UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case No.: 1:21-CV-00553-DNH-CFH

R.B., individually, and on behalf of all those similarly situated;

Plaintiff,

v.

United Behavioral Health;

Defendant.
_____/

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

Jordan Lewis*
JORDAN LEWIS, P.A.
4473 N.E. 11th Avenue
Fort Lauderdale, FL 33334
Telephone: (954) 616-8995
Fax: (954) 206-0374
Email: Jordan@jml-lawfirm.com

Arthur M. Stock*
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN
800 S Gay Street - Suite 1100
Knoxville, TN 37929
215-875-5704
Fax: 215-875-4604
Email: astock@milberg.com

Randi A. Kassan (N.D.N.Y. Bar No. 517821)
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN
100 Garden City Plaza, Suite 500
Garden City, NY 11530
516-741-5600
Fax: 516-741-0128
Email: rkassan@milberg.com

* admitted *pro hac vice*

I. INTRODUCTION

The proposed settlement described in these papers represents a successful resolution of plaintiffs' class claim brought under the Mental Health Parity and Addiction Equity Act. This settlement not only successfully resolves this lawsuit, but it also validates the purpose of Act, which is to ensure that mental health and chemical dependence insurance claims are treated *in parity* with how the same insurer or plan administrator covers medical/surgical claims.

Plaintiffs' theory of the case was that defendant United Behavioral Health denied, entirely, all mental health and chemical dependency claims from a provider where it determines that a single component of those services is experimental, investigational or unproven. Named plaintiff R.B.'s dependent was treated at an Arizona-licensed residential treatment center that offered, among other things, equine therapy. Plaintiff alleges that UBH denied the entire claim based on its view that equine therapy was experimental, investigational or unproven.

Plaintiff's proposed settlement obtains substantial relief for R.B. and a class of 349 individuals—reimbursements of amounts denied based on the challenged practice at issue. The proposed settlement easily clears the burden required for preliminary approval. The Court should grant this uncontested motion.

II. BACKGROUND

A. Facts

Named Plaintiff R.B. participates in an ERISA-regulated health plan sponsored by his employer. His son J.B. is covered under the same plan. J.B. has been diagnosed with: Major Depressive Disorder; Generalized Anxiety Disorder; Attention-Deficit Hyperactivity Disorder; Oppositional Defiant Disorder; Cannabis Use Disorder; Nicotine Dependence; Opioid Use Disorder; Hallucinogenic Use Disorder; Alcohol Use Disorder; and Parent-Adopted Child Conflict.

J.B started treatment at Arivaca Boys Ranch, an Arizona-licensed residential treatment center, on June 8, 2020. Among other things, Arivaca offered individual counseling, group therapy, family therapy and addiction recovery. J.B. discharged from Arivaca on April 17, 2021. R.B. paid, $68,417.99 for mental health and substance abuse treatment services rendered.

J.B.'s health plan authorizes coverage at licensed residential treatment facilities *and* skilled nursing facilities. Arivaca sought coverage for J.B.'s treatment before treatment began. In its initial denial on June 10, 2020, UBH stated that "the provider being unable to be authorized … due to the unproven therapy of equine therapy." R.B. appealed this denial, which UBH affirmed on December 12, 2020. The second denial included multiple reasons supporting the coverage denial, in addition to Arivica's predominant focus on equine therapy.

B. Litigation

This case commenced on May 12, 2021 with the filing of a single count ERISA

class action complaint. Plaintiff's claim was brought as a violation of the federal Mental Health Parity and Addiction Equity Act, which is incorporated into ERISA. Plaintiff's theory was that UBH's practice – to allegedly deny coverage for all services rendered by residential treatment programs where a single program is deemed to be experimental – violates the Parity Act because no other comparable medical services are adjudicated in the same manner. Plaintiff alleges that for medical services, UBH only denies coverage for the experimental service; it doesn't invalidate coverage for all other services. Plaintiff does not contend that UBH should have covered these programs in their entirety, but rather that UBH should have covered the "portions" of the programs that were not experimental or unproven (*e.g.*, therapy sessions by licensed clinicians during the course of the broader residential programs). UBH disputes Plaintiff's theory of the case and his factual allegations, which were never decided on the merits.

Plaintiff brought his class certification motion on January 9, 2023; it was vigorously opposed, including on the basis that the coverage protocol that Plaintiff challenges in this case does not exist. On September 14, 2023, this Court certified the following class:

> All persons covered under ERISA-governed health care plans, administered or insured by United Behavioral Health, whose requests for coverage for mental health and substance abuse treatment services received at a licensed residential treatment center were denied in total based on its determination that a component of such services is considered experimental, investigational, or unproven.[1]

UBH petitioned the 2nd Circuit for immediate appellate review, which was

[1] *R.B. v. United Behavioral Health*, 2023 U.S. Dist. LEXIS 162918, *11-12 (N.D.N.Y. Sept. 14, 2023).

denied. Following that denial, the parties agreed to mediate, which took place August 29 before Rodney Max, a well-known mediator[2] out of Miami, Florida. The settlement described below was the result of the full-day mediation.

C. Mediation and settlement

On Aug. 29, the parties and their counsel engaged in a full-day mediation in Miami before mediator Rodney Max. The parties did not settle during the day, but after the mediation concluded Max presented to the parties a "mediator's proposal" of $1,415,000 "all in" to settle the case. Both parties separately agreed to the mediator's proposal, which settled this matter, pending written agreement and this Court's approval.

Plaintiff proposes to divide this fund in the following manner:

- $32,500 to reimburse counsel for the out-of-pocket costs incurred in litigating this matter. These costs include travel and deposition-related expenses, the costs associated with a vendor that housed and organized hundreds of thousands of documents produced by UBH, and the mediator charges.

---

[2] *See Brna v. Isle of Capri Casinos, Inc.*, 2018 U.S. Dist. LEXIS 26662, *4-5 (S.D. Fla. Feb. 20, 2018)("The Court finds that the Settlement reached in this case was the product of significant give-and-take by both sides and was negotiated at arm's length with the benefit of both extensive discovery having been completed and a mediator overseeing the negotiations. This case was mediated by Rodney Max, who is not only well known for mediating class actions but who has been recognized in this district as 'probably one of the top mediators in the country.' *Lee v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 121998, 2015 WL 5449813, *11 (S.D. Fla. Sept. 14, 2015). His involvement serves to reject any notion that a resulting settlement was the product of collusion. *Id.; accord Wilson, supra* 2014 U.S. Dist. LEXIS 48485, [WL] at *6 (recognizing Rodney Max a 'nationally renowned mediator' whose very involvement weighs in favor of settlement approval); *Curry v. AvMed, Inc.*, 2014 U.S. Dist. LEXIS 48485, 2014 WL 7801286, *2 (S.D. Fla. Feb. 28, 2014) (favorably observing that class settlement negotiations were 'presided over by the highly experienced third-party neutral Rodney A. Max').

- up to $20,000 to pay for a claims administrator, RG-2, to administer the payment of claims.

- $15,000 as an incentive payment to the Class Representative, R.B., if approved by the Court.

- $471,667 in attorneys' fees. This represents a one-third fee recovery, which aligns with the named plaintiff's original retainer agreement.

- $875,833 to fund the class recovery, to be divided in different amounts to three groups that plaintiff has named **Experimental**, **Multiple** and **Wilderness**. These groups are defined as follows:

  Experimental = These are class members whose dependents were treated at residential treatment programs and for whom UBH raised only the contention that the program was investigational, experimental or unproven. Based on our review, there are 8 class members who fit in this category.

  Multiple = These are class members whose dependents were treated at residential treatment programs and for whom UBH raised multiple reasons for denial, including a contention that the program was investigational, experimental or unproven. There are 46 class members who fit this definition, including the named plaintiff.

  Wilderness = These are class members whose dependents were treated at wilderness programs and for whom UBH denied the claim. There are 292 class members who fit this definition. In addition, there are 3 other class members whose dependent attended two wilderness programs. They are entitled to twice this group's recovery.

  Under the proposed settlement, each **Experimental** class member would receive about **$19,000**. Each **Multiple** class member would receive about **$9,500**. Each **Wilderness** class member would receive about **$950** and those class members who were treated twice at Wilderness would receive about **$1,900.** These amounts are net of all fees and costs.

There is no reversion in this settlement. Unclaimed benefits, if a significant amount, will be returned to the class fund and will be distributed, *pro rata*, among participating class members at a second distribution. If there is any remaining balance,

the balance will be placed into a *Cy Pres* Fund. The parties will negotiate to reach agreement regarding a mental health organization recipient of any *Cy Pres* Fund amounts.

D. Summary of litigation risks

There are many risks remaining for plaintiff should this case proceed to a litigated result. Here are a few:

Delay – Even if plaintiff succeeds at all the remaining litigation junctures, it could be years before a single class member receives a single dollar. There are significant appellate issues raised by this matter, and defendant can be expected to raise all of them.

Liability – Defendant maintains that the coverage protocol that Plaintiff challenges in this case does not exist and that UBH already covers "proven" services at otherwise experimental residential programs, when those portions are submitted separately for coverage. Plaintiff, naturally, disagrees, but appreciates that reasonable people might view the record differently.

Decertification of the class – Plaintiff acknowledges that the Court's certification order could be challenged on a number of grounds. *First*, it could be challenged on manageability. The order limits class membership to persons whose claims were denied in total because of a finding that a component service was experimental, investigational or unproven. Defendant internal recordkeeping doesn't permit a computer search to identify class members based on that characteristic; to identify class members attorneys from both parties individually reviewed the claims files of hundreds of potential class

members. This could be viewed as inconsistent with Fed. R. Civ. P. 23. *Second*, the class could be challenged on numerosity grounds. Only 8 class members claims were residential denials where the only denial ground was that the programs involved experimental or unproven treatment. Forty-six class members whose dependents were treated at residential treatment centers were denied for multiple reasons – meaning that, at least arguably, for reasons unrelated to the purported experimental, investigational or unproven services. *Third*, the Court could conclude that named plaintiff R.B. was an inadequate class representative, because his claim was denied for multiple reasons. *Fourth*, the Court could conclude that the class was too broad, because it includes persons whose dependents were treated at residential treatment centers and persons whose dependents were treated at wilderness therapy programs. While the liability theory for these two groups is the same – UBH's denial should be limited only to those services it considers experimental, investigational or unproven, the method of calculating recovery is completely different. For residential treatment centers, plaintiff calculates individual recoveries by reducing the total residential treatment center charge by the cost of the experimental service. Because wilderness is considered experimental, wilderness therapy damages are calculated by adding those limited services that are additionally provided to wilderness therapy patients (such as therapy or medication services). *Fifth*, the Court could conclude that the evidentiary record ultimately doesn't sustain class certification. Defendant doesn't have records of the cost of the non-experimental portions of residential services when they were not submitted for coverage, and providers typically don't break them out either. *Sixth*, even under the

most favorable circumstances, defendant typically limits the duration of coverage. There is no way for anyone to know how long UBH would have authorized coverage had it administered the claims in a manner consistent with plaintiff's theory in the first place.

All of these reasons factored into plaintiff's decision to settle this case.

III. ARGUMENT

A. Legal standard

District courts have the discretion to approve proposed class action settlements.[3] "If the settlement was achieved through experienced counsels' [sic] arm's-length negotiations, '[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.' "[4] The purpose of preliminary approval is to allow notice to be issued to the class and for class members to object to the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the class members' advice and contribution.[5] "Preliminary approval requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties."[6]

---

[3] *Hill v. County of Montgomery*, 2021 U.S. Dist. LEXIS 103183, *3 (N.D.N.Y. June 2, 2021)("The approval of a class action settlement is a matter of discretion for the trial court.").
[4] *Id.* (quoting *Massiah v. MetroPlus Health Plan Inc.*, 2012 U.S. Dist. LEXIS 166383, *6 (E.D.N.Y. Nov. 20, 2012)).
[5] *Flynn v. New York Dolls Gentlemen's Club*, 2014 U.S. Dist. LEXIS 142588, *3 (S.D.N.Y. Oct. 6, 2014).
[6] *Hadel v. Gaucho, LLC*, 2016 U.S. Dist. LEXIS 33085, *3-4 (S.D.N.Y. March 14, 2016).

Courts in this Circuit assess the procedural and substantive fairness of the settlement by weighing both the factors set out in *City of Detroit v. Grinnell Corp.*,[7] as well as the factors set forth in Rule 23(e)(2) of the Federal Rules of Civil Procedure.[8]

B. *Grinnell*

The nine "*Grinnell* factors," are: **(1)** the complexity, expense and likely duration of the litigation; **(2)** the reaction of the class to the settlement; **(3)** the stage of the proceedings and the amount of discovery completed; **(4)** the risks of establishing liability; **(5)** the risks of establishing damages; **(6)** the risks of maintaining the class action through the trial; **(7)** the ability of the defendants to withstand a greater judgment; **(8)** the range of reasonableness of the settlement fund in light of the best possible recovery; and **(9)** the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[9]

1.* Factor 1 – *complexity, expense and likely duration of the litigation

"Most class actions are inherently complex, and settlement avoids the costs, delays and multitude of other problems associated with them."[10] And unless a proposed settlement is *clearly* inadequate, its acceptable and approval are preferable to

---

[7] 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds, Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir. 2000).
[8] *See Moses v. New York Times Co.,* 79 F.4th 235, 242–43 (2d Cir. 2023) (holding that after the 2018 amendments to Rule 23(e), courts must apply the factors set forth and cannot consider the *Grinnell* factors alone when assessing the fairness of class settlements).
[9] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 117 (2d Cir. 2005), citing *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000).
[10] *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp.2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom., D'Amato v. Deutsche Bank,* 236 F.3d 78 (2nd Cir. 2001).

continued lengthy and expensive litigation, with no guarantee as to results.[11] The fact that this is an ERISA cases makes things more difficult: "It is well-recognized that ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation."[12]

Without settlement, this case is years away from resolution. The next step in this case, should settlement fail, would be cross-motions for summary judgment; UBH is likely to move to decertify the class. After that, as yet unscheduled, is trial, and then appeals to the 2nd Circuit and perhaps beyond.

Though this case is mature, there is a long ways to go. This supports the first *Grinnell* factor.

2. Factor 2 – *reaction of the class to the settlement*

The second *Grinnell* factor looks at the reaction of the class. At preliminary approval, the class has not yet received notice of the Settlement, so the overall class's reaction to the settlement is undetermined. Plaintiff favors the Settlement and is not aware of any opposition to it. At final approval, the Court will have additional information, including the class's reactions.

---

[11] *TBK Partners, Ltd., v. Western Union Corp.*, 517 S. Supp 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2nd Cir. 1982).

[12] *Stevens v. SEI Invs., Co.*, 2020 U.S. Dist. LEXIS 35471, *9 (E.D. Pa. Feb. 26, 2020)(internal quote marks and citations omitted).

3. Factor 3 – *stage of the proceedings and amount of discovery completed*

The third *Grinnell* factor focuses on "whether counsel had an adequate appreciation of the merits of the case before negotiating."[13] Before trial, "negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement … but an aggressive effort to ferret out facts helpful to the prosecution of the suit."[14]

This factor weighs heavily in favor of settlement approval. By the time of mediation, the parties had litigated class certification, conducted several depositions, and served multiple rounds of written discovery. UBH produced over 80,000 pages of discovery, much of that after discovery was formally closed. This final round was done, upon agreement, to enable the parties to identify class members.

By the time mediation occurred, there were no surprises. Both parties understood each other's case. This knowledge directly resulted in the compromises embodied by the terms of this settlement.

4. Factor 4 – *risk of establishing liability and* Factor 5 – *risk of establishing damages*

In evaluating *Grinnell's* fourth and fifth factors, courts "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement."[15] Plaintiff, and his counsel, believe in this case. But they are obligated to litigate with their

---

[13] *Torres v. Gristede's Operating Corp.*, 2010 U.S. Dist. LEXIS 139144, *16 (S.D.N.Y. 2010), aff'd, 2013 U.S. App. LEXIS 75362 (2nd Cir. May 22, 2013).
[14] *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp.2d 164, 176 (S.D.N.Y. 2000)(internal quote marks omitted).
[15] *In re Austrian & German*, 80 F. Supp.3d at 177 (internal quotations omitted).

eyes open, and appreciate that significant litigation risks were ahead. In particular, the identification of class members was difficult because it entailed a case by case review of the records at issue, which jeopardized class certification. UBH would certainly argue that liability could not be established without mini-trials, and that argument would have some purchase. UBH also disputes the existence of the challenged coverage protocol in this case or that there is any evidence that how it covers residential programs differs from its coverage of comparable medical services. UBH also maintains that it already covers "proven" services at otherwise experimental residential programs, when those portions are submitted separately for coverage. None of these liability issues have been decided on the merits.

In addition, UBH doesn't have records of the cost of the non-experimental portions of residential services when they were not submitted for coverage, and providers typically don't break them out either. Plaintiff's formula for calculating the benefits owed is based on a generic database. Plaintiff could not prove up each individual class members' actual benefits owed, if the Court so required.

Application of both of these factors favors approving the settlement.

5. **Factor 6 –** ***risk of maintain class action through trial***

The class in this case was certified, and the 2nd Circuit denied UBH's petition for immediate appeal. But that doesn't end the discussion. "A number of courts have considered the increased risk of decertification in their settlement…"[16]

On September 14, 2023, this Court – over vigorous objection by UBH – certified the class as described originally in plaintiff R.B.'s **Complaint**.[17] Of importance, the certified class **a)** brings claims against multiple plans **b)** seeks the recovery of benefits and **c)** involves hundreds of people. Many cases bringing similar claims either were not certified or were certified under distinguishable circumstances. Of the reported cases:

- Six class certification motions lost.[18]
- Certification was granted six times where the motion was *unopposed*.[19]

---

[16] *Charron v. Pinnacle Group NY LLC,* 874 F. Supp.2d 179, 200 (S.D.N.Y. 2012)(citing *Ebbert v. Nassau County*, 2011 U.S. Dist. LEXIS 150080, *32 (E.D.N.Y. Dec. 22, 2011); *McDonough v. Toys "R" Us, Inc.*, 834 F. Supp.2d 329, 338 (E.D. Pa. 2011); *Cohorst v. BRE Prop., Inc.*, 2011 U.S. Dist. LEXIS 151719, *46-47 (S.D. Cal. Nov. 14, 2011); *In re Wells Fargo Loan Processor Overtime Pay Litig.*, 2011 U.S. Dist. LEXIS 84541, *18-19 (N.D. Cal. Aug. 2, 2011)).

[17] *R.B. v. United Behav. Health,* 2023 U.S. Dist. LEXIS 162918 (N.D.N.Y. September 14, 2023).

[18] *Smith v. Golden Rule Ins. Co.*, 2022 U.S. Dist. LEXIS 86823 (S.D. Ind. May 13, 2022); *J.P. v. BCBSM*, 2021 U.S. Dist. LEXIS 7462 (D. Minn. Jan. 14, 2021*); J.T. v. Regence Blueshield,* 291 F.R.D. 601 (W.D. Wash. 2013); *Gordon v. New West Health Servs.*, 2017 U.S. Dist. LEXIS 10414 (D. Mont. Juan 25, 2017); *Amy G. v. United Healthcare*, 2020 U.S. Dist. LEXIS 101752 (D. Utah June 9, 2020); *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115 (N.D. Cal. 2014).

[19] *See R.H. v. Premera Blue Cross*, 2014 U.S. Dist. LEXIS 92691 (W.D. Wash. July 7, 2014); *C.C. v. Scott*, 2022 U.S. Dist. LEXIS 174005 (E.D. Tex. Sept. 26, 2022); *Craft v. Health Care Serv. Corp.*, 2018 U.S. Dist. LEXIS 184108 (N.D. Ill. Oct. 26, 2018); *J.R. v. Blue Cross & Blue Shield*, 2019 U.S. Dist. LEXIS 237336 (W.D. Wash. Nov. 25, 2019); *A.D. v. T-Mobile USA, Inc. Emple. Ben. Plan*, 2016 U.S. Dist. LEXIS 94155 (W.D. Wash. July 18, 2016); *K.M. v. Shield*, 2015 U.S. Dist. LEXIS 15437 (W.D. Wash. Feb. 9, 2015).

- Contested certification motions were won by plaintiffs four times *where the remedy was limited to declaratory or injunctive relief.*[20]

There are only two cases other than this one where contested certification was granted and the requested relief was the payment of benefits. In one, *Wilson v. Anthem Health Plans of Ky., Inc.*, the class consisted of only 27 people.[21] The other case, *D.T v. NECA/IBEW Family Medical Care Plan*, the Parity Act claim was brought *against a single plan*.

Plaintiff believes that the certification decision is correct. But plaintiffs also – recognize that - to the extent that UBH wants to argue to the 2nd Circuit that this Court's class certification was improvidently granted – there is abundant caselaw supporting that position. In addition to the case law, decertification is a real possibility for all of the reasons outlined above.

This factor strongly favors settlement approval. Plaintiff faces significant risk at holding on to class certification.

6. **Factor 7 – *ability of UBH to withstand a greater judgment***

UBH could easily withstand a greater judgment. This factor, however, "standing alone, does not suggest that the settlement is unfair."[22]

---

[20] *See Z.D. v. Group Health Coop.,* 2012 U.S. Dist. LEXIS 76498 (W.D. Wash. June 1, 2012); *A.F. v. Providence Health Plan*, 300 F.R.D. 474 (D. Ore. Dec. 24, 2013); *Meidl v. Aetna, Inc.*, 2017 U.S. Dist. LEXIS 70223 (D. Conn. May 4, 2017); *Collins v. Anthem, Inc.,* 2024 U.S. Dist. LEXIS 48569 (E.D.N.Y. March 19, 2024).

[21] 2017 U.S. Dist. LEXIS 572 (W.D. Ky. Jan. 4, 2017).

[22] *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp.2d 164, 178 n. 9 (S.D.N.Y. 2000)(citing *In re Paine Webber Ltd. Partnership Lit.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997)("The fact that a defendant is able to pay more that it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate."))

7. **Factor 8 –** ***range of reasonableness of settlement in light of best possible recovery and*** **Factor 9 –** ***range of reasonableness of settlement in lights of all the risks of litigation***

These final two *Grinnell* factors are often combined for analytical purposes.[23] "[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range."[24]

A recovery representing 100 cents on the dollar would be 1) unpaid benefits 2) to cover conventional mental health and chemical treatment services that are medically necessary and meet other plan requirements 3) that are not considered by defendant as "experimental" generally 4) and thus not excluded by defendant's view that other services are experimental and 5) limited by a reasonable duration (in other words, plaintiff's theory does not assume that all non-experimental services should be covered indefinitely). Plaintiff believes that the settlement represents between 18% and 50% of the total possible recovery among class members. This compares favorably with recoveries in other ERISA class actions.[25] This factor, too, favors approval of the

---

[23] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 47-48 (E.D.N.Y. 2019).

[24] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2nd Cir. 2005)(internal citations omitted).

[25] *Sims v. BB&T Corp.*, 2019 U.S. Dist. LEXIS 75837 (M.D.N.C. May 6 2019)(approving settlement representing 19% of estimated damages); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 U.S. Dist. LEXIS 127131 (C.D. Cal. July 30, 2018)(approving settlement

settlement. If the "range of reasonableness" is compared against Parity Act cases, and not ERISA cases generally (and plaintiff believes that's appropriate), the settlement is even stronger. All but a small handful of class cases brought under the Parity Act have either lost on motion; failed to certify; or certified a much smaller class. In light of the significant litigation risk and risk of decertification, this settlement is well within a "range of reasonableness."

C. Rule 23

Under Rule 23(e), the Court must also 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.

The fact that this settlement is the product of a mediator's proposal bears on a number of these elements. As discussed above, the mediator, Rodney Max, is a well-known and highly regarded mediator. Ultimately, this case settled on terms that he

---

representing about 25% of estimated losses); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, 2018 U.S. Dist. LEXIS 80219 (N.D. Cal. May 11, 2018)(approving settlement representing 10% of damage potential); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp.2d 706, 715 (E.D. Pa. 2001)(noting that, since 1995, class action settlements typically have "recovered between 5.5% and 6.2% of the class members' estimated losses.").

proposed, which shows, first, that the class representatives and counsel have adequately represented the class, and further that the proposal was negotiated at arms-length. The costs, risks and potential delays absent settlement are discussed above.[26] This case easily could have taken years longer to resolve, with no guarantee of an improved outcome. The proposed method of distributing relief is simple: checks will be mailed to class members; there is no claims process burdening the process. Finally, the proposed settlement divides the class into subsets depending on the specific circumstances of their denials. To ignore the legal and proof distinctions between these three groups *would be inequitable*. It is consistent with Rule 23 to account for these differences.

IV. NOTICE TO CLASS MEMBERS

UBH's records contain names and addresses for all Class members. Because the number of class Members is relatively small and the amount each may receive is relatively large, the Parties propose that all Class members receive a long-form Notice by mail.[27] The Proposed Notice includes, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) a date by which Settlement Class members must object; (6) the date, time, and location of the final approval hearing; (7) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount that Class Counsel may seek in attorneys' fees and

[26] *See generally* Rodney Max Declaration.
[27] *See* Settlement Agreement Ex. B.

expenses. This information is "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."[28]

V. CONCLUSION

The plaintiff has satisfied all that is required at this stage. The Court should grant the motion for preliminary approval.

Dated: 12.17.2024, 2024.

Respectfully submitted,

/s/ Jordan Lewis
JORDAN LEWIS, P.A.
Jordan Lewis (Fl. Bar No. 97997) *
4473 N.E. 11th Avenue
Fort Lauderdale, FL 33334
Telephone: (954) 616-8995
Facsimile: (954) 206-0374
Email: Jordan@jml-lawfirm.com

Randi A. Kassan (N.D.N.Y. Bar No. 517821)
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN
100 Garden City Plaza, Suite 500
Garden City, NY 11530
516-741-5600
Fax: 516-741-0128
Email: rkassan@milberg.com

Arthur M. Stock*
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN
800 S Gay Street - Suite 1100
Knoxville, TN 37929
215-875-5704
Fax: 215-875-4604
Email: astock@milberg.com
* Admitted *pro hac vice*
Attorneys For Plaintiff and the Certified Class

[28] *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950).

CERTIFICATE OF SERVICE

I certify that on December 18, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Notices of Electronic Filing by CM/ECF:

Geoffrey M. Sigler
Clare F. Steinberg
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue N.W.
Washington, D.C.
20036
gsigler@gibsondunn.com
csteinberg@gibsondunn.com

James A. Tsouvalas
GIBSON, DUNN & CRUTCHER, LLP
333 South Grand Avenue
Los Angeles, CA
90071
jtsouvalas@gibsondunn.com

/s/ Jordan Lewis
Jordan Lewis