaintiffs estimated a damages best case scenario of $9.9 million assuming all their alleged claims were sustained, and Defendants caused the Plan to overcharge participants for fees related to investment options and recordkeeping by 100%. Gyandoh Decl., ¶ 34. On the other hand, given the unlikely scenario the Court would find that Plan participants were overcharged by 100%, the more realistic damages figure as calculated by Plaintiffs could be as low as $2,800,000.00. *Id*. The proposed Settlement Amount of $975,000.00 is an appropriate discount to avoid the costs of continued litigation and potential risk for Plaintiffs to receive less or no damages. It amounts to roughly 10% (of $9.9 million at the high end) to 34% (of $2.8 million at the low end) of the range of potential damages.

This percentage of recovery is in accord with the typical percentage district courts have approved. *See GSE Bonds*, 414 F. Supp. 3d at 697 (the court accepted a settlement amount of 13-17% of the range of recovery); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving a settlement amount "representing roughly 10-15% of the credit transaction fees collected by Defendants."); *Mehling v. New York Life Ins. Co*., 248 F.R.D. 455, 462 (E.D. Pa. 2008) (approving a settlement

representing 20% of estimated damages in ERISA class action).

An analysis of the Second Circuit's *Grinnell* Factors support preliminary approval of the Settlement.

D. The Attorney's Fees and Expenses Are Reasonable

"Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%–50% range in class actions." *In re Marsh ERISA Litig*., 265 F.R.D at 149 (listing cases and awarding attorney's fees of 33% of the common fund in ERISA cases). *See also Jander*, 2021 WL 3115709, at *7 (An ERISA case where the court held, "Class Counsel's request for 30% of the gross settlement fund is reasonable within this circuit."). Moreover, "Plaintiffs' Counsel had to contend with the traditional risks inherent in any contingent litigation" and "the unsettled nature of the law applicable to Plaintiffs' claims […] increases the risks for Plaintiffs' Counsel." *In re Marsh ERISA Litig*., 265 F.R.D at 148 (noting 401(k) plans did not exist when ERISA was enacted and consequently the law is still developing). Furthermore, because Class Counsel took this case on a contingency fee basis, "Class Counsel assumed a real risk in taking the case, investing time, effort, and money over a period of years with no guarantee of recovery. This factor weighs in favor of approving the requested fee award." *Karpik*, 2021 WL 757123, at *7 (approving attorney's fees request of one third of the settlement fund). Plaintiffs' counsel actively pursued this case on a contingency fee basis and is seeking attorney's fees in line with typical ERISA class action settlements, thirty-three and one third percent (33 1/3%) of the common fund.

Plaintiffs request for reimbursement of expenses not to exceed not to exceed $100,000.00 is also reasonable. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients." *Jander*, 2021 WL 3115709, at *8 (quoting *Miltland Raleigh-*

Durham v. Myers, 840 F. Supp. 235, 239 (S.D.N.Y. 1993)). The attorney's fees and expense reimbursement in the Settlement are reasonable and therefore weigh in favor of preliminary settlement approval.

E. The Proposed Notice Plan and The Claims Procedure Should Be Approved by The Court

"Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *In Re Global Crossing*, 225 F.R.D. at 448. Here the Class Notice and notice dissemination procedures are reasonable and provide "the best notice that is practicable under the circumstances." Rule 23(c)(3). The Class Notice should be approved because it is "sufficient to alert prospective class members to the pendency and terms of the proposed settlement and to the options that are open to them in connection with the proceedings" and will "be mailed to each class member who can be identified through reasonable effort." *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 177 (E.D.N.Y. 1999) (internal citations omitted). The notice procedure should also be approved because "it directs the Claims Administrator to mail notice to the members of the Class and provides detailed procedures for handling returned notices. It also establishes a settlement website that any member of the Class can access." *Thomsen v. Morley Cos., Inc.,* No. 1:22-cv-10271 2022 WL 16708240, at *7 (E.D. Mich. Nov. 4, 2022). As detailed in section III.B., *supra*, the Notice Plan utilizes first class mail, has procedures for return mail, creates a website and toll-free number for members, and informs members of their rights and procedures to object to the settlement. The proposed notice plan is the best practicable plan and warrants preliminary approval.

F. Incentive Awards to Class Representatives are Reasonable

Courts regularly approve awards to Class Representatives because they "encourage class representatives to participate in class action lawsuits, which are 'designed to provide a mechanism

by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries.'" *Moses v. New York Times Co*., No. 21-2556-cv, 2023 WL 5281138, at *13 (2d Cir. 2023) (quoting S. Rep. No. 109-14, at 5, and citing 1 Joseph McLaughlin, McLaughlin on Class Actions § 1:1 (19th ed. 2022)). Also, "incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement." *Id*. Indeed here, Plaintiffs Gandy and Caroleo communicated extensively with Class Counsel, attended depositions, provided counsel with important information, and reviewed case filings. A service award of $10,000 per named plaintiff "is consistent similar awards granted in this district." *Jander*, 2021 WL 3115709, at *8 (listing cases). Thus, an award for their service is warranted.

IV. CONCLUSION

Plaintiffs respectfully request the Court grant their Unopposed Motion for Preliminary Approval of Settlement, Approval of Form and Manner of Class Notice and Scheduling of Fairness Hearing. Plaintiffs propose the Fairness Hearing be scheduled at least 90 calendar days after entry of the Preliminary Approval Order in order to provide the Settlement Class with fair notice and the opportunity to be heard, as well as to provide notice to appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711-1715. The submitted proposed preliminary approval order sets forth the proposed schedule of events which are subject to the Court's approval. For the reasons set forth above, the Settlement meets the standard for preliminary approval under Rule 23.

Dated: September 25, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all attorneys of record.

/s/Mark K. Gyandoh