IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTINA C. SEIDNER and JARED MACKRORY, Plaintiffs, v. KIMBERLY-CLARK CORPORATION, et al. Defendants.	CIVIL ACTION NO. 3:21-CV-00867-L

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

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INTRODUCTION

Plaintiffs Christina C. Seidner and Jared Mackrory ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of the Class Action Settlement and Release with Defendants Kimberly Clark Corporation ("Kimberly-Clark") and the Kimberly-Clark Benefits Administration Committee ("Plan Committee") (collectively, "Defendants"), relating to the management of the Kimberly-Clark Corporation 401(k) and Profit Sharing Plan (the "Plan").[1]

Under the terms of the proposed Settlement, a gross Settlement Amount of two million and two hundred and fifty thousand dollars and zero cents ($2,250,000.00) will be paid to resolve the claims of Settlement Class Members who participated in the Plan during the Class Period. This is a significant recovery for the Settlement 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 Settlement 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 settlements in other similar cases;
- The Settlement conveniently provides for automatic distribution of the settlement proceeds to the accounts of Current Participants in the Plan, and automatic distribution of checks or rollover options for Former Participants in the Plan;
- 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;

[1] A copy of the Class Action Settlement Agreement and Release ("Settlement Agreement") embodying the compromise and settlement between the parties ("Settlement") is attached as **Exhibit 1** to the accompanying Declaration of Paul Secunda in Support of Motion for Preliminary Approval of Class Action Settlement and Release ("Secunda Decl."). All capitalized terms that are not otherwise defined in this Memorandum of Law have the meaning assigned to them in the Settlement Agreement.

- The proposed Settlement Class is consistent with the requirements of Fed. R. Civ. P. 23;
- The proposed Notice provides substantial information to Settlement Class Members about the Settlement, and will be distributed via e-mail (if available) or first-class mail; and
- The Notice advises Settlement Class Members of the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notice, attached as **Exhibit B** to the Settlement Agreement, and authorizing distribution of the Notice to the Settlement Class; (3) certifying the proposed Settlement Class; (4) approving the proposed Plan of Allocation, attached as **Exhibit C** to the Settlement Agreement; (5) scheduling a final approval hearing; (6) granting such other relief as set forth in the accompanying Preliminary Approval Order, attached as **Exhibit D** to the Settlement Agreement; and (7) approving the Class Action Fairness Notice letter template, attached as **Exhibit E**. Defendants take no position on this motion and do not intend to object.

BACKGROUND

I. PLEADINGS, MOTIONS, AND DISCOVERY

In the Amended Complaint, *Dkt. 22*, Plaintiffs allege that during the putative Class Period (April 15, 2015 through the date of judgment), Defendants, as fiduciaries of the Plan, as that term is defined under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duty of prudence they owed to the Plan by requiring the Plan to pay excessive administrative fees and by failing to properly monitor their high-cost recordkeepers, Fidelity Investments Institutional Operations Company ("Fidelity"), Hewitt Associates ("Hewitt"), and Alight Financial Solutions ("Alight"), and removing them. *See id.*, ¶ 6. On May 20, 2022, Defendants filed a motion to dismiss the Amended Complaint. *Dkts. 25-27.* This motion was briefed, with numerous supplemental authorities submitted, through January 10, 2023. *Dkts. 28-39.* Thereafter, on March 17, 2023, the

Court denied Defendants' motion to dismiss the Amended Complaint. *Dkt 40*. On May 7, 2023, and Defendants answered the Amended Complaint, *Dkt. 47.* On January 23, 2024, the Court denied Defendants' motion to certify an interlocutory appeal of the motion to dismiss order. *Dkt. 80*.

The parties filed a joint discovery plan on May 19, 2023. *Dkt. 49*. The Court entered a scheduling order on February 2, 2024, *Dkt. 84*, and on the same day ordered that the Parties engage in mediation. *Dkt. 85*. In the meantime, the parties engaged in substantial discovery, including the production by Defendants of over 23,000 pages of documents, the production of three expert reports between the parties, and the taking of thirteen fact and expert depositions. The parties notified the Court on April 8, 2024, that they had scheduled a private mediation with JAMS mediator, Robert A. Meyer, on August 6, 2024. *Dkt. 93.*

II. MEDIATION AND SETTLEMENT

The parties engaged in a full-day mediation with JAMS mediator Robert A. Meyer on August 6, 2024.[2] *Secunda Decl. ¶ 10*. After extensive arm's length negotiations through August 6, 2024, and additional negotiations thereafter through August 9, 2024, the Parties reached a settlement in principle, signed a settlement term sheet, and then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Id. ¶ 11.* The Parties filed a joint status report on August 9, 2024, advising the Court of the Settlement. *Dkt. 98.* On October 2, 2024 the Court granted the parties' amended joint motion for status conference (Dkt. 104), and held a status conference on October 11, 2024. *Dkt. 105*. Thereafter, on the same day, the Court reopened the case for the limited purpose of certifying a settlement class and approving the parties' proposed settlement. *Id.*

[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.*

On October 18, 2024, the parties jointly filed an agreed schedule and proposed order for the court's approval that included deadlines for the milestones discussed during the status conference that now govern the proceedings in this case moving forward until a final settlement is approved by the Court. *Dkt. 107.* On October 22, 2024, the Court ordered the following class action settlement date: Plaintiffs shall file a motion and proposed order for preliminary approval of the class action settlement, along with supporting documents, by December 2, 2024. *Dkt. 108.*

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement Class is defined as follows:

> 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.

B. Monetary Relief

Under the Settlement Agreement, Defendants will cause to be paid $2,250,000 to a common settlement fund. *Settlement Agreement §§ 1.44, 3.1(a).* After accounting for any Attorneys' Fees and Expenses, Administrative Costs, and Case Contribution Awards approved by the Court, the Distributable Settlement Amount will be distributed to eligible Settlement Class Members. *Id. § 3.1(j).*

The Plan of Allocation has been prepared and submitted to the Court for approval in connection with this preliminary approval of the Settlement. *See Ex. C to Settlement Agreement.* Class Counsel has retained Analytics Consulting LLC ("Analytics") as the Settlement

Administrator to calculate the amounts payable to Settlement Class Members. *Id. §§ 1.43, 2.5.*[3] No Former Participant (meaning a participant who no longer has a positive balance in their Plan account as of September 30, 2024) whose payment pursuant to the Plan of Allocation would otherwise be less than twenty-five dollars ($25), shall receive any payment from the Distributable amount. *Settlement Agreement, Ex. C.*

C. Release of Claims

In exchange for the foregoing relief, the Settlement Class will release Defendants and affiliated persons and entities from "Released Claims," meaning:

> [A]ny 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 any of the Defendant Released Parties and Defendants' Counsel through the date the Court enters the Final Approval Order and Judgment:
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> 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 that could have been alleged or asserted in the Action, whether or not pleaded in the Amended Complaint; or
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> That arise out of, relate to, are based on, or have any connection with: (1) the selection, monitoring, oversight, retention, fees, expenses, or performance of the Plan's Qualified Default Investment Alternative(s) ("QDIA(s)"), or service providers, including without limitation, its administrative and/or recordkeeping service providers; (2) the selection, nomination, appointment, retention, monitoring, and removal of the Plan's fiduciaries; (3) fees, costs, or expenses charged to, paid, or reimbursed by the Plan or Plan participants; (4) the services provided to the Plan or the cost of those services; (5) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties relating to the Plan's QDIA(s), or service providers; and/or (6) 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

[3] Under no circumstances will any monies revert to Defendants. Any checks that are uncashed will be delivered to the Plan and deposited into the forfeiture account. *Settlement Agreement § 3.4.*

> That would be barred by *res judicata* based on entry of the Final Approval Order and Judgment; or
>
> 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
>
> That relate to the approval by the Independent Fiduciary of the Settlement, except for claims brought against the Independent Fiduciary alone.

Id. § 1.41; see also id., § 5.1.

D. Class Notice and Settlement Administration

Settlement Class Members will receive notice of the Settlement via e-mail if an e-mail address is reasonably available in Plan records, and, if not, via first-class U.S. Mail at the address then on file with the Plan. *Id. § 2.5 & Settlement Agreement, Ex. B*. To the extent that Settlement Class Members would like more information, the Settlement Administrator[4] will establish a Settlement Website on which it will post the Settlement Agreement, the Notice, and relevant case documents, including the Amended Complaint and a copy of all Court orders related to the Settlement. *Id. § 2.5(c) and Settlement Agreement Ex. B.* 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) and Settlement Agreement Ex. B.*

E. Attorneys' Fees and Administrative Costs

The Settlement Agreement requires that Class Counsel file a Fee and Expense Application, which the Plaintiffs will file four weeks prior the Final Approval Hearing. *Settlement Agreement, § 2.8.* Under the Settlement Agreement, the requested Attorneys' Fees and Expenses may not

[4] Analytics Consulting, LLC has been selected as the Settlement Administrator and has extensive experience administering similar ERISA class action settlements. *Id. § 1.33; Secunda Decl. ¶ 29 & Ex. 3.*

exceed one-third of the Settlement Amount for fees and $180,000 for litigation costs. *Id. § 7.2(a).* In addition, the Settlement Amount will be used to pay all Administrative Costs related to the Settlement, *id. § 3.1(j)*, and a Class Representative Service Award up to $10,000 for each of the class representatives. *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 Agreement, § 2.6(c)*, so it may be considered by the Court on a timely basis.

ARGUMENT

I. Standard of Review

Under Rule 23(e), Courts in the Fifth Circuit and nationwide generally follow a two-step process in considering the approval of class action settlements. First, courts conduct a preliminary review to determine whether the settlement is "within the range" of possible approval, such that notice should be provided to the proposed settlement class. *See Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 662 (N.D. Tex. 2010). If preliminary approval is granted, courts conduct a final fairness hearing at which all interested parties are afforded an opportunity to be heard on the proposed settlement. See FED. R. CIV. P. 23(e)(2). The purpose of the fairness hearing is to determine whether the proposed settlement is "fair, reasonable, and adequate." *See DeHoyos v. Allstate Corp., et al.*, 240 F.R.D. 269, 287 (W.D. Tex. 2007).

II. Certification of Settlement Class is Appropriate

"Settlement classes are a typical feature of modern class litigation, and courts routinely certify them . . . to facilitate the voluntary resolution of legal disputes." *See Duncan v. JPMorgan Chase Bank, N.A.*, 2015 WL 11623393, at *2 (W.D. Tex. Oct. 21, 2015) (citing *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997)) (quotation omitted). At the preliminary approval stage, the Court must "make findings that the class complies with Rule 23(a) and the appropriate parts of Rule 23(b) . . . ." *See DeHoyos*, 240 F.R.D. at 279. Notwithstanding this requirement, "the Court need not consider the manageability of a potential trial, since the settlement . . . would obviate the need for one." *See Duncan*, 2015 WL 11623393 at *2; *see also In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 310 F.R.D. 300, 314 (E.D. La. 2015) (same).

Here, the proposed Settlement Class satisfies Rule 23(a)'s prerequisites and Rule 23(b)(1). ERISA breach of fiduciary duty claims are ideally suited for class treatment, as they are brought on behalf of retirement plans and affected participants. *See e.g., In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 556 (S.D. Tex. 2005); *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) ("breach of fiduciary duty claims . . . are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class").

A. The Settlement Class Satisfies Rule 23(a)

The requirements of Rule 23(a) are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See Amchem*, 521 U.S. at 613; *DeHoyos*, 240 F.R.D. at 279. The Settlement Class satisfies each of the requirements of Rule 23(a).

Numerosity. The numerosity requirement of Rule 23 dictates that a putative class must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Impracticability does not equate to impossibility, but merely means that the difficulty of joining all class members makes the use of the class action device appropriate. *See Central States Se. &*

Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 244-45 (2d Cir. 2007). "To determine impracticability, the Court may consider the following circumstances, among others: class size, geographic diversity of the class, and the ability to identify class members for the purpose of joinder." *Boos v. AT & T, Inc.*, 252 F.R.D. 319 (W.D. Tex. 2008) (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999)). The Fifth Circuit has found that classes numbering in the hundreds satisfy the numerosity requirement. *See Boos*, 252 F.R.D. at 322. Here, the Plan had approximately 25,000 participants during the Class Period across the country. *See Secunda Decl., ¶ 3.* This far exceeds the threshold for numerosity.

Commonality. The commonality prerequisite requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).[5] Commonality involves "the capacity of a class-wide proceeding to generate common answers apt to drive resolution of the litigation." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This occurs when there is at least one common question, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Districts courts in the Fifth Circuit have found that the commonality and typicality requirements are "not demanding tests." *See In re Enron*, 228 F.R.D. at 555. Furthermore, "[t]he rule requires only that resolution of the common questions affect all or a substantial number of the class members." *See Boos*, 252 F.R.D. at 322 (citing *Jenkins v. Raymark Indus., Inc*, 782 F.2d 468, 472 (5th Cir. 1986)). As relevant here, courts in this Circuit recognize that the question of defendants' liability for ERISA violations is common among plan participants and satisfies the commonality requirement. *See Guenther v. BP Ret.*

[5] "The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). While the requirements are discussed separately, and arguments supporting one requirement frequently support the other.

Accumulation Plan, 2021 WL 1216377, at *6 (S.D. Tex. Mar. 12, 2021); *In re Enron,* 228 F.R.D. at 555 ("[S]hared issues include whether the defendants were fiduciaries, whether they breached fiduciary duties, and what is the measure of the plan's alleged losses.").

The core questions in this action are common to all Plan participants and include (i) whether Defendants breached their fiduciary duties by (a) selecting and retaining the challenged managed account program in the Plan, and (b) causing the Plan to pay excessive administrative fees; (ii) whether the Plan suffered resulting losses; (iii) the manner in which to calculate the Plan's losses; and (iv) what equitable relief, if any, is appropriate in light of these breaches. While the putative class members need only "at least one issue" to meet the commonality standard, the common questions here are numerous. *See Boos*, 252 F.R.D. at 325; *see also Wal-Mart*, 564 U.S. at 359.

The evidence required to answer these contentions is Plan-level and, consequently, common to all of the Plan's participants. If the evidence shows that Defendants breached their fiduciary duties, "it would not only generate answers applicable to all class members, but would also address the heart of the claims at issue in this litigation." *See Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 160 (S.D.N.Y. Nov. 27, 2017); *see also Mallory v. Lease Supervisors, L.L.C.*, 2017 WL 1281555, at *5 (W.D. Tex. Jan. 13, 2017) (citing *Stoffels v. SBC Commc'ns, Inc.*, 238 F.R.D. 446, 452 (W.D. Tex. 2006)) (finding that "commonality requirement is met when there is a common question such as whether 'ERISA was violated by [a defendant's] alleged mismanagement of the averred plan.'"). Since the central allegations here concern Defendants' administration of the Plan, common questions pervade the Class Action and the commonality prong has been met.

Typicality. The typicality prerequisite mandates that the claims of the representative

plaintiffs be typical of the claims of the class. *See* FED. R. CIV. P. 23(a)(3). Like commonality, typicality is not a demanding test. *See In re Enron*, 228 F.R.D. at 555. "Typicality refers to similarity, but not complete identity, between plaintiffs' legal and remedial theories and those of the class members; it does not require identity of claims, but only that the class representatives' claims. share essentially the same characteristics as those of the class members." *Id.; see also Duncan*, 2015 WL 11623393 at *3. Typicality is satisfied "when the named plaintiffs' claims for relief arise from the same common nucleus of operative facts as the claims of absent class members." *DeHoyos*, 240 F.R.D. at 281-82 (citing *Mullen*, 186 F.3d at 625). Plaintiffs' claims in this case arise from the same set facts as the claims of all members of the Settlement Class.

Furthermore, typicality has been found to be satisfied if "[i]n the event the class members in this case were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs." *See Matson v. NIBCO Inc.*, 2021 WL 4895915, at *9 (W.D. Tex. Oct. 20, 2021). Because ERISA § 502(a)(2) claims are inherently representative claims, any participant's claim is necessarily typical of the claims of the class, since every participant is asserting the Plan's claim. Thus, typicality has been met.

Adequacy. The representative plaintiffs must also show that they will "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The adequacy prerequisite is met where: (1) the proposed class representatives share common interests with the class members; and (2) Plaintiffs' counsel is qualified to vigorously pursue the interest of the class. *See Boos*, 252 F.R.D. at 323. The Fifth Circuit has held that "as long as the proposed representatives have a sufficient stake in the outcome of the litigation and are united in asserting a common right, then the class members' interests are aligned." *Id.* (citing *Mullen*, 186 F.3d at 625-26). Plaintiffs' claims are identical to those of all Class Members, and each share the goal of maximizing the

Plan's recovery. Further, Class Counsel are experienced in ERISA litigation and have leveraged their experience and resources throughout this litigation. *See* Section II.C *infra*.

Plaintiffs are adequate class representatives because they have diligently pursued this action on behalf of the Settlement Class after acknowledging their duties as class representative. *See Seidner Decl.* ¶¶ *3–4*; *Mackrory Decl.* ¶¶ *3–4.* Among other things, they have both (1) reviewed the allegations in the Complaint and Amended Complaint; (2) provided information and documents to counsel to assist in the prosecution of the action; (3) helped counsel respond to multiple sets of interrogatories and documents requests; (4) prepared for and sat for their depositions in the case; and (5) reviewed the Settlement Agreement in its entirety and communicated with counsel regarding the negotiation of the Settlement. *See id*. Neither Plaintiff is aware of any conflicts of interest between themselves and other Class Members. *See id.* For all these reasons, Plaintiffs should be appointed as adequate Class Representatives.

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

In addition to meeting the requirements of Rule 23(a), Plaintiffs need only satisfy one subsection of Rule 23(b). *See Amchem*, 521 U.S. at 613-14. 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). Settlement Class Members are still permitted to object to the Settlement, *Settlement, § 2.4*, and requirements for filing an objection are set out in the Notice and proposed Preliminary Approval Order. *Id.*, *Exs. B and D*.

Courts routinely grant certification under Rule 23(b)(1) to ERISA fiduciary breach cases. This is because "[s]eparate actions by individual class members would create the risk of inconsistent or varying adjudications that would likely prejudice the defendants and those adjudicated might be dispositive of the interests of class members not parties to the action or impair their ability to protect their rights." *In re Enron Corp.*, 228 F.R.D. at 556. This proposition finds root in trust law, as "[a] suit which alleges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries requiring an accounting or similar procedure to restore the subject of the trust is a classic example of the Rule 23(b)(1)(B) action." *See id.* (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999)).

Indeed, the breach of fiduciary claims here plainly satisfy this test because they are brought derivatively on behalf of the Plan under ERISA, *see* 29 U.S.C. §§ 1109 and 1132(a)(2), and the outcome will necessarily affect the participants in the Plan and the Plan's 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).[6]

That is precisely the nature of this Action. *See Amended Complaint (Dkt.22)*, ¶ *16* (citing 29 U.S.C. §§ 1109, 1132(a)(2)). This Class should therefore be certified under Rule 23(b)(1).

C. Walcheske & Luzi and Kendall Law Group Should Be Appointed Class Counsel and Plaintiffs Should Be Appointed Class Representatives.

In appointing Class Counsel, this Court should consider the Rule 23(g)(1)(A) factors:

[6] 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).

> (i) the work counsel has done in identifying or investigating potential claims in this action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A). Proposed Class Counsel, Walcheske & Luzi, LLC ("Walcheske Luzi") and Kendall Law Group PLLC ("Kendall Law") are exceedingly qualified under these factors. *See* Secunda Decl., ¶¶ 25-28. To date, Class Counsel have leveraged their experience and resources to vigorously pursue recovery on behalf of the Plan and protect the interests of all Class Members, including, inter alia, comprehensively investigating the claims forming the basis of this Class Action, filing detailed pleadings, briefing several motions, and significantly engaging in the discovery process. *Id.* Class Counsel will continue to leverage their deep experience and resources on behalf of the Settlement Class. This Court should appoint Walcheske & Luzi and Kendall Law as Class Counsel.

II. The Settlement Warrants Preliminary Approval

The Fifth Circuit "has admonished courts to be mindful of the 'overriding public interest in favor of settlement' in class action suits." *See DeHoyos*, 240 F.R.D. at 287 (citing *Garza v. Sporting Goods Properties, Inc.*, 1996 WL 56247, at *12 (W.D. Tex. Feb. 6, 1996)). As explained below, the Settlement is emblematic of the compromise favored in this Circuit.

A. Standard of Review

Preliminary approval is not a final determination; after preliminary approval and notice, the court "conducts a more thorough and rigorous analysis of the same factors" to determine "the appropriateness of granting final approval." *In re Chesapeake Energy Corp.*, 2021 WL 2270167, at *5 (S.D. Tex. June 3, 2021) (citing *In re Chinese-Mfd. Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456, 484 (E.D. La. 2020)). Plaintiffs request that the Court take the first step in the approval

process and preliminarily approve the Settlement so that notice can be given to the Settlement Class. *See id.* at *4.

At the preliminary approval stage, "the standards are not as stringent as those applied to a motion for final approval." *See In re Pool Prods.*, 310 F.R.D. at 314. "If the proposed settlement discloses no reason to doubt its fairness, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, does not grant excessive compensation to attorneys, and appears to fall within the range of possible approval, the court should grant preliminary approval." *Id.* Settlements reached through arm's-length negotiation are entitled to a judicial presumption of fairness. *See DeHoyos*, 240 F.R.D. at 287.

B. The Proposed Settlement Merits Preliminary Approval

Pursuant to Rule 23, a class action "may be settled, voluntarily dismissed, or compromised only with the court's approval." FED. R. CIV. P. 23(e). Before 2018, the Fifth Circuit instructed district courts to consider the following six so-called "*Reed* factors" in determining whether to approve a proposed class settlement: (1) the existence of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings; (4) the plaintiffs' probability of success; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members. *See Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). In applying these factors, however, the Court was to remain "mindful of the 'overriding public interest in favor of settlement' in class action suits." *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

In 2018, Rule 23(e) was amended to provide that a Court may only approve a binding settlement agreement after a hearing and "only on finding that it is fair, reasonable, and adequate" after considering 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). The Advisory Committee notes to the 2018 amendments indicate that the changes to the rule are meant to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal," rather than "displace any factor" sanctioned by the circuit courts. In light of this explanation and because the Rule 23 and *Reed* factors overlap, courts in this circuit combine these factors in analyzing a proposed settlement. *See, e.g., O'Donnell v. Harris Cty., Tex.*, 2019 WL 6219933, at *9 (S.D. Tex. Nov. 21, 2019). A careful review of the Rule 23(e)(2) and *Reed* factors reflects that preliminary approval of the Settlement is warranted here.

1. The Rule 23(e)(2) Factors Favor Preliminary Approval

a. Adequacy of Representation

Rule 23(e)(2)(A) requires a Court to find that "the class representatives and class counsel have adequately represented the class" before preliminarily approving a settlement. *See Matson*, 2021 WL 4895915 at *9. For the same reasons as explained in the discussion of Rule 23(a)(4) above, Plaintiffs and Class Counsel satisfy the requirements of Rule 23(e)(2)(A). Plaintiffs' interests are neatly aligned with the Settlement Class because each member suffered injuries as a

result of Defendants' alleged Plan-level conduct. Further, Class Counsel has "substantial experience in litigating complex class actions and is familiar with the factual and legal issues of the case." *See Hays v. Eaton Group Attorneys, LLC*, 2019 WL 427331, at *9 (M.D. La. Feb. 4, 2019); Secunda Decl., ¶ 25-27.

b. The Settlement is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

Under Rule 23(e)(2)(B), "[a] 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063 (S.D. Tex. 2012); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 116 (2d Cir. 2005) (noting strong "presumption of fairness" where settlement is product of arm's-length negotiations by experienced counsel after discovery). Here, the Parties conducted significant discovery and the Settlement Agreement was negotiated at arm's-length by adverse parties, each represented by experienced counsel, and with the assistance a well-respected JAMS mediator, Robert A. Meyer. *See* Secunda Decl., ¶ 10.

Through the mediation process, the Parties engaged in an extensive process in which they communicated their respective positions and conducted independent analyses to support the mediation settlement. *Id.*, ¶¶ 8-10. As demonstrated by rounds of motion practice and adversarial briefing, as well as extensive arm's-length settlement negotiation, there has been no collusion or complicity of any kind in connection with the Settlement or related negotiations. *Id.*, ¶¶ 9-10. The settlement negotiations took place in the context of a full day mediation session before an experienced and impartial mediator. *See id., ¶ 10 & Ex. 2*.

"[C]ompromise is the essence of a settlement" and the Court should "rely upon the judgement of experienced counsel for the parties." *See Cotton*, 559 F.2d at 1330; *San Antonio*

Hispanic Police Officers' Org., Inc. v. City of San Antonio, 188 F.R.D. 433, 461 (W.D. Tex. 1999) ("[A] presumption of correctness is said to attach to a class settlement reached in arm[']s[-]length negotiations between experienced, capable counsel after meaningful discovery."). Class Counsel have significant experience in similar litigation, and are well-informed about this Class Action. See Secunda Decl., ¶¶ 12-27. Accordingly, Class Counsel's judgment about the merits of the Settlement should be given considerable weight.

c. Adequacy of Relief

In assessing the adequacy of relief accorded by a proposed settlement, under Rule 23(e)(2)(C), courts must consider the following: (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). *See* FED. R. CIV. P. 23(e)(2)(C).

The prosecution of this Class Action and the risks that Plaintiffs face in establishing liability and damages as well as maintaining a class through trial overwhelmingly support preliminary approval. Indeed, absent settlement, the Parties would file cross motions for summary judgment, any trial would be complex given the legal issues relevant to Plaintiffs' allegations, and even if Plaintiffs prevailed, it could be years before any recovery would be received in light of the possibility of appeals. "In evaluating the merits of a class action settlement, this Court has recognized it is important to be mindful of 'the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.'" *See DeHoyos*, 240 F.R.D. at 291 (citation omitted). Moreover, because continued litigation increases litigation expenses, it could result in a smaller recovery ultimately to the class, even ignoring the time value of money.

Plaintiffs' pursuit of recovery for the Plan's losses resulting from the course of conduct asserted in this case began well over three years ago. Here, Class Counsel's thorough investigation, coupled with the significant document discovery conducted in this case, has afforded them a significant understanding of the merits of the claims asserted, the strength of Defendants' defenses, and the values of theoretical outcomes of the case, which is reflected by, the rounds of briefing and extensive settlement negotiations through mediation. In addition, Class Counsel's reliance upon experts in assessing the claims, defenses and potential losses supports a finding that they had adequate information and evidentiary support for the Settlement.

The record in these proceedings and the law confirm the risks of establishing liability and damages. In order to succeed on the merits, Plaintiffs would need to establish not only that Defendants' managed account and QDIA selection processes were deficient, but Defendants would certainly assert affirmative defenses and, undoubtedly, vigorously argue for a judgment in their favor at the summary judgment and trial stages. Such defenses would likely include, arguments based upon the substantive and procedural prudence of Defendants' monitoring processes. The summary judgment and trial stages would certainly feature extensive briefing and motion practice and significant competing expert testimony, all of which pose risks to Plaintiffs' ability to establish liability. Moreover, even if Plaintiffs are successful in establishing liability at trial, there is a substantial risk that the Court could accept Defendants' damages arguments and award far less than the funds secured by the Settlement, or nothing at all.

Here, the Settlement Agreement and Plan of Allocation provide for a notice and claims process designed to ensure relief is effectively accorded to Settlement Class members. Because the Settlement Class comprises current participants and former participants, much of the data necessary to administer the Settlement is in the possession of the Plan's Recordkeeper. Indeed,

participants with active accounts in the Plan need not even submit a claim form. As explained below, the Plan of Allocation is designed to provide pro rata recovery to Settlement Class members.

Class Counsel will request no more than 33 1/3% of the Gross Settlement Amount as an award of attorneys' fees. In addition, Class Counsel will seek litigation expenses of no more than $180,000. This is consistent with awards made by courts in this Circuit under the percentage-of-the recovery method. *See Welsh v. Navy Fed. Credit Union*, 2018 WL 7283639 (W.D. Tex. Aug. 20, 2018) (citing *Schwartz v. TXU Corp.*, 2005 WL 3148350 (N.D. Tex. Nov. 8, 2005)). In addition, Class Counsel are not aware of any agreements required to be disclosed under Rule 23(e)(3). Further, consistent with awards by courts nationwide, Class Counsel will request awards of no more than $10,000 each to compensate Plaintiffs for their service. *See, e.g., DeHoyos*, 240 F.R.D. at 340 (collecting cases). This request is reasonable in light of Plaintiffs' willingness to devote their time and energy to this litigation and overall benefits achieved for the Settlement Class. *See id.*

2. The Remaining *Reed* Factors Favor Preliminary Approval

Since several *Reed* factors are addressed by Rule 23(e)(2), the discussion that follows will focus on the non-overlapping factors: (i) Plaintiffs' probability of success on the merits; (ii) range of possible recoveries; (iii) stage of proceedings and amount of discovery completed; and (iv) opinions of Class Counsel, Class Representatives, and absent Class Members.

a. Plaintiffs' Probability of Success on the Merits

"In evaluating the likelihood of success, the Court must compare the terms of the settlement with the rewards the class would have been likely to receive following a successful trial." *See DeHoyos*, 240 F.R.D. at 287. At the same time, the court "must not try the case in the settlement

hearings because the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.* (quotations and alterations omitted). In assessing potential resolutions of this case, Class Counsel took into account Defendants' defenses, arguments in favor of an alternative methodology for measuring the Plan's losses, and intention to move for summary judgment. Even if Plaintiffs were to prevail at trial, and damages awarded were even higher than the Settlement, there is "no doubt lengthy appeals would follow as would enormous costs and expenses." *See Garza*, 1996 WL 56247 at *16.

b. Range of Possible Recoveries

"In determining whether the settlement is reasonable in light of the range of possible recovery factor, the Court is to 'determine the value of the settlement in light of the potential for recovery.'" *Id.* (quoting *In re Shell Oil Refinery*, 155 F.R.D. 552, 563 (E.D. La. 1993)). Based on a well-established method for measuring the Plan's losses, employed in consultation with an expert, Plaintiffs demanded $14.9 million to settle the case at the start of the mediation. Secunda Decl., ¶ 4. Were the Court to adopt an alternative method for measuring the Plan's losses or apply a lesser interest rate than applied by Plaintiffs and their expert, potential recoveries would be smaller. Of course, this also presupposes a finding of liability on each of Plaintiffs' claims, which Defendants have vigorously disputed.

The Fifth Circuit has recognized "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement . . . should be disapproved." *See Parker v. Anderson*, 667 F.2d 1204, 1210 n.6 (5th Cir. 1982). (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974)); *Welsh*, 2018 WL 7283639 ("Indeed, 'a satisfactory settlement . . . could . . . amount to a hundredth or even a

thousandth part of a single percent of the potential recovery.'" (quoting *Grinell*, 495 F.2d at 455 n.2).

The negotiated monetary relief represents a significant portion of the alleged losses sustained by the Plan. For purposes of mediation, Plaintiff estimated the Settlement Class's losses to be $14.9 million dollars. *Secunda Decl. ¶ 4 & n.1.* At $2,250,000.00, the Settlement recovery would represent a recovery rate of over 15% against Plaintiffs' maximum loss calculation, all assuming that Plaintiffs successfully established liability for their claims. These recovery rates sit comfortably within the range accepted by courts in this Circuit. *See, e.g.*, *In re Lease Oil Antitrust Litig*., 186 F.R.D. 403, 434-35 (S.D. Tex. 1999) (collecting cases) (approving settlement where tiers of claimants would receive 3-13% and 32%, respectively, of estimated damages); *see also Blackmon v. Zachary Holdings, Inc.*, 2022 WL 3142362, at *4 (W.D. Tex. Aug. 5, 2022) (court approving settlement where 13% of maximum losses achieved through settlement).

c. Stage of the Proceedings and Amount of Discovery

In assessing whether the Parties have sufficient information to evaluate the Settlement, "[t]he Court should consider all information which has been available to the parties." *See DeHoyos*, 240 F.R.D. at 292. "The extent of discovery needed in order for the parties to have sufficient information to make an informed and reasoned evaluation of the settlement . . . is left to the discretion of the Court." *See Garza*, 1996 WL 56247 at * 13 (citing *Cotton*, 559 F.2d at 1332-33). The sufficiency of this information, however, does not depend on the amount of formal discovery because "other sources of information may be available to show that the settlement may be approved even when little or no formal discovery has been completed." *Id.* Here, the Parties engaged in over a year of formal discovery concerning Defendants' administration of the Plan. Class Counsel has thoroughly reviewed over 23,000 pages of the record, consulted with several

experts, and took ten fact and expert depositions, providing sufficient information to realistically evaluate the Settlement.

d. Opinions of Class Counsel, Class Representatives, and Absent Class Members

When "evaluating the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *See Welsh*, 2018 WL 7283639 at *14. Plaintiffs have relied on experienced and qualified counsel and remained abreast of developments in the litigation through regular consultation with Class Counsel. "The endorsement of class counsel is entitled to deference, especially in light of class counsel's significant experience in complex civil litigation and their lengthy opportunity to evaluate the merits of the claims." *See DeHoyos*, 240 F.R.D. at 292.

Here, Class Counsel submit that the Settlement is fair, reasonable, and adequate based on their extensive experience with ERISA class actions, hands-on involvement and knowledge of this litigation, and participation in negotiations through multiple mediation sessions. Secunda Decl., ¶ 11; *see also Welsh*, 2018 WL 7283639 at *15. Pursuant to the Notice Plan, Class Members will have the opportunity to be heard regarding the Settlement and requests for fees, expenses, and case contribution awards in advance of the Fairness Hearing. *Settlement Agreement, Ex. B*. Accordingly, while receipt of few or no objections "can be viewed as indicative of the adequacy of the settlement," *In re Enron*, 228 F.R.D. at 567, consideration of the response of absent Class Members is premature at this juncture.

In all, all the *Reid* and Rule 23(e) factors have been sufficiently met, such that the Court should preliminarily approve the Settlement Agreement.

IV. The Proposed Notice Plan Should be Approved

In addition to preliminarily approving the proposed Settlement, the Court must approve the

proposed means of notifying Settlement Class members. *See* FED. R. CIV. P. 23(c)(2); *see also Matson*, 2021 WL 4895915 at *8 (Rule 23 "requires the Court to direct to class members 'the best notice that is practicable under the circumstances.'"). At bottom, in order to satisfy due process considerations, notice to Settlement Class members must be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

That is precisely the type of notice proposed here, as the Settlement Administrator will individually e-mail or mail Notice of the Settlement to Settlement Class Members. *Settlement Agreement § 2.5.* These types of notice are presumptively reasonable. *See Phillips Petrol. Co. v. Shutts,* 472 U.S. 797, 812 (1985). The Notice Plan is designed to reach the largest number of Settlement Class members possible. *See Settlement Agreement, Ex. B.* Indeed, the Settlement Notice will be sent by email and/or first-class mail to the last known address of each Settlement Class member prior to the Fairness Hearing. *Id.* Notably, all Settlement Class members had Plan accounts, so the Plan's recordkeeper will generally have addresses and other identifying information from the time that they were Plan participants. Additionally, the Settlement Notice, Settlement Agreement, and other litigation documents will be posted on a website established by the Settlement Administrator, and the Settlement Administrator will establish and monitor a toll-free number to field inquiries by Settlement Class members. *See id.* The Settlement Notice will also provide Class Counsel's contact information. *Id.*

The Notice Plan satisfies all due process considerations and meets the requirements of Rule 23(e). It clearly describes: (i) the terms and operation of the Settlement; (ii) the nature and extent of the Released Claims; (iii) the maximum attorneys' fees, litigation expenses, and case contribution awards that may be sought; (iv) the procedure and timing for objections; and (v)

subject to the Court's schedule, the date and location of the Fairness Hearing. Courts in this Circuit have approved similar notice plans. *See, e.g.*, *In re Pool Prods.*, 310 F.R.D. at 317. In sum, the Notice Plan is designed to "fairly apprise[]" members of the class "of the terms of the settlement and the options that are open to them, and provide[] them with sufficient information for them to make a rational decision whether they should intervene in the settlement approval procedure." *See Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 342 (N.D. Tex. 2011) (quoting *Maher v. Zapata Corp.*, 714 F.2d 436, 451 (5th Cir. 1983)).

V. The Plan of Allocation Should be Approved

Approval of a plan of allocation "is governed by the same standard of fairness, reasonableness and adequacy applicable to approval of the settlement as a whole." *See Schwartz*, 2005 WL 3148350 at *23 (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238 (5th Cir. 1982)). "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *See Slipchenko v. Brunel Energy, Inc.*, 2015 WL 338358, at *12 (S.D. Tex. Jan. 23, 2015) (collecting cases).

Here, the Plan of Allocation provides recovery to members of the Settlement Class on a *pro rata* basis, with no preferential treatment for the Class Representatives or any segment of the Settlement Class. *See Settlement, Ex. C; see also In re Pool Prods.*, 310 F.R.D. at 315. The Settlement treats Settlement Class Members equitably. As outlined in the Plan of Allocation, the distributable Settlement Amount will be allocated among eligible Settlement Class Members on a *pro rata* basis based on the amount of time that they participated in the Plan, the same allocation formula is used to calculate settlement payments for all eligible Settlement Class Members, and that formula is tailored to the claims asserted in the case. *See Ex. C to Settlement Agreement*.

This approach to allocation is substantially similar to plans approved by courts in analogous ERISA litigation. *See, e.g., Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, Dkt. 268 (N.D. Cal.

Sept. 8, 2020) ("Settlement Scores will be determined by calculating the Class Member's year-end account balance during the Class Period and dividing that amount by the total sum of year-end asset amounts in the Plan during the Class Period . . . ."). In light of equitable treatment of Class Members, the Court should find that the Plan of Allocation is also fair, reasonable, and adequate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Parties' Class Action Settlement Agreement and Release; (2) approve the proposed Notice and authorize distribution of that Notice to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) approve the proposed Plan of Allocation; (5) schedule a Final Approval Hearing; and (6) enter the accompanying Preliminary Approval Order.

Dated this 2nd day of December, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, 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.

s/Paul M. Secunda
Paul M. Secunda