UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DENIS J. CONLON, NICOLE TRAVIS, DIANE M. MATO, BRIAN J. SCHROEDER, PATRICK A. JACEK, PETER HANSELMANN, and ALEXANDER PASCALE, Individually, on Behalf of The Northern Trust Company Thrift-Incentive Plan, and on Behalf of All Others Similarly Situated, Plaintiffs, v. THE NORTHERN TRUST COMPANY; THE NORTHERN TRUST COMPANY EMPLOYEE BENEFIT ADMINISTRATIVE COMMITTEE; and KIMBERLY SOPPI, Defendants.	)	Case No. 1:21-cv-2940 Hon. Keri L. Holleb Hotaling

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AND AUTHORIZATION TO DISSEMINATE NOTICE OF THE SETTLEMENT

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Plaintiffs Denis J. Conlon, Diane M. Mato, Brian J. Schroeder, Patrick A. Jacek, Peter Hanselmann, and Alexander Pascale ("Plaintiffs"), individually, and on behalf of a class of participants in The Northern Trust Thrift-Incentive Plan (the "Plan"), respectfully submit this Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice of the Settlement. Defendants do not oppose any portion of Plaintiffs' Motion.[1]

BACKGROUND

I. PROCEDURAL BACKGROUND

Plaintiffs Denis J. Conlon and Nicole Travis, individually, and as representatives of a class of participants in the Plan, filed this action on June 1, 2021. ECF No. 1. On September 3, 2021, Defendants filed their Motion to Dismiss for Failure to State a Claim. ECF Nos. 21-22. Plaintiffs Denis J. Conlon, Nicole Travis,[2] Diane M. Mato, Brian J. Schroeder, Patrick A. Jacek, Peter Hanselmann, and Alexander Pascale filed an amended complaint on October 22, 2021. ECF No. 25. The amended complaint alleged that Defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001 *et seq.*, with respect to its management of the Plan's investments, including failing to diligently screen the majority of Plan options (including the Company's retention of Northern Trust's proprietary target date funds series ("Northern Trust Focus Funds" or "Focus Funds")); failing to monitor the Plan's investment and

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Class Action Settlement Agreement dated December 6, 2024 ("Settlement Agreement"), which is attached as Exhibit A to the Declaration of Kristen M. Anderson in Support of Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice of the Settlement ("Anderson Decl."). Internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

[2] Nicole Travis subsequently voluntarily withdrew as a named plaintiff. ECF Nos. 78, 105.

administrative fees to defray the Plan costs; and engaging in certain prohibited transactions. *Id*. On November 5, 2021, Defendants filed their Motion to Dismiss for Failure to State a Claim. ECF Nos. 28-29. On December 20, 2021, Plaintiffs filed their Memorandum in Opposition to the Motion to Dismiss for Failure to State a Claim. ECF No. 36. On January 26, 2022, Defendants filed their Reply in Support of the Motion to Dismiss. ECF No. 40.

Upon the parties' motion, the Court stayed proceedings until May 25, 2022, while the parties engaged in mediation. ECF No. 43. The parties exchanged mediation statements and engaged in a full-day mediation on May 18, 2022, before Robert A. Meyer, Esq., of JAMS ADR in Los Angeles, CA, but were unable to reach an agreement to resolve the claims asserted in the Action. ECF No. 45.

On August 5, 2022, the Court denied Defendants' Motion to Dismiss after lengthy briefing and submission of numerous supplemental authorities. ECF No. 51. The case was referred to a magistrate judge for discovery supervision and a settlement conference. ECF No. 58. Following the Court's dismissal order, Defendants filed their Answer (ECF No. 56), and the parties engaged in fact discovery, which included six depositions of Plaintiffs, 13 depositions of Defendant witnesses, Plaintiffs' review of 24,899 documents (348,998 pages) produced by Defendants and 1,440 documents (11,357 pages) produced by a non-party, and Plaintiffs' production of 29 documents (154 pages). Fact discovery closed on November 30, 2023, with the exception of a supplemental document production by Defendants on December 20, 2023, and a production of documents by a non-party in January 2024. ECF No. 89.

On February 21, 2024, the parties engaged in a full-day mediation before Jed D. Melnick, Esq., of JAMS ADR in New York, NY. The mediation did not result in a settlement. ECF No. 91.

The parties proceeded to expert discovery, which included the disclosure of two expert reports by Plaintiffs and two expert reports by Defendants. The parties took four expert depositions in June 2024, and expert discovery closed on June 24, 2024. ECF No. 93.

Following the completion of expert discovery, the parties requested a settlement conference conducted by a magistrate judge. *Id.* Following a pre-settlement call before the Honorable Keri L. Holleb Hotaling, a three-hour, in-person Settlement Conference was set for October 8, 2024. ECF Nos. 94-95, 97. The parties submitted settlement letters to the Court in advance of the Settlement Conference. With permission of the parties, on September 27, 2024, the Court held *ex parte* calls with counsel for Plaintiffs and counsel for Defendants, and the parties submitted additional information to Judge Holleb Hotaling on October 1, 2024. ECF No. 99.

Following the October 8, 2024 Settlement Conference, settlement discussions continued, and the parties reached an agreement in principle on October 10, 2024. ECF Nos. 101, 103. Also following the Settlement Conference, the case was reassigned to the Honorable Keri L. Holleb Hotaling for all purposes with the consent of the Parties. ECF No. 109.

On October 30, 2024, the Court held an off-the-record settlement call and ordered the parties to file a joint proposed schedule for settlement by November 8, 2024, which the parties timely filed. ECF Nos. 107, 110. The Court adopted the parties' proposed schedule with minor changes, setting an in-person hearing on preliminary approval on January 28, 2025, at 10:00 a.m., and an in-person Fairness Hearing on June 10, 2025, at 10:00 a.m. ECF Nos. 111, 112. The Parties executed the Stipulation on December 6, 2024.

II. PROPOSED SETTLEMENT CLASS

In accordance with Section 2.1(a) of the Settlement Agreement, Plaintiffs seek to certify the following Settlement Class:

> All participants and beneficiaries of The Northern Trust Thrift-Incentive Plan who were invested in The Northern Trust Focus Funds at any time on or after June 1, 2015, through preliminary approval of this Settlement, excluding any persons with responsibility for the Plan's investment or administrative functions.

The Class Period is defined as any time on or after June 1, 2015, through preliminary approval of this settlement.

III. THE TERMS OF THE PROPOSED SETTLEMENT

In exchange for releases, for the dismissal of the action, and for entry of a judgment as provided in the Settlement, Defendants will make available to Class Members the benefits described below.

Monetary Relief: Defendants will deposit $6,900,000 (the "Gross Settlement Amount") into the Qualified Settlement Fund. The Gross Settlement Fund, plus any interest or income earned on the Qualified Settlement Fund, will be used to pay the Plan participants' recoveries, Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, and Plaintiffs' Service Awards as described in the Settlement.

Releases: All Class Members and anyone claiming through them will fully release the Plan as well as Defendants and the Released Parties from Plaintiffs' Released Claims. The Released Parties include, but are not limited to, Defendants' past, present, and future parent corporation(s), subsidiaries, divisions, joint ventures, predecessors, successors, successors-in-interest, and assigns, and any individual, partnership, corporation, or any other form of entity or organization that controls, is controlled by, or is under common control with any of the foregoing. Plaintiffs' Released Claims include, but are not limited to, all claims that were asserted in the Action or could have been asserted in the Action based on any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences asserted in the Action, whether or not pleaded in the complaints.

IV. COSTS TO ADMINISTER THE SETTLEMENT AND SERVICE AWARDS

The costs to administer the Settlement, including those costs associated with providing notice to Class Members, will be paid from the Gross Settlement Amount. Plaintiffs will seek $7,500 for each of the six named plaintiffs as service awards. This request is consistent with similar litigation finding that such awards are justified to incentivize individuals to step forward to represent a class as class representatives. *See Beesley v. Int'l Paper Co.*, No. 3:06-cv-703, 2014 WL 375432, at *3-4 (S.D. Ill. Jan. 31, 2014) (approving $25,000 each to six named plaintiffs, noting that "ERISA litigation against an employee's current or former employer carries unique risks and fortitude, including alienation from employers or peers"); *Barcenas v. Rush Univ. Med. Ctr.*, No. 1:22-cv-00366 (N.D. Ill. Jan. 19, 2023), ECF No. 73 (approving $7,500 each to four named plaintiffs in ERISA case); *Tolomeo v. R.R. Donnelley & Sons, Inc.*, No. 1:20-cv-07158 (N.D. Ill. May 23, 2024), ECF Nos. 120, 122 (awarding two named plaintiffs $7,500 each in ERISA case). Service awards are justified here. Plaintiffs took on a substantial risk of non-recovery, exposed themselves to personal liability if Defendants are awarded their attorneys' fees and costs under 29 U.S.C. §1132(g)(1), and devoted substantial amounts of their own time to benefit absent Class Members. The total award requested for Plaintiffs is only 0.65% of the Gross Settlement Amount.

V. ATTORNEYS' FEES AND COSTS

Class Counsel will request attorneys' fees to be paid out of the Gross Settlement Fund in an amount not to exceed one-third of the Gross Settlement Amount, or $2,300,000, and reimbursement for reasonable litigation expenses incurred not to exceed $800,000, plus interest on such amounts awarded at the same rate as earned on the Settlement Fund until paid. If the Settlement is approved, Class Counsel will incur additional fees and costs, which will not be sought from the Gross Settlement Amount. Class Counsel will seek no further fees for communicating

with Class Members or Defendants regarding the Settlement and monitoring the administration of the Settlement. Class Counsel also will not seek fees or costs to enforce the Settlement, if necessary. A formal application for Attorneys' Fees and Costs and for Service Awards will be made at least 14 days prior to the deadline for Class Members to file objections to the Settlement. *See* ECF No. 112.

ARGUMENT

I. THE COURT SHOULD CERTIFY A SETTLEMENT CLASS

To be approved for certification, even a settlement class, a case must meet the requirements of Federal Rule of Civil Procedure 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The Court need not determine whether the action would be manageable if tried, "for the proposal is that there be no trial." *Id.* at 620. The proposed class must satisfy numerosity, common questions of fact and law, typicality of claims or defenses, and adequacy of representation under Rule 23(a) and one of the categories under Rule 23(b). Fed. R. Civ. P. 23(a), (b).

The proposed settlement class satisfies Rule 23(a) and Rule 23(b)(1), and Plaintiffs and their counsel meet the requirements for appointment of class representatives and Class Counsel.

A. Rule 23(a) Is Satisfied

1. Numerosity

The proposed Settlement Class consisting of approximately 14,000 individuals satisfies the numerosity requirement under Rule 23(a)(1) because joinder of all Class Members is impracticable. *Orr v. Shicker*, 953 F.3d 490, 497-98 (7th Cir. 2020).

2. Commonality

The proposed Settlement Class satisfies Rule 23(a)(2) because there are "questions of law or fact common to the class" (*id.* at 499 (citing Fed. R. Civ. P. 23(a)(2))), including whether the Plan suffered a loss and the proper measure of loss, whether equitable relief is needed to remedy

any fiduciary breach, and whether Defendants breached their fiduciary duty and committed prohibited transactions with respect to the Plan.

3. Typicality

The proposed Settlement Class satisfies Rule 23(a)(4) because Plaintiffs' claims are "typical of the claims [. . .] of the class," as they arise from the same course of conduct and are based on the same legal theories as the absent Class Members. *McFields v. Dart*, 982 F.3d 511, 517-18 (7th Cir. 2020).

4. Adequacy of Representation

Plaintiffs meet the requirements of Rule 23(a)(4) because they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiffs understand the claims they are pursuing, understand their responsibilities to serve as Class Representatives, have remained in contact with Class Counsel, monitored the progress of the litigation, and actively participated in the prosecution of this action, including sitting for depositions, responding to interrogatories, and producing documents.

Plaintiffs' counsel, Scott+Scott Attorneys at Law LLP, Peiffer Wolf Carr Kane & Conway LLP, and The Law Offices of Michael M. Mulder, have substantial expertise in the litigation of ERISA class actions, are fully capable of prosecuting this Action, and are competent and able to fairly and adequately represent the interests of the proposed Settlement Class. Fed. R. Civ. P. 23(g).

B. The Requirements of Rule 23(b)(1) Are Met

The proposed Settlement Class meets the requirements under Rule 23(b)(1)(A) and (B). "'[N]umerous courts have held' that claims for breach of fiduciary under ERISA § 502(a)(2) are 'paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class,' in light of their derivative nature." *Wachala v. Astellas US LLC*, No. 20 C 3882, 2022 WL 408108, at *9

(N.D. Ill. Feb. 10, 2022) (quoting *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009), and citing *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011)). Separate actions to resolve, for example, whether Defendants violated their fiduciary duties with respect to the offering of the Northern Trust Focus Funds, whether the Northern Trust Focus Funds were prudent investments, what is the proper measure of Plan losses, among other issues, would "establish incompatible standards of conduct" for Defendants. Fed. R. Civ. P. 23(b)(1)(A). Likewise, a judgment for one participant in an individual action over these issues would be "dispositive of the interests" of absent Class Members or "substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

II. THE COURT WILL LIKELY BE ABLE TO APPROVE THE PROPOSED SETTLEMENT

Settlement is a strongly favored method for resolving class action litigation. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *1 (N.D. Ill. Oct. 10, 1995) ("[T]he federal courts look with great favor upon the voluntary resolution of litigation through settlement[. . . .] In the class action context in particular, there is an overriding public interest in favor of settlement.").

Rule 23(e) requires judicial approval of class action settlements. *In re Northfield Labs., Inc. Sec. Litig.*, No. 06 C 1493, 2012 WL 366852, at *5 (N.D. Ill. Jan. 31, 2012). First, under Rule 23(e)(1), the court performs a preliminary review of the terms of the proposed settlement to determine whether it is sufficient to warrant notice to the class and a hearing. Second, under Rule 23(e)(2), after notice has been provided and a hearing held, the court determines whether to grant final approval of the settlement. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §13.14 (2020).

A court should grant preliminary approval and authorize notice of a settlement to the class upon a finding that it "will likely be able" to: (i) finally approve the settlement under Rule 23(e)(2) and (ii) certify the class for purposes of the settlement. *See* Rule 23(e)(1)(B). This standard codifies prior case law holding that preliminary approval is warranted where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible [judicial] approval." 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §13:13 (5th ed. 2021) (alteration in original).[3]

In considering whether final approval is likely, courts consider whether:

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

Fed. R. Civ. P. 23(e)(2).[4] Because these factors are satisfied here, final approval of the Settlement is "likely," and preliminary approval of the Settlement is warranted. Fed. R. Civ. P. 23(e)(1)(B).

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[3] *See also Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (the question at the preliminary approval stage is "whether the proposed settlement is within the range of possible approval"); *Kaufman v. Am. Express Travel Related Servs. Co., Inc.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009) (a relevant consideration is "whether [the settlement] has no obvious deficiencies [and] does not improperly grant preferential treatment to class representatives or segments of the class") (second alteration in original).

[4] Final approval will involve an analysis of the Rule 23(e)(2) factors and, to the extent they do not overlap, the Seventh Circuit's approval factors: (i) the strength of the case, balanced against the settlement amount; (ii) the defendant's ability to pay; (iii) the complexity, length, and expense of further litigation; (iv) the amount of opposition to the settlement; (v) the presence of collusion in reaching a settlement; (vi) the reaction of class members to the settlement; (vii) the opinion of competent counsel; and (viii) the stage of the proceedings. *Armstrong*, 616 F.2d at 314.

A. Procedural Aspects of the Settlement Satisfy Rule 23(e)(2)

Rule 23(e)(2)'s first two factors "look[] to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Courts have found that a settlement arrived at after arm's-length negotiations by fully informed, experienced, and competent counsel may be properly presumed to be fair and adequate. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001).

Here, the Settlement embodies all the hallmarks of a procedurally fair resolution under Rule 23(e)(2). ***First***, Class Counsel's settlement posture was informed by the extensive, highly contentious, years-long litigation efforts that preceded the Settlement. All parties have extensively developed the facts supporting their claims and defenses. Through the settlement process, Class Counsel comprehensively vetted the factual record, analyzed Defendants' arguments and contrary facts, and thoroughly considered potential damages and the costs and risks of ongoing litigation. Class Counsel – who have extensive experience litigating ERISA class actions – were well informed of the strengths and weaknesses of the claims and defenses in this Action and conducted the settlement negotiations seeking to achieve the best possible result for the Settlement Class in light of the risks, costs, and delays of continued litigation.[5]

Second, the parties' settlement negotiations were contentious and at arm's length. The parties engaged in settlement negotiations in this case three times, and only on the third try, in a settlement conference before the Court, did they reach a resolution. The prior mediators' and the Court's close involvement in the settlement process further supports that the Settlement the parties

[5] Courts give considerable weight to the opinion of experienced and informed counsel. *See In re: Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *12 (N.D. Ill. Feb. 29, 2016); *Armstrong*, 616 F.2d at 325 (in assessing a class settlement, "the court is entitled to rely heavily on the opinion of competent counsel").

achieved is free of collusion. *See McCue v. MB Fin., Inc.*, No. 1:15-cv-00988, 2015 WL 1020348, at *1-2 (N.D. Ill. Mar. 6, 2015) (preliminarily approving settlement and finding it to be "result of extensive, arms'-length negotiations by [well-versed] counsel" with the assistance of an experienced mediator, "reinforc[ing] the non-collusive nature of the settlement").

B. The Terms of the Proposed Settlement Are Adequate

1. The Settlement Provides Substantial Relief, Especially in Light of the Costs, Risks, and Delay of Further Litigation

A key factor in assessing whether to approve a class action settlement is a plaintiff's likelihood of success on the merits, balanced against the relief offered in settlement. *See* Rule 23(e)(2)(C). Here, the Settlement provides for a $6,900,000 million cash recovery to be allocated among Settlement Class Members following deduction of Court-approved costs.

While Plaintiffs maintain that they have strong underlying claims against Defendants related to their management and administration of the Plan, Plaintiffs faced significant and ongoing risks to recovery. Plaintiffs alleged that Defendants breached their fiduciary duties under ERISA by failing to establish and follow a prudent and loyal process for monitoring and reviewing the Plan's investment options, including the Company's retention of Northern Trust Focus Funds throughout the Class Period. Plaintiffs further alleged that Defendants kept these target date funds in the Plan despite their persistent underperformance compared to competitor target date funds and failed to timely remove or replace them with readily available alternatives. In defined contribution plans, like the one at issue here, fiduciaries must "systematic[ally] conside[r] all the investments of the [Plan] at regular intervals to ensure that they are appropriate." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015) (first and second alterations in original). Fiduciaries have an ongoing duty to "monitor investments and remove imprudent ones." *Id.* at 530. Plaintiffs argue that Defendants' alleged fiduciary misconduct caused the Plan to sustain multi-million-dollar damages while

Defendants gained wrongful profits from their employees. Further, Plaintiffs contend that Defendants made the decision to retain the Focus Funds to advance their own business interests rather than acting solely in Plan participants' interests. *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (ERISA requires that a plan fiduciary "act with complete and undivided loyalty to the beneficiaries of the trust."). The Court found that these allegations supported claims of a breach of fiduciary duty at the pleading stage (ECF No. 51 at 1-2), but there was no guarantee that Plaintiffs would continue to prevail at the class certification, summary judgment, and trial stages of the case.

Although Class Counsel continue to believe in the underlying merits of their claims, there are legal obstacles and defenses that render recovery in this case uncertain. Defendants denied and continue to deny Plaintiffs' allegations. Defendants dispute that any of the Plan's fiduciaries committed or participated in any fiduciary breach related to the use of the Focus Funds. In particular, Defendants contend that they followed a rigorous decision-making and monitoring process, adhered to a reasonable investment policy statement, and that Plan investment decisions were in the hands of highly qualified investment professionals.

Class Counsel dispute Defendants' contentions and believe discovery in the case was supportive of Plaintiffs' arguments and claims and that Plaintiffs' claims are meritorious. However, proceeding to trial would have taken substantial time and would have entailed a risk of non-recovery. "ERISA 401(k) fiduciary breach class actions are extremely complex and require a willingness to risk significant resources in time and money, given the uncertainty of recovery and the protracted and sharply-contested nature of ERISA litigation." *Allegretti v. Walgreen Co.*, No. 1:19-cv-05392, 2022 WL 484216, at *1 (N.D. Ill. Jan. 4, 2022). In Class Counsel's experience, and as evidenced by this case, these types of actions are hard fought at each stage of litigation.

Following the Court's denial of Defendants' Motion to Dismiss, the parties engaged in extensive discovery, including the completion of fact and expert discovery. Had the parties not settled, the case was set to be returned to the district judge for dispositive motion practice and trial. ECF No. 92. The next milestone in the case would have been class certification. While Class Counsel believe there was a strong likelihood that Plaintiffs would obtain certification, Defendants would no doubt raise a substantial defense, including renewal of arguments rejected at the motion to dismiss stage relating to Plaintiffs' standing. *See* ECF No. 51 at 17-18.

Following class certification, Defendants almost certainly would bring a motion for summary judgment. This case, like most ERISA matters, involve fact-intensive and context-specific inquiries into whether Defendants breached their fiduciary duties, making summary abdication here unlikely, but not risk free, for Plaintiffs. *See Anderson v. DePhillips*, No. 02 C 7685, 2004 WL 816464, at *9 (N.D. Ill. Mar. 17, 2004) ("Whether ERISA fiduciaries acted 'prudently' involves a question of fact precluding summary judgment."); *Keach v. U.S. Tr. Co., N.A.*, 234 F. Supp. 2d 872, 884 n.3 (C.D. Ill. 2002) (same).

The trial in this matter would have been complex, and there was certainly no guarantee of a verdict in favor of Plaintiffs. *See, e.g.*, *In re: Prime Healthcare ERISA Litig.*, No. 8:20-cv-1529, 2024 WL 3903232, at *28 (C.D. Cal. Aug. 22, 2024) (concluding after five-day bench trial that investment committee used prudent processes and ruling in favor of defendants on all claims). A voluminous number of exhibits would be admitted, numerous fact witnesses would testify, and two expert witnesses would testify in support of each party's claims or defenses. Litigating this case through judgment would require tremendous resources. Even if Plaintiffs prevailed at trial, further resources would be devoted to defending the judgment on appeal, which would result in

years of delay in recovery for Class Members. Regardless of expending significant resources to take this case through judgment, recovery was uncertain for the reasons previously stated.

Plaintiffs' damages expert estimated the Settlement Class's aggregate damages in this Action to be between $18 million and $59 million. Using this estimate, the Settlement represents approximately 12% to 38% of damages – a recovery consistent with, or larger than, damages percentages recovered in other ERISA class action settlements that have been approved across the country. *See, e.g.*, *Tolomeo v. R.R. Donnelley & Sons, Inc.*, No. 1:20-cv-07158 (N.D. Ill. May 23, 2024), ECF No. 116 at 11, approved ECF No. 120 (approving settlement that represented approximately 17% of alleged losses); *Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633 (D. Mass. Mar. 24, 2021), ECF No. 95 at 10, approved ECF No. 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. 1:17-cv-00563 (S.D.N.Y. May 20, 2020), ECF No. 211, approved 2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (16% of alleged losses); *Price v. Eaton Vance Corp.*, No. 1:18-cv-12098 (D. Mass. May 6, 2019), ECF No. 32 at 12, approved ECF No. 57 (D. Mass. Sept. 24, 2019) (23% alleged losses); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 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.*, No. 8:15-cv-01614, 2018 WL 8334858 (C.D. Cal. July 30, 2018) (25% of alleged losses); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-cv-03698, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approximately 10% of losses under Plaintiffs' highest model). Thus, the Settlement provides a significant recovery for Settlement Class Members.

2. The Settlement Treats All Class Members Fairly

The Court must also ultimately assess the Settlement's effectiveness in equitably distributing relief to the Settlement Class. Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D). The proposed Plan of Allocation, set forth in Article 5 of the Settlement Agreement and the Notice at

Question 5, provides a fair and effective means of distributing the Net Settlement Fund. Under the Plan of Allocation, monies will be distributed to Current and Former Participants pro rata, based on their Average Qualifying Account Balance for the period June 1, 2015, to September 22, 2021. The amounts that will be allocated to Class Members will be based upon records maintained by the Plan's recordkeeper(s). Calculations regarding the individual distributions will be performed by the Settlement Administrator, whose determinations will be final and binding.

3. The Anticipated Request for Attorneys' Fees Is Reasonable

Class Counsel will request attorneys' fees to be paid out of the Gross Settlement Fund in an amount not to exceed one-third of the Gross Settlement Amount, or $2,300,000, and reimbursement for reasonable litigation expenses incurred not to exceed $800,000, plus interest on such amounts awarded at the same rate as earned on the Settlement Fund until paid.[6] A one-third fee is consistent with "'settlements concerning this particularly complex area of law,' and courts routinely award that percentage to class counsel in ERISA cases." *Allegretti*, 2022 WL 484216, at *1 (quoting *George v. Kraft Foods Glob., Inc.*, No. 1:08-cv-3799, 2012 WL 13089487, at *2 (N.D. Ill. June 26, 2012)); *see also Ramsey v. Philips N. Am. LLC*, No. 18-1099, 2018 U.S. Dist. LEXIS 226672, at *6 (S.D. Ill. Oct. 15, 2018). A formal application for Attorneys' Fees and Costs

[6] Additionally, the proposal that Class Counsel receive their award of any attorneys' fees upon issuance of an order awarding such fees (Settlement Agreement, §6.1) is appropriate and consistent with common practice in cases of this nature. Section 6.1 provides that if the Settlement is ultimately terminated, or the fee award is later reduced or reversed, Class Counsel will refund the relevant amounts. *See, e.g.*, *Flynn v. Exelon Corp.*, No. 1:19-cv-08209, 2023 WL 8291661, *1-2 (N.D. Ill. Sept. 8, 2023) ("The award of attorneys' fees and expenses may be paid to Lead Counsel from the Settlement Fund immediately upon entry of this Order, subject to the terms, conditions, and obligations of the Stipulation, which terms, conditions, and obligations are incorporated herein."); *Boutchard v. Gandhi*, No. 1:18-cv-07041, 2021 WL 12100450, *2 (N.D. Ill. July 30, 2021) (same).

and for Service Awards will be made at least 14 days prior to the deadline for Class Members to file objections to the Settlement. *See* ECF No. 112.

4. Plaintiffs Have Identified All Agreements Made in Connection with the Settlement

Apart from the Settlement Agreement and its exhibits, there are no agreements required to be identified under Rule 23(e)(3).

III. THE COURT SHOULD APPROVE THE PROPOSED NOTICE AND PLAN FOR PROVIDING NOTICE TO THE SETTLEMENT CLASS

Plaintiffs propose that the notice and claims process be administered by Analytics Consulting LLC ("Analytics"), an independent settlement and claims administrator with extensive experience handling the administration of ERISA class actions. *See* Declaration of Richard W. Simmons in Support of Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice of the Settlement ("Simmons Decl."), ¶¶3-9, Exs. A and B. Class Counsel selected Analytics after a competitive bidding process in which three firms submitted proposals. Anderson Decl., ¶2. The Simmon's Declaration further describes the notice program that has been proposed to be implemented in this matter and why it will satisfy Federal Rule of Civil Procedure 23 and provide due process for members of the proposed Settlement Class.

Due process and Rule 23(e) do not require that each Class Member receive notice but do require that the class notice be "reasonably calculated, under all 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 & Tr. 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). Notice is sufficient when it "inform[s] the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may

appear and be heard at the hearing." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 351 (N.D. Ill. 2010) (quoting 3 NEWBERG ON CLASS ACTIONS §8:32 (4th ed. 2010)).

The proposed form and method of notice satisfy all due process considerations and meet the requirements of Rule 23(e)(1). The parties' proposed forms of Notice are attached as Exhibits 1 and 2 to the Settlement Agreement and the proposed Former Participant Rollover Form is attached as Exhibit 3 to the Settlement Agreement. 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 to those documents, will be posted.

The notice plan consists of multiple components designed to reach Class Members as set forth in Sections 3.2-3.3 of the Settlement Agreement. After entry of the preliminary approval order, notice will be sent to the last known email address of all Class Members or by first-class mail to the current or last known address of all Class Members for whom there is no email address. The notice plan also includes a follow-up requirement for the Claims Administrator to take additional action to reach those Class Members whose notice emails and letters are returned as undeliverable. *Id.*, ¶¶18-20, 22-24. Because the notice plan provides for emailing or mailing individual notice to all Class Members who are reasonably identifiable, it satisfies the requirement to provide direct notice in a reasonable manner to the Class and conforms to the best practices identified in the FJC's Publication, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guid*e (2010) (stating that "[t]he lynchpin in an objective determination of the

adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%.").[7] Because of the nature of the Class, and the fact that all Class Members are known, the Settlement Administrator expect to deliver notice within this range. Simmons Decl., ¶34.

In addition to the notice, the Claims Administrator will develop a dedicated website solely for the Settlement and operate a call center with both pre-recorded answers to frequently asked questions and live agents. *Id*., ¶25-31. The Settlement Administrator will also operate an email address that Class Members can use to obtain information about the Settlement. *Id*., ¶¶32-33.

Accordingly, 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. *See AT&T*, 270 F.R.D. at 351.

Finally, Plaintiffs propose that the Court approve their selection of Huntington National Bank as escrow agent. HNB was established in 1866, holds over $60 billion in assets, and has more than 700 branches nationwide. HNB's national settlement team has handled more than 1,000 settlements for law firms, claims administrators, and regulatory agencies. Significantly, HNB has also agreed not to charge the Class any fees in connection with its investment of Settlement Fund assets. Anderson Decl., ¶3.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice

[7] *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, FED. JUD. CTR. 3 (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

of Settlement. The Parties' agreed-to [Proposed] Preliminary Approval Order is being respectfully submitted for the Court's consideration.

Dated: January 6, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system to send notification of such filing to all counsel of record.

/s/ *Kristen M. Anderson*
Kristen Anderson