UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

JOSHUA WALTER, individually,
and as representative of a Class of
Participants and Beneficiaries
of the Kerry Inc. Savings Plan,

Plaintiff,

Case No. 21-cv-539-BHL

v.

KERRY INC., *et al.,*

Defendants

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiff Joshua Walter ("Plaintiff") respectfully moves the Court to: (1) preliminarily approve the Parties' Class Action Settlement Agreement in the above-referenced matter; (2) approve the proposed Settlement Notices and authorize distribution of the Notices to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

This motion is made pursuant to Federal Rule of Civil Procedure 23(e) and is based on the accompanying Memorandum of Law and authorities cited therein, the Declaration of Paul M. Secunda and exhibits attached thereto (including the Settlement Agreement attached as **Exhibit 1**), the Declaration of Joshua Walter, and all files, records, and proceedings in this matter. Defendants join in the relief requested by Plaintiff's Motion for Preliminary Approval of Settlement. However, Defendants do not agree with the averments, statements, allegations, and claims stated by Plaintiff in the Motion for Preliminary Approval of Settlement and the attached Exhibits.

Dated this 31st day of October, 2022

WALCHESKE & LUZI, LLC

s/ Paul M. Secunda
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, 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: October 31, 2022

s/Paul M. Secunda
Paul M. Secunda

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

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INTRODUCTION

Plaintiff Joshua Walter ("Plaintiff") submits this Memorandum in support of his Motion for Preliminary Approval of his class action settlement with Defendants, Kerry Inc. ("Kerry"), the Board of Directors of Kerry Inc. ("Board Defendants"), the Benefits Committee of Kerry Inc. ("Committee Defendants") ("Defendants"), relating to the management of the Kerry Inc. Savings Plan ("Kerry Plan").[1]

Under the terms of the proposed Settlement, a Gross Settlement Amount of $900,000 will be paid to resolve the claims of Settlement Class Members who participated in the Plan during the subject period. This is a significant 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 former participants in the Plans;
- 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;

[1] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as **<u>Exhibit 1</u>** to the accompanying Declaration of Paul Secunda ("Secunda Decl.").

- The proposed Settlement Notices provide substantial information to Class Members about the Settlement, and will be distributed by email if available, or via first-class mail; and
- The Settlement provides Class Members the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices and authorizing distribution of the Notices to the Settlement Class; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the accompanying Preliminary Approval Order. Defendants join in the relief requested by Plaintiff's Motion for Preliminary Approval of Settlement. However, Defendants do not agree with the averments, statements, allegations, and claims stated by Plaintiff in this Memorandum of Law in Support of the Motion for Preliminary Approval of Settlement and the attached Exhibits.

BACKGROUND

I. PLEADINGS, MOTIONS, AND DISCOVERY

Plaintiff Joshua Walter filed this action on April 27, 2021. *Dkt. 1.* In his Complaint, Plaintiff alleges that during the putative Class Period (April 27, 2015 through the date of judgment), Defendants, as fiduciaries of the Plan, breached the duties they owed to the Plan, to Plaintiff, and to the other Participants of the Plan by, among other things: (1) authorizing the Plan to pay unreasonably high fees for retirement plan services ("RPS") (including Participant Account Maintenance ("PAM") fees); (2) authorizing the Plan to pay unreasonably high fees for managed account services; and (3) maintaining certain funds in the Plan despite the availability of identical or similar investment options with lower costs. *Id.* On June 28, 2021, Defendants filed a motion to dismiss the Complaint. *Dkts. 10-11.* This motion was briefed through September 7, 2021. *Dkts. 14-18.* After the decision by the Supreme Court in *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022), the Court held a status conference on February 8, 2022. *Dkts.* 20-21. The parties filed supplemental briefs on March 11, 2022. *Dkts. 22-23.* Thereafter, on May 27, 2022, the Court denied Defendants' motion to dismiss the Amended Complaint. *Dkt.* 24. On June 10, 2022, the parties entered into a proposed stipulation staying the matter to allow the parties to engage in voluntary mediation, *Dkt.* 27, and the Court entered a stay on June 10, 2022. *Dkt. 28.*

II. MEDIATION AND SETTLEMENT

The Parties engaged in a full-day mediation with a neutral mediator, Robert Meyer, on September 13, 2022.[2] *Secunda Decl. ¶ 10.* After extensive arm's length negotiations, the Parties reached a settlement in principle, signed a settlement term sheet on September 13, 2022, and then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Id. ¶ 11.* The parties filed a joint status report on September 15, 2022, alerting the Court of the Settlement and asking the case continued to be stayed until this Motion could be drafted. *Dkt. 30.* The next day, this Court granted the continuance of the stay and ordered that this preliminary approval motion be filed by Plaintiff by October 31, 2022. *Dkt. 31.*

[2] 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. 2.*

III. Overview of Settlement Terms

A. The Settlement Class

The Settlement applies to the following Settlement Class:

> All participants and beneficiaries of the Plan, at any time during the Class Period, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period, and any Alternate Payees, in the case of a person subject to a QDRO who was a participant in the Plan at any time during the Class Period.

Settlement § 1.10. In turn, the Class Period means at any time on or after April 27, 2015, through and including the date on which the Preliminary Approval Order is entered. *Id.* § 1.11. There are approximately 5,000 Settlement Class Members between April 27, 2015, and the present. *Secunda Decl. ¶ 3.*

B. Monetary Relief

Under the Settlement, Kerry will contribute $900,000 to a common settlement fund. *Settlement §§ 1.46, 3.1(a).* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id. §§ 3.1(b).*

The Plan of Allocation shall be prepared by Class Counsel and submitted to the Court for approval in connection with Final Approval of the Settlement. *Id. § 3.2(a).* Class Counsel shall retain the Settlement Administrator to calculate the amounts payable to Settlement Class Members. *Id. §§ 4.1.* For those Settlement Class Members who no longer have an account in the Plan at the time of the distribution of the share amounts owed to Class Members (the "Former Participants"), the Settlement Administrator shall issue a check from the Settlement

Fund to each Former Participant in the amount equaling his or her pro-rata share of the Net Settlement Amount. *Id. §3.2.2(a)*.[3]

C. Release of Claims

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

> Subject to Part VIII of [the Settlement] Agreement, upon and through the date of the Court's entry of the Final Approval Order and Judgment, Plaintiff and each Class Member (on behalf of themselves and their current and former beneficiaries, heirs, descendants, dependents, marital community, administrators, executors, representatives, predecessors, successors, and assigns), and the Plan (by and through the Independent Fiduciary pursuant to Section 2.6) absolutely and unconditionally release and forever discharge all Defendant Released Parties from any and all Released Claims.

Id. § 5.1. In turn, the Release Claims mean:

> Any and all actual or potential claims (including any Unknown Claims), actions, causes of action, demands, rights, obligations, damages, and liabilities (including claims for attorneys' fees, expenses, or costs), whether arising under federal, state, or local law, whether by statute, contract, tort, equity, or otherwise, whether brought in an individual or representative capacity, whether known or unknown, suspected or unsuspected, for monetary, injunctive, and any other relief against the Defendant Released Parties and Defendants' Counsel through the date the Court enters the Final Approval Order and Judgment: a. That were asserted in the Action, or that arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, occurrences or the conduct alleged or asserted in the Action or could have been alleged or asserted in the Action, whether or not pleaded in the Complaint; b. That arise out of, relate to, are based on, or have any connection with: (1) the overall structure, management, or monitoring of the Plan's investment menu; (2) the selection, removal, monitoring, oversight, retention, fees, expenses, or performance of the

[3] Under no circumstances will any monies revert to Defendants. Any checks that are uncashed will be paid into the Plan for the purpose of defraying administrative expenses. *Id. § 3.4.*

> investment options available under the Plan; (3) the selection, monitoring, oversight, retention, fees, expenses, or performance of the Plan's service providers, including without limitation, its administrative and/or recordkeeping service providers, and/or its managed account service providers; (4) the selection, nomination, appointment, retention, monitoring, and removal of the Plan's fiduciaries; (5) fees, costs, or expenses charged to, paid, or reimbursed by the Plan; (6) the services provided to the Plan or the cost of those services; (7) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties relating to the Plan's investment options or service providers; (8) engaging in self-dealing or prohibited transactions in related to the Plan's investment options or service providers, or any alleged breach of the duty of loyalty, care, or prudence; and/or (9) any assertions with respect to any fiduciaries or service providers of the Plan (or the selection or monitoring of those fiduciaries) in connection with the foregoing; or c. That would be barred by *res judicata* based on entry of the Final Approval Order and Judgment; or d. That relate to the direction to calculate, the calculation of, or the method or manner of allocation of the Settlement Fund in accordance with the Plan of Allocation or to any action taken or not taken by the Settlement Administrator in the course of administering the Settlement; or e. That relate to the approval by the Independent Fiduciary of the Settlement; and The Class Representative, Class Members and the Plan expressly waive and relinquish, to the fullest extent permitted by law, any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which provides that a "general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party," and any similar state, federal or other law, rule or regulation or principle of common law of any domestic governmental entity.

Id. § 1.42. The Released Claims do not include claims to enforce the Settlement Agreement. *Id. § 1.43*.

D. Class Notice and Settlement Administration

Class Members will receive notice of the settlement via first-class U.S. Mail. *Id. § 2.5(a), & Exs. B-1 & B-2.* To the extent that Class Members would like more information, the Settlement Administrator[4] 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 § 2.5(c) and Exs. B-1, B-2.* 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. § 2.5(d).*

E. Attorneys' Fees and Administrative Expenses

The Settlement requires that Class Counsel file their Motion for Attorneys' Fees and Costs no later than the deadline set in the Preliminary Approval Order. *Id. § 7.2(a).* Under the Settlement, the requested fees may not exceed one-third of the Gross Settlement Amount. *Id.* In addition, the Settlement provides for recovery of Administrative Costs related to the Settlement, *id. §§ 1.3, 3.5,* and for a case contribution award up to $10,000 for Plaintiff. *Id § 7.1(a).*

F. Review by Independent Fiduciary

As required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. *Id. §§ 1.29, 2.6*; *see also* 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 thirty (30) calendar days before the Fairness Hearing. *Settlement,* § 2.6(c), so it may be considered by the Court.

[4] Analytics Consulting, LLC has been selected as the Settlement Administrator, and has extensive experience administering similar ERISA class action settlements. *Id. § 1.45; Secunda Decl. ¶ 28 & Ex. C.*

ARGUMENT

I. Standard of Review

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. This involves a two-step process. *See* MANUAL FOR COMPLEX LITIGATION §§ 21.61–.63, at 308–23 (4th ed. 2004). First, counsel submit the proposed settlement terms to the court, and the court makes a preliminary fairness evaluation. *Id.* § 21.632. Second, following preliminary approval, class members are provided notice of a fairness hearing, at which time arguments and evidence may be presented in support of, or opposition to, the settlement. *Id.* §§ 21.633–.634.

In 2018, Rule 23 was amended to specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory cmte note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able" to approve the proposal. Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court should consider at the final approval stage in determining whether a settlement should be approved:

> (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;
> (iii) the terms of any proposed award of attorney's fees; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).[5]

At this stage, the proposed agreement is viewed "in a light most favorable to settlement." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996); *Martin v. Caterpillar, Inc.*, 2010 WL 3210448, at *2 (C.D. Ill. Aug. 12, 2010). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard. For the reasons that follow, this Court should grant preliminary approval of the Settlement and authorize notice to the Settlement Class.

II. The Settlement Meets the Standard for Preliminary Approval

A. The Class Is Adequately Represented

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.* The named Plaintiff is also an adequate class representative, who has diligently pursued this action on behalf of the Class after acknowledging their duties as class representatives. *See Walter Decl. ¶¶ 2–3.*

[5] Prior to the 2018 Rule 23(e) amendments, the Seventh Circuit required district courts to consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby*, 75 F.3d at 1199). Because these factors "overlap," they are considered together with the Rule 23(e)(2) factors below. *See Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *2 (S.D. Ill. Dec. 16, 2018); *In re NCAA Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 217 (N.D. Ill. 2019), *aff'd sub nom. Walker v. NCAA*, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

B. The Proposal Was Negotiated at Arm's-Length

Where experienced counsel has negotiated a settlement at arm's-length, with the help of an experienced mediator, a strong initial presumption is created that the compromise is fair. *See Eubank v. Pella Corp.*, 2019 WL 1227832, at *3 (N.D. Ill. Mar. 15, 2019); *Hale*, 2018 WL 6606079, at *3. That is exactly the situation here: The settlement negotiations took place in the context of an arm's length mediation session before an experienced and impartial mediator. *See Secunda Decl. ¶ 10 & Ex. 2.*

Also, relevant here: (1) Class Counsel undertook an extensive investigation of the factual and legal bases for Plaintiffs' claims prior to commencing the action, *Secunda Decl. ¶ 8*; and (2) Class Counsel had the necessary experience and qualifications to evaluate the Parties' legal positions, *id. ¶¶ 12–27.* These circumstances further favor approval of the Settlement. Courts in this Circuit consistently approve class action settlements reached through arms-length negotiations after meaningful mediation discovery. *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014) (noting that, "although formal discovery had not commenced, [plaintiffs] had access to extensive public documents," and settlement was reached "after an arm's-length negotiation where the parties' positions on liability and damages were extensively briefed and debated" before an experienced mediator); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 133, at *5 (N.D. Ill. Sept. 20, 2018) ("The negotiations were supported by a robust investigation before commencement of the Lawsuit; the production and review of confidential documents … during mediation discovery; and extensive legal and factual research on the issues in the case.").

C. The Settlement Terms Are Fair and Adequate

1. The Monetary Relief Is Significant

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, Plaintiff estimated that the total retirement plan fees (RPS) exceeded a reasonable amount by $3.9 million, $650,000 for high-cost share classes, and $1.3 million for excessive managed account, for a total loss of $5.85 million. *Secunda Decl. ¶ 4 & n.1.* Based on this estimate, the $900,000 recovery represents 15% of the total estimated losses. This is on par with numerous other ERISA class action settlements that have been approved across the country.[6]

2. The Risks, Costs, and Delay of Further Litigation Were Significant

In the absence of a settlement, Plaintiff would have faced potential risks. At the time of settlement, although Plaintiff had withstood Defendants' motion to dismiss, there was a risk that the Court might have dismissed the claims on summary

[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); *Price v. Eaton Vance Corp.*, No. 18-12098, Dkt. 32 at 12 (May 6, 2019), *approved* Dkt. 57 (D. Mass. Sept. 24, 2019) (23% alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858 (C.D. Cal. July 30, 2018) (25% of estimated 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").

judgment. If the case proceeded to trial, the Defendants still might have prevailed.[7] Finally, even if Plaintiff 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.[8] 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 Plaintiff lacked confidence in his claims. However, given the risks and costs of litigation, it was reasonable for Plaintiff to reach a settlement on these terms. *See 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 plaintiffs would have spent a large amount of money, time, and effort.")

3. The Proposed Method of Distributing Relief to The Class Is

[7] *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).

[8] *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).

Effective

Consistent with numerous other ERISA settlements that have received court approval,[9] current Participants will have their Plan accounts automatically credited with their share of the Settlement, and former Participants will receive their pro-rata amount by check. *See Settlement § 3.1.* This method of distribution is both effective and efficient.

4. The Settlement Imposes a Reasonable Limitation on Attorney's Fees

The amount of any fee award is reserved to the Court in its discretion. *See Settlement § 7.2(a).* However, Class Counsel have agreed to limit their request to one-third of the settlement amount. *Id.* This is the amount typically awarded in complex ERISA cases such as this. *See Bell v. Pension Comm. of ATH Holding Co.*, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting cases).

5. No Separate Agreements Bear on the Adequacy of Relief to the Class

There are no side agreements relating to the Settlement. As the Settlement plainly and expressly states: "The Agreement is the entire agreement among the Parties, and it supersedes any prior agreements, written or oral, between the Parties. The Agreement cannot be altered, modified, or amended except through a writing executed by either (a) Plaintiff and Defendants, or (b) Class Counsel and Defendants' Counsel." *Settlement § 10.5.*

[9] *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).

6. The Settlement Treats Class Members Equitably

The Settlement treats Class Members equitably. As noted above, the Settlement Amount will be allocated among eligible Class Members on a *pro rata* basis, the same allocation formula is used to calculate settlement payments for all eligible Class Members, and that formula is tailored to the claims asserted in the case. *See supra* at 5; *Secunda Decl. ¶ 6*. This further supports approval of the Settlement.

7. The Class Notice Plan is Reasonable and Should be Approved

The Court also must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here, as the Settlement Administrator will individually email or mail notices of the Settlement to Class Members. *Settlement ¶ 2.5(a).* This type of notice is presumptively reasonable. *See Phillips Petrol. Co. v. Shutts,* 472 U.S. 797, 812 (1985); *Snyder v. Ocwen Loan Serv'g*, 2019 WL 2103379, at *8 (N.D. Ill. May 14, 2019). Moreover, the content of the Notices is also reasonable, as they contain information regarding the terms of the Settlement, the claims asserted in the action, the definition of the class, the scope of the class release, the process for making an objection, Class Members' right to appear at the Fairness Hearing, and the proposed attorneys' fees, expenses, and service awards. *See Settlement Exs. B-1–B-2.*

8. The Proposed Class Should be Certified for Settlement Purposes

Finally, this Court should certify the Settlement Class for settlement purposes.[10] "ERISA class actions are commonly certified" under Rule 23 because ERISA breach of fiduciary duty claims are brought on behalf the plan as a whole. *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). That is precisely the nature of this action. *See Compl. (Dkt. 1) ¶ 6* (citing 29 U.S.C. §§ 1109, 1132(a)(2)).

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

Rule 23(a) of the Federal Rules of Civil Procedure sets forth four requirements applicable to all class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem*, 521 U.S. at 620. Each of these requirements is met in this case.

Numerosity. As noted above, there are approximately 5,000 Class Members. *See supra* at 4. This far exceeds the threshold for numerosity. *See Neil*, 275 F.R.D. at 260.

Commonality. "[T]he commonality requirement is typically easily satisfied in ERISA cases." *Shanechian v. Macy's, Inc.*, 2011 WL 883659, at *3 (S.D. Ohio March 10, 2011); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004) ("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."). Here, as in other ERISA cases, there are common questions, such as (1) whether the Plans' RPS expenses and managed account fees

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[10] In the context of a settlement, class certification is more easily attained because the court need not inquire whether a trial of the action would be manageable on a class-wide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

were excessive; (2) whether it was prudent to retain certain share classes and investments in the Plan; (3) whether Defendants breached their fiduciary duties to the Plans; and (4) whether the Plans suffered losses from the alleged fiduciary breaches. Accordingly, commonality is satisfied. *See, e.g.*, *Neil*, 275 F.R.D. at 260–61; *Godfrey v. GreatBanc Tr. Co.*, 2021 WL 679068, at *4 (N.D. Ill. Feb. 21, 2021).

Typicality. The typicality requirement "tend[s] to merge" with commonality. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Godfrey*, 2021 WL 679068, at *5. Typicality is satisfied here because the "ERISA claims share the same 'essential characteristics' of the 'claims of the class at large' in that they seek to (1) obtain recovery owed to the Plan[s] and (2) hold fiduciaries accountable for breaching their duties." *Id.* (citing *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993)).

Adequacy. The adequate representation inquiry considers the adequacy of the named plaintiffs and class counsel. *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), *as modified* (Sept. 22, 2011). Both are adequate here for the reasons noted above. *See supra* at 9.

The named Plaintiff has no known conflicts of interest with other Class Members, has assisted in pursuing the action, and has acknowledged his responsibilities as class representative. *See Walter Decl. ¶¶ 2–3.* This is sufficient to demonstrate adequacy. As members of the Plans, their interests are aligned with other class members. *See Rush v. GreatBanc Tr. Co.,* 2021 WL 2453070, at *7 (N.D. Ill. June 16, 2021); *Godfrey*, 2021 WL 679068, at *5–6.

For their part, Class Counsel are experienced ERISA litigators. *See supra* at 9; *Secunda Decl. ¶¶ 25–27.* Thus, Class Counsel are also adequate to represent the Class.

E. 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). The claims here plainly satisfy this test because they are brought derivatively on behalf of the Plans under ERISA, *see* 29 U.S.C. §§ 1109 and 1132(a)(2), and the outcome will necessarily affect the participants in the Plans and the Plans' fiduciaries. *See Godfrey*, 2021 WL 679068, at *7. Indeed, courts have held that "breach of fiduciary duty claims brought [section 1132(a)(2)] are 'paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.'" *Neil*, 275

F.R.D. at 267–68 (collecting cases); *In re Household Int'l, Inc. ERISA Litig.*, 2004 WL 7329911, at *2 (N.D. Ill. Nov. 22, 2004).[11] This case is no exception.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests 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; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

Dated this 31st day of October, 2022

WALCHESKE & LUZI, LLC

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[11] The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate 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, Advisory Committee Note (1966).

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, 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: October 31, 2022

s/Paul M. Secunda
Paul M. Secunda