UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL CHECHILE and SONIA LOPEZ, individually, and as Representatives of a Class of Participants and Beneficiaries of the Baystate Heath, Inc. Retirement Plan,

Plaintiffs,

v.

BAYSTATE HEALTH, INC. et al.,

Defendants

Case No: 3:22-cv-30155-KAR

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

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INTRODUCTION

Plaintiffs Michael Chechile and Sonia Lopez ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of their class action settlement with Defendants Baystate Health Inc. ("Baystate"), and the Board of Directors of Baystate Health Inc.[1] (collectively, "Defendants") relating to the management of the Baystate Health Inc. Retirement Plan ("Baystate Plan").[2] Plaintiffs and Defendants are referred to herein as the "Parties."

Under the terms of the proposed Settlement, a Gross Settlement Amount of $500,000.00 will be paid to resolve the claims of Settlement Class members who participated in the Plan during the Class Period. This is a significant monetary recovery for the Class in relation to the claims that were alleged and falls well within the range of negotiated settlements in similar ERISA cases.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that notice may be disseminated to the class. Among other things:

- The Settlement was negotiated at arm's length with the assistance of a respected mediator;
- The Settlement provides for significant monetary relief that is on par with other settlements;
- The Settlement conveniently provides for automatic distribution of the settlement proceeds to the accounts of current participants and by check to former participants;[3]
- The Released Claims are tailored to the claims that were asserted in the action or could have been asserted based on the same factual predicate;
- The proposed Settlement Class is consistent with the requirements of Rule 23;

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[1] The Complaint improperly names the Board of Directors of Baystate Health, Inc. as a Defendant, but Baystate does not have a Board of Directors—it has a Board of Trustees.

[2] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as **Exhibit A** to the accompanying Declaration of Paul Secunda ("Secunda Decl."). Capitalized terms have the meaning assigned to them in the Settlement Agreement unless otherwise specified.

[3] The Settlement Class is defined as "all Participants and beneficiaries in the Baystate Health, Inc. Retirement Plan during the Class Period," but excludes from the Settlement Class participants who joined the Plan for the first time on or after May 27, 2022, after which Baystate switched to Fidelity from Mass Mutual/Empower. (Settlement Agreement, §1.41.) Plaintiffs did not challenge Fidelity's fees in this lawsuit.

- The proposed Settlement Notice provides substantial information to Settlement Class members about the Settlement, and will be distributed; and
- The Settlement provides Settlement Class members the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices and authorizing distribution of the Notice to the Settlement Class; (3) certifying the proposed Settlement Class for settlement purposes under Federal Rule of Civil Procedure 23(a) and 23(b)(1); (4) scheduling a final approval hearing; (5) appointing Michael Chechile and Sonia Lopez as Settlement Class Representatives and appointing Walcheske & Luzi, LLC and Jonathan M. Feigenbaum as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g); (6) approving the Plan of Allocation; and (7) granting such other relief as set forth in the accompanying Preliminary Approval Order. This motion is not opposed by Defendants, but Defendants do not agree with the averments, statements, allegations, and claims stated by Plaintiffs in this Memorandum of Law in Support of the Motion for Preliminary Approval of Settlement.

BACKGROUND

I. PLEADINGS

Plaintiffs Michael Chechile and Sonia Lopez filed this action on November 17, 2022. Dkt. 1. In their Complaint, Plaintiffs allege that during the putative Class Period (November 17, 2016 through the date of judgment), Defendants, as fiduciaries of the Plan, breached the duties they owed to the Plan, to Plaintiffs, and to the other Participants of the Plan by requiring the Plan to "pay[ ] excessive recordkeeping fees," *Hughes*, 142 S. Ct. at 739-740, and by failing to timely remove their high-cost recordkeeper, Great-West Life & Annuity Insurance d/b/a Empower Retirement and Massachusetts Mutual Life Insurance Company ("Mass Mutual") ("Empower"). *Id.*, ¶6. Shortly thereafter, the Parties discussed the case in depth and decided to attempt private mediation. On January 18, 2023, the Court entered a stay, asking the Parties to file a joint status report no later than February 17, 2023. Dkt. 11.

II. MEDIATION AND SETTLEMENT

The Parties engaged in a full-day mediation with a neutral mediator, Robert Meyer, on February 10, 2023.[4] (Declaration of Paul M. Secunda in Support of Motion for Preliminary Approval of Class Action Settlement ("Secund Decl."), ¶ 10.) After extensive arm's length negotiations, the Parties reached a settlement in principle, signed a settlement term sheet on February 10, 2023, and then prepared the comprehensive Settlement Agreement that is the subject of this motion. (*Id.*, ¶ 11.) The Parties filed a joint status report on February 19, 2023, alerting the Court of the Settlement and asking the case continued to be stayed until this Motion could be drafted. Dkt. 17. On that same day, this Court granted the continuance of the stay and ordered that this preliminary approval motion be filed by Plaintiff by April 6, 2023, Dkt. 18, and then extended the stay on joint motion from Parties until May 8, 2023. Dkt. 21.

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement applies to the following Settlement Class:

> All Participants and beneficiaries in the Baystate Health, Inc. Retirement Plan during the Class Period. Excluded from the Settlement Class are participants who joined the Plan for the first time on or after May 27, 2022.

(Settlement § 1.41). In turn, the Class Period means the period from November 17, 2016 through the Effective Date of Settlement. (*Id.* § 1.7.) There are approximately 26,800 Settlement Class Members of which approximately 9,315 are formers participants. (Secunda Decl. ¶ 3.)

B. Monetary Relief

Under the Settlement, Baystate will contribute $500,000 thousand dollars to a Qualified Settlement Fund. (Settlement § 1.40.) After accounting for any (a) taxes and tax-related expenses;

[4] Mr. Meyer is an experienced mediator who has successfully facilitated the resolution of numerous complex class actions, including ERISA class actions. (Secunda Decl., ¶ 10 & Ex. B.)

(b) Settlement Administration Expenses; (c) reimbursement of expenses incurred by Class Counsel that are awarded by the Court; (d) attorneys' fees to Class Counsel that are awarded by the Court; and (e) Case Contribution Awards that are awarded by the Court, the Net Settlement Amount will be distributed to eligible Settlement Class members. (*Id.* §§ 1.25, 3.25(k).)

The Plan of Allocation has been prepared by Class Counsel, reviewed by Defendants, and is now being submitted to the Court for approval in connection with this Motion. (*Id.*, § 9.3.) Class Counsel shall retain the Settlement Administrator to calculate the amounts payable to Settlement Class members. (*Id.* § 1.39.) For those Settlement Class members who are Current Participants with a positive balance in their Plan account, the distribution will be made directly into his or her account in the Plan. (*Id.*, § 9.2.) For those Settlement Class Members who are Former Participants without a positive balance in their Plan account, the distribution will be made by check. (*Id.*, § 9.2.)

C. Release of Claims

In exchange for the foregoing relief, the Settlement Class will release Defendants and affiliated persons and entities (the "Defendant Releasees") from all relevant claims (the "Released Claims" as defined in the Settlement):

> "*Plaintiffs' Released Claims*" means: subject to Section 10 [of the Settlement Agreement] and the Carved Out Claims, any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, disgorgement, and causes of action, whether arising under federal, state or local law, whether by statute, regulation, contract or equity, whether brought in an individual, derivative, or representative capacity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, against the Defendant Releasees for actions, inactions, or omissions during the Class Period that: (a) would have been barred by the doctrine of *res judicata* or claim preclusion had the Action been fully litigated to a final judgment; (b) arise out of the same operative facts as those alleged in the Complaint; (c) were asserted in the Complaint, or arise out of the conduct alleged in the Complaint whether or not pleaded in the Complaint; (d) arise out of, relate to, are based on, or have any connection with fees, costs, or expenses charged to, paid by, or reimbursed by the Plan, or the Plan's Participants, directly or indirectly; (e) relate to the direction to calculate, the calculation of, and/or the method or manner of allocation, implementation or administration of the Qualified Settlement Fund or Net Settlement Fund to the Plan or any member of

> the Settlement Class in accordance with the Plan of Allocation; or (f) relate to the approval by the Independent Fiduciary of the Settlement Agreement.

(*Id.*, §§ 1.33, 4.1.)

D. Class Notice and Settlement Administration

Settlement Class members will receive notice of the settlement by email or mail. (*Id.*, §§ 3.23-3.24, & Ex. A. to Preliminary Approval Order.) To the extent that Settlement Class members would like more information, the Settlement Administrator[5] will establish a Settlement Website on which it will post the Settlement Agreement, Notices, and relevant case documents, including the Complaint and a copy of all Court orders related to the Settlement. (Settlement § 3.24 & Ex. A. to Preliminary Approval Order.) The Settlement Administrator also will establish a toll-free telephone line that will provide the option of speaking with a live operator if callers have questions. *Id.*

E. Attorneys' Fees and Administrative Expenses

The Settlement requires that Class Counsel shall petition the Court no later than twenty-one (21) days prior to the deadline for objections for an award of attorneys' fees and Case Contribution Awards, and for reimbursement of expenses incurred by Class Counsel, to be paid from the Qualified Settlement Fund. (Settlement Agreement § 11.1.) Under the Settlement, the requested fees may not exceed 33% of the Qualified Settlement Fund. *Id.* In addition, the Settlement provides for recovery of Administrative Expenses, (*id.*, §§ 1.38, 9.2.2), and for a case contribution award up to $5,000 for each Named Plaintiff. (*Id.,* § 11.2.2.)

F. Review by Independent Fiduciary

Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. (*Id.,* § 3.4; Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830.) The Independent Fiduciary will issue its report no later than twenty-

[5] Analytics Consulting, LLC has been selected as the Settlement Administrator, and has extensive experience administering similar ERISA class action settlements. (Secunda Decl. ¶ 28 & Ex. C).

one (21) days before the Fairness Hearing (Settlement, § 3.4), so it may be considered by the Court. The Independent Fiduciary's fees and expenses shall be paid from the Qualified Settlement Fund (Settlement, §§ 1.38, 3.4.1).

ARGUMENT

I. Standard of Review

The approval of a settlement agreement is a two-step process." *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 97 n.1 (D. Mass. 2010). In the first step, "the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Id.* at 106–7 (quoting Manual for Complex Litigation (Fourth), §13.14 (2004)). Therefore, a court first makes a "'preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.'" *Id.* at 107 (quoting Manual for Complex Litigation (Fourth), §21.632 (2004)). In making a preliminary determination, courts "examine the proposed settlement for obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). A presumption of fairness attaches when "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Hochstadt*, 708 F. Supp. 2d at 107 (citing *In re Lupron Mktg. and Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Each of those factors is satisfied.

II. The Court Should Grant Preliminary Approval to the Settlement

A. The Settlement Is The Product Of Arm's-Length Negotiations

There is an initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *City P'ship. v. Atlantic Acquisition Ltd.*, 100 F.3d 1041,

1043 (1st Cir. 1996). The Settlement is the result of arm's-length negotiations between counsel for all Parties in this action. (*See* Secunda Decl., ¶ 2.)

The product of these serious and informed negotiations is a Settlement that provides significant benefits to the class. The negotiated monetary relief represents a significant portion of the alleged losses sustained by the Plans. For purposes of mediation, Plaintiffs alleged that the total recordkeeping fees exceeded a reasonable amount by $4.8 million. (Secunda Decl. ¶ 4 & n.1.) Based on this allegation, the $500,000 recovery represents 10.4% of the total estimated losses. This is on par with numerous other ERISA class action settlements that have been approved across the country.[6]

Consistent with numerous other ERISA settlements that have received court approval,[7] Current Participants will have their Plan accounts automatically credited with their share of the Settlement and Former Participants will receive their payments without filling out a claim form. This method of distribution is both effective and efficient.

B. The Settlement Was Reached After Informed Negotiations

At the time the Settlement was reached, the Parties had just commenced litigation, but there appeared to be an early chance for settlement. Based on the Parties' understanding of the claims in the case after substantial investigation, the Parties, fully informed as to the value of the claims and the cost of further litigation, engaged in settlement discussions through a mediator, Robert Meyer, who also has an expert knowledge of these claims. During the course of these mediation discussions, the

[6] *See, e.g.*, *Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, Dkt. 95 at 10 (Mar. 24, 2021), *approved* Dkt. 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 17-cv-00563, Dkt. 211 (May 20, 2020), *approved* 2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (16% of alleged losses); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *6–7 (N.D. Cal. May 11, 2018) (approximately 10% of losses under Plaintiffs' highest model); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

[7] *See, e.g.*, *Kinder v. Koch Indus., Inc.*, 2021 WL 3360130, at *1–2 (N.D. Ga. July 30, 2021); *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *2 (S.D. Ohio Feb. 18, 2021); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 122-1 § 9 (N.D. Ill. Aug. 6, 2018).

Parties were able to reach an agreement to resolve all the claims in this case, thus bringing a final and full resolution of this action.

In the absence of a settlement, Plaintiffs would have faced potential risks. At the time of settlement, there was a risk that the Court might have dismissed the claims on a motion to dismiss or summary judgment. If the case proceeded to trial, the Defendants still might have prevailed.[8] Finally, even if Plaintiffs prevailed on liability, issues regarding loss would have remained. *See* Restatement (Third) of Trusts, § 100 cmt. (b)(1) (determination of investment losses in breach of fiduciary duty cases is "difficult").

At a minimum, continuing the litigation would have resulted in complex and costly proceedings, and significantly delayed any relief to the Class. ERISA cases such as this can extend up to a decade before final resolution, sometimes going through multiple appeals.[9] The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERISA cases such as this are "particularly complex"); *Koerner v. Copenhaver*, 2014 WL 5544051, at *4 (C.D. Ill. Nov. 3, 2014) ("The facts giving rise to Plaintiffs' claims are complicated, require the elucidation of experts, and are far from certain.").

None of this is to say that Plaintiffs lacked confidence in their claims. However, given the risks and costs of litigation, it was reasonable for Plaintiffs to reach a settlement on these terms. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 582–83 (N.D. Ill. 2011); *accord Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case had been litigated to conclusion, all that is certain is that

[8] *See, e.g.*, *Rozo v. Principal Life Ins. Co.*, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), *aff'd*, 9 F.4th 95 (2d Cir. 2021); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019).

[9] *See, e.g.*, *Spano v. Boeing Co.*, 2016 WL 3791123, at *1, 4 (N.D. Ill. Mar. 31, 2016) (9 years); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) (8.5 years); *Beesley v. Int'l Paper Co.*, No. 3:06-cv-00703, Dkt. 559 (S.D. Ill. Jan. 31, 2014) (more than 7 years).

plaintiffs would have spent a large amount of money, time, and effort.")

C. The Proponents Of The Settlement Are Highly Experienced In Similar ERISA Litigation

The record reflects that the Class is adequately represented. Class Counsel are experienced ERISA litigators with a proven track record. (*See* Secunda Decl. ¶¶ 25–27.) Walcheske & Luzi, LLC ("Walcheske & Luzi"), lead Class Counsel, is a firm recognized for being "experienced in complex [ERISA] litigation," and having the ability and resources to vigorously prosecute [an] action." *See Soulek v. Costco Wholesale Corp. et al.*, Case No. 20-C-937, Dkt. 52 at p. 4 (E.D. Wis. Mar. 17, 2022). The named Plaintiffs are also adequate class representatives, who have diligently pursued this action on behalf of the Class after acknowledging their duties as class representatives. (*See* Chechile Decl. ¶¶ 2–3; Lopez Decl. ¶¶ 2–3.)

It is Class Counsel's opinion that the Settlement is fair and reasonable. (Secunda Decl. ¶ 2.) As set forth above, the Settlement provides monetary relief in the Gross Amount of $500,000, which, after paying fees and expenses, will be paid to current and former participants of the Plan during the Class Period.

D. The Settlement is Fair, Reasonable, and Adequate to Warrant Sending Notice to the Settlement Class

Due process and Rule 23(e) do not require that each Class Member receive notice but do require that class notice be "reasonably calculated, under the circumstances, to apprise interested Parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank 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 and Jacquelin*, 417 U.S. 156, 175 (1974).

The proposed form and method of notice satisfy all due process considerations and meet the requirements of Rule 23(e)(1) because it is reasonably calculated to affect actual notice to the

Settlement Class which consists of current and former Plan participants. The Parties' proposed notice is attached as Exhibit A to the Proposed Preliminary Order. The notice will fully apprise class members of the existence of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights, including: (i) the terms and operation of the Settlement; (ii) the nature and extent of the release; (iii) the maximum attorneys' fees and costs that will be sought; (iv) the procedure and timing for objecting to the Settlement; (v) the date and place of the fairness hearing; and (vi) the website on which the full Settlement documents and any modifications thereto will be posted. (Exhibit A to the Proposed Preliminary Order.).

The notice plan will be implemented in a cost-conscious fashion given the monetary amount of the Settlement via electronic email to all class members who have a current email address known to the Plan's recordkeeper. This notice will be delivered shortly after entry of the order preliminarily approving the Settlement. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate.

III. The Proposed Class Should be Certified for Settlement Purposes

Finally, this Court should certify the Settlement Class for settlement purposes. Under Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs move for certification under Rule 23(b)(1) of the following settlement class and appointment of Walcheske & Luzi, LLC and Jonathan Feigenbaum as Class Counsel:

> All Participants and beneficiaries in the Baystate Health, Inc. Retirement Plan during the Class Period. Excluded from the Settlement Class are participants who joined the Plan for the first time on or after May 27, 2022.

(Settlement Agreement, ¶ 1.41.) The Class Period commences on November 17, 2016, which is six years prior to the date of filing Plaintiffs' complaint. Doc. 1; 29 U.S.C. § 1113(1). The Class Period ends on the effective date of the Settlement. (Settlement Agreement, ¶ 1.7.).

To certify the Settlement Class, the Court must find that it satisfies each requirement of Rule

23(a) and at least one subpart of Rule 23(b). *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The standard for certifying a class for settlement purposes is more lenient than that applied in certifying a class for trial, as the Court need not inquire whether the class would be manageable for trial purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

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

Rule 23(a) provides four prerequisites to class certification:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

1) the class is so numerous that joinder of all members is impracticable;

2) there are questions of law or fact common to the class;

3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Plaintiffs satisfy each prerequisite for the following reasons.

(1) Numerosity

The proposed class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This is a "low threshold" that is generally met if the number of class members "exceeds 40." *Gordon v. Johnson*, 300 F.R.D. 31, 35 (D. Mass. 2014) ("Although no specific, numerical threshold exists, a class of forty or more is generally sufficient in the First Circuit."); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 388 (D. Mass 2011). A class of almost 2,000 individuals "would obviously satisfy the numerosity threshold." *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003). Here, the class includes over 26,000 members. (Secunda Decl., ¶ 3.)

(2) Commonality

The commonality requirement is met when there is at least "a single common question" to the

class. *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (quoting *Dukes*, 564 U.S. at 359). It is "not a difficult one to meet." *Hochstadt*, 708 F. Supp. 2d at 102. Due to the nature of ERISA fiduciary breach claims, "commonality is quite likely to be satisfied." *In re Schering Plough ERISA Litigation*, 589 F.3d 585, 599 n.11 (3d Cir. 2009). Plaintiffs have identified common questions of law and fact that can or would be resolved as to the Plan, not as to any individual participant. Dkt. 1, ¶ 127. In this instance, common questions exist pertaining to the alleged excessive fees associated with Plan recordkeeping provided by Mass Mutual/Empower during the Settlement Class Period, with whether Defendants breached their fiduciary duties to the Plans; and with whether the Plan suffered losses from the alleged fiduciary breaches. Accordingly, commonality is satisfied.

(3) Typicality

Rule 23(a)(3) requires the claims of the class representatives to be typical of the claims of the class. "The representative plaintiff satisfies the typicality requirement when its 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 Secs. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008). Typicality does not require "identical claims." *In re Neurontin Mktg. & Sale Practices Litig.*, 244 F.R.D. 89, 106 (D. Mass. 2007).

In this case, the Named Plaintiffs assert an identical legal theory on behalf of the Plan under § 1132(a)(2), which arises from the same course of Plan-level conduct: Defendants' alleged flawed process for selecting and monitoring the Plan's recordkeeper during the Settlement Class Period and the fees associated with those recordkeeping services. If Defendants acted imprudently, they breached their duty to the Plan as a whole, and hence, to all participants. All participants were allegedly harmed or exposed to harm by the alleged breaches of duty, by being subjected to the same excessive recordkeeping fees. Each class member would have to rely on the same evidence to establish Defendants' liability.

(4) Adequacy of Representation

Rule 23(a)(4) requires the Court to determine that the Named Plaintiffs and their attorneys will adequately represent the class. Fed. R. Civ. P. 23(a)(4). "The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F. 2d 124, 130 (1st Cir. 1985). Plaintiffs Michael Chechile and Sonia Lopez (the "Named Plaintiffs") and their attorneys, Walcheske & Luzi, LLC, satisfy both elements.

a. Plaintiffs are adequate class representatives.

The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting 1 William B. Rubenstein, Newberg on Class Actions § 3:58 (5th ed. 2012)). The interests of the Named Plaintiffs are not antagonistic to any class member. Since the damages and remedies pertaining to the claims in this case all go to the Plan, the Named Plaintiffs have the same interest as any of the other proposed settlement-class members: that is, recovering losses for the Plan. Accordingly, no conflict exists between the class representatives and the absent class members.

An adequate class representative need only have a basic understanding of the claims and a willingness to participate in the case. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *George v. Kraft Foods Global, Inc.*, 270 F.R.D. 355, 369 (N.D. Ill. 2010). The class representatives here more than meet this minimum standard. The Named Plaintiffs understand that they are attempting to recover the losses caused by Defendants' alleged unlawful, systematic management of the Plan. (Chechile Decl., ¶¶ 2,3; Lopez Decl., ¶¶ 2,3.) The Named Plaintiffs understand their duties as class

representatives, have provided information necessary for the prosecution of this case, and indicated their intent to vigorously prosecute this action. *Id.* The Named Plaintiffs understand their responsibilities to represent all class members, are willing to serve as class representatives, and participate in the vigorous prosecution of this lawsuit. *Id.*

b. Plaintiffs' attorneys are competent and qualified to represent all class members.

In assessing counsel's adequacy to represent the class, courts look to the factors for appointing class counsel under Rule 23(g):

> (i) the work counsel has done in identifying or investigating potential claims in the 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 that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g).

Walcheske & Luzi, LLC, lead Class Counsel, has extensive experience. Courts have found that Walcheske & Luzi is a firm recognized for being "experienced in complex [ERISA] litigation," and having the ability and resources to vigorously prosecute [an] action." *See Soulek*, Case No. 20-C-937, Dkt. 52 at p. 4. Walcheske & Luzi also has relevant knowledge to act as Class Counsel. The firm has litigated dozens of ERISA class action cases over the years and is one of the few firms in the country with the expertise and experience to do so. (Secunda Decl., ¶¶ 25-27.)

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

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

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

> to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1). Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re IKON Office Solutions*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). In both instances, the court is concerned with the problems that would be caused if each potential class member were free to pursue his or her own lawsuit.

The Rule 23 Advisory Committee noted that "an action which charges a breach of trust …by [a] … fiduciary similarly affecting the members of a large class of … beneficiaries" calls for certification under this section. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-34 (1999)(citing same). Further, due to the "derivative nature" of claims brought under ERISA §502(a)(2) [29 U.S.C. §1132(a)(2)], "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[.]" *Schering*, 589 F.3d at 604 (citing cases).

This district has granted class certification under Rule 23(b)(1) in actions brought under 29 U.S.C. §1132(a)(2). *See, e.g., Hochstadt*, 708 F. Supp.2d at 105–06 (Rule 23(b)(1) was "clearly satisfied" given that the "ERISA §502(a)(2) claim brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class member"); *Tracey v. M.I.T.*, No. 16-11620, Doc. 157 at 17–18 (D. Mass. Oct. 19, 2018) (certifying a class in an ERISA action under Rule 23(b)(1)); *Weeks v. JetDirect Aviation, Inc.*, No. 09-10527, 2010 U.S. Dist. LEXIS 111037, at *16 (D. Mass. Oct. 19, 2010) (certified settlement class under Rule 23(b)(1)).

Plaintiffs further contend that the proposed settlement class can be certified under Rule 23(b)(1)(A) or (B) because "inconsistent or varying adjudications with respect to individual class members…would establish incompatible standards of conduct for the party opposing the class," or "adjudications with respect to individual class members…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)(A)–(B). The risk of establishing

inconsistent standards is particularly strong where, as here, the central element of the prudence claims is not individualized: the fiduciary duties are owed to, and carried out for, the Plan.

Thus, a court adjudicating a suit by an individual plaintiff would determine the issues of the existence of the fiduciary duty and its breach not in relation to the individual plaintiff, but in relation to the entire plan because the fiduciaries' actions are taken as to the plan as a whole. As the Supreme Court stated: "Section 502(a)(2) provides for suits to enforce the liability-creating provisions of §409, concerning breaches of fiduciary duties that harm plans." *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 251 (2008). Plaintiffs contend that this produces not only a significant risk, but a near certainty that separate actions would establish differing standards for the duty under ERISA owed by the fiduciaries to the Plan. The tremendous number of Plan participants only enhances the likelihood of separate actions producing inconsistent and incompatible results.

In all, the Court should certify the proposed class for settlement purposes under Rule 23(b)(1).

CONCLUSION

Plaintiffs respectfully request that the Court (1) preliminarily approve the Parties' Class Action Settlement Agreement; (2) approve the proposed Settlement Notice and authorize distribution of the Notice to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes for settlement purposes under Federal Rule of Civil Procedure 23(a) and 23(b)(1); (4) schedule a final approval hearing; (5) appoint Michael Chechile and Sonia Lopez as Settlement Class Representatives and appoint Walcheske & Luzi, LLC and Jonathan M. Feigenbaum as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g); (6) approve the Plan of Allocation; and (7) enter the accompanying Preliminary Approval Order.

Dated this 8th day of May, 2023

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Attorneys for Plaintiffs and Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: May 8, 2023

s/Paul M. Secunda
Paul M. Secunda