UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHRISTOPHER J. GERKEN, DENNIS KEMP, TRAVIS KNIGHT and ANGELIQUE PERKINS, individually and on behalf of all others similarly situated, Plaintiffs, v. MANTECH INTERNATIONAL CORPORATION, BOARD OF DIRECTORS OF MANTECH INTERNATIONAL CORPORATION, THE RETIREMENT PLAN COMMITTEE, and JOHN DOES 1-30. Defendants.	**CIVIL ACTION NO.:** **1:20-cv-01536**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF CLASS NOTICE, AND SCHEDULING OF A FAIRNESS HEARING

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Plaintiffs Christopher J. Gerken, Dennis Kemp, Travis Knight, and Angelique Perkins (collectively "Named Plaintiffs" or "Plaintiffs"), participants in the ManTech International 401(k) Plan (the "Plan"), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, Approval of Class Notice, and Scheduling of a Fairness Hearing ("Motion for Preliminary Approval"), and respectfully move this Court for an Order (1) granting preliminary approval to the proposed Settlement Agreement entered into with Defendants[1] (the "Settlement" or "Settlement Agreement"),[2] (2) preliminary certifying the Settlement Class, (3) approving form and manner of providing notice of the Settlement to proposed Settlement Class (the "Notice Plan"), and (4) scheduling of a Fairness Hearing.

I. INTRODUCTION

The Parties have reached a proposed Settlement of this case brought under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*., (ERISA) for a monetary payment of $1,200,000.00 (the "Class Settlement Amount") that will provide substantial benefits to and resolve all claims asserted by Plaintiffs in their dispute with Defendants on behalf of the Plan and Settlement Class. In light of the facts, governing law, and the substantial risks of continued litigation, Class Counsel[3] believes the proposed Settlement is fair, reasonable, adequate

[1] "Defendants" refers, collectively, to ManTech International Corporation ("ManTech"), the Board of Directors of ManTech International Corporation ("Board"), and the Retirement Plan Committee of the Board ("Committee") (collectively, the "Defendants"). Plaintiffs and Defendants are collectively referred to as the "Parties."

[2] The Settlement Agreement, attached to the Declaration of Mark K. Gyandoh ("Gyandoh Decl.") as Exhibit 1, itself has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); D (Final Approval Order and Judgment); and E (CAFA Notice). All capitalized terms not otherwise defined in this Memorandum shall have the same meaning as ascribed to them in the Settlement Agreement.

[3] "Class Counsel" means Capozzi Adler, P.C.

and in the best interest of the proposed Settlement Class as it provides for an immediate and meaningful recovery.

Plaintiffs have vigorously prosecuted their disputes with Defendants. Plaintiffs initially filed this action on May 15, 2020 in the Richmond division but voluntarily dismissed the action on July 2, 2020 because of a dispute between the parties of the propriety of the Richmond division as the venue for the action. Pending refiling of the action in this Court, the parties exchanged relevant discovery and engaged in arm's length negotiations under the auspices of an experienced mediator which resulted in the Settlement. Resolving the case at this juncture allows the Parties to avoid continued and costly litigation that would deplete available insurance coverage and could result in a judgment less than the recovery under the Settlement Agreement, or no recovery at all.

Accordingly, as set forth below, all prerequisites for preliminary approval of the Settlement and certification of a Settlement Class are satisfied. Plaintiffs' Motion for Preliminary Approval should be granted and Notice should be given to the Settlement Class. The proposed Notice Plan, which consists of individualized direct-mail and a settlement website, as described herein, is consistent with the forms of notice approved in directly analogous actions and satisfies due process concerns.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Summary of the Litigation

Plaintiffs commenced litigation with the filing of *Gerken, et al., v. ManTech International Corporation, et al.*, No. 3:20-cv-00350, on May 15, 2020, in the United States District Court of the Eastern District of Virginia, Richmond Division. Soon after, counsel for the Parties met and conferred regarding the propriety of the Richmond division as a venue. Defendants believed the Alexandria division was the proper division in which to file this matter. During their discussions, the Parties also began to discuss the possibility of an early resolution of this matter through

mediation. In order to focus their efforts on resolving this matter, both as to venue and the merits of the case, Plaintiffs filed a Notice of Voluntary Dismissal without prejudice pursuant to FED. R. CIV. P. 41(a)(1)(A)(i) on July 2, 2020. Prior to dismissing the action, the Parties executed a tolling agreement that preserved the proposed class period and claims against Defendants in the original complaint.

The Parties agreed to engage in preliminary, informal discovery to allow Plaintiffs to fully evaluate the merits of their claims. Defendants voluntarily provided Plaintiffs with key materials to evaluate the merits of their claims, including thousands of pages of Committee materials and fee disclosure documents. On October 20, 2020, the Parties participated in a mediation before Robert Meyer, Esq., JAMS, a neutral, third-party private mediator with substantial experience mediating ERISA class actions. After a full-day (8+ hour mediation), on that date, the Parties agreed to a settlement in principle and, over the last several weeks have negotiated the specific terms of the Settlement Agreement.

On December 15, 2020, Plaintiffs re-filed their Complaint in the Alexandria division and Defendants executed waivers of service. The Complaint alleges the same claims as the previously filed original complaint. Plaintiffs allege in Count I that ManTech and the Committee Defendants breached their fiduciary duties to the Plan, Plaintiffs, and the proposed Class by failing to prudently and loyally manage the Plan's investment options by, *inter alia*, selecting and retaining investment options in the Plan despite the high cost of the funds in relation to other comparable investments, failing to investigate the availability of lower-cost share classes of certain mutual funds in the Plan, even though they generally provide the same investment management services at a lower cost and

failing to monitor or control the grossly-excessive compensation paid for recordkeeping services, in violation of ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Cmplt.,[4] ¶¶137-43.

In Count II, Plaintiffs alleged that ManTech and the Board Defendants breached their fiduciary duties by failing to adequately monitor other persons to whom management/administration of the Plan's assets was delegated. *Id.*, at ¶¶144-50.

As set forth below, Defendants deny, and continue to deny, the merits of these allegations.

B. Investigation of Claims and Discovery

Several months prior to filing the original complaint, Plaintiffs' Counsel conducted an extensive investigation into the underlying merits of the action which included the review of public records regarding the assets held by the Plan and ManTech's response to Plaintiffs' request for disclosure of documents pursuant to §104(b) of ERISA,[5] as well as the retention of an expert to assess the management of the Plan. Additionally, Plaintiffs' Counsel researched and analyzed relevant case law to determine potential legal claims. Defendants also provided additional material described above in anticipation of the mediation the Parties attended, including all of the Committee meeting materials and minutes and fee disclosures covering the entire 6-year putative class period.

C. Settlement Negotiations

After reviewing all of the relevant information, Plaintiffs determined realistic maximum potential damages to the Plan to be up to $3.5 million. Gyandoh Decl., ¶14. This figure is based in large part on what Plaintiffs allege is the cost to the Plan for Defendants failing to utilize lower

[4] "Cmplt." refers to the Complaint (Doc. 1).

[5] The documents produced by Defendants included: (1) Automatic Rollover IRA Plan Admnistrator Agreement, (2) the Retirement Plan Committee Charter, (3) the operative Plan document and amendments, (4) Financial Statements for the Plan for the Year ended 2018, (5) the trust agreement, (6) the Summary Plan Description, (7) Form 5500s filed with the Department of Labor, and (8) Plan and investment related disclosures.

cost identical mutual funds and materially identical collective trusts as Plan investment options during the Class Period and the failure to negotiate lower recordkeeping fees. *Id.* The mediation in this Action was conducted via Zoom on October 20, 2020 and the negotiations were certainly arm's length. Gyandoh Decl., ¶12. Robert Meyer, Esq. from JAMS, a mediator with extensive experience in ERISA and other complex litigation matters, assisted the parties at arriving at a settlement in principle, settling this matter for $1,200,000.00. Gyandoh Decl., ¶¶ 12, 15. Several weeks of negotiations followed to finalize the terms of the Settlement Agreement, inclusive of exhibits, which was executed on December 28, 2020. Gyandoh Decl., ¶ 15. Based on the aforementioned negotiations and exchange of information both before and during the mediation, the Parties were able to negotiate a fair settlement that they believe to be in their respective best interests. Gyandoh Decl., ¶¶ 16-17.

Throughout the litigation and settlement negotiation processes, Plaintiffs' Counsel has been cognizant of the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses. Gyandoh Decl., ¶16. This, combined with the arm's-length nature of the negotiation of the Settlement Agreement by the experienced advocates for the Parties, strongly support the conclusion the proposed Settlement is fair, reasonable, and adequate.

D. The Proposed Settlement

The Settlement provides the Defendants will pay (or cause their insurance carrier to pay) $1,200,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation.[6] Defendants have also agreed to pay the cost of the independent fiduciary outside the settlement amount, which is also a benefit to the Class. In exchange, the Plaintiffs and the Plan

[6] The Plan of Allocation is attached to the Settlement Agreement as Exhibit B. The Plan of Allocation is premised on calculating a Plan participant's pro rata distribution based upon the individual's balances in the Plan during the Class Period.

will dismiss their claims, as set forth more fully in the Settlement Agreement. The Settlement Agreement also sets forth the proposed Notice Plan to Settlement Class Members and provides for the payment of attorneys' fees and Plaintiffs' Case Contribution Awards, both of which are subject to Court approval.

E. Reasons for the Settlement

Plaintiffs entered into this Settlement with a full and comprehensive understanding of the strengths and weaknesses of the claims, which is based on Plaintiffs' Counsel's extensive experience with ERISA litigation, the investigation performed in connection with filing the Complaint, and the facts obtained during the course of litigation. Gyandoh Decl., ¶¶ 19-25. Class Counsel, in negotiating the proposed Settlement, considered the risks and uncertainties of proceeding with the litigation and ultimately prevailing at trial in light of various factors, which were debated during the settlement process. *Id.*, at ¶ 15.

Defendants certainly would argue in a dispositive motion and/or at trial that, among other things: (1) they employed a prudent process to select and retain investment options in the Plan despite what Plaintiffs allege was the high cost of the funds in relation to other comparable investments, (2) they did not fail to investigate the availability of lower-cost share classes of certain mutual funds in the Plan, (3) they did not fail to investigate collective trusts as alternatives to mutual funds, (4) they did not fail to monitor or control the compensation paid for recordkeeping services, and (5) all decisions were an appropriate discharge of their fiduciary duties of loyalty and prudence. Indeed, the documents Defendants provided ahead of the mediation tended to support these defenses.

In sum, based upon the extensive investigation both before and during the litigation, the analysis of the risks inherent in continuing litigation and establishing liability and damages, and

the likelihood of appeals associated with any trial verdict, Plaintiffs' Counsel supports the proposed Settlement and its certain and immediate benefit to the Settlement Class Members. Gyandoh Decl., ¶¶ 8-11, 15-17. Without this Settlement, there is no assurance that Plaintiffs would prevail if litigation were to continue – much less that Settlement Class Members would recover more than the Class Settlement Amount.

F. Proposed Timetable

The Parties request the Court schedule a Fairness Hearing at least 120 days after the Court's order granting preliminary approval of the settlement. This timing will ensure that the Fairness Hearing takes place no earlier than ninety days from the date notice is mailed pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA Notice"), and sixty days from the mailing of the Class Notice.[7] The Parties have consented to a generalized schedule as follows, assuming the Court preliminarily approves the Settlement.

- *Class Notice* will be mailed and published to the settlement website by no later than thirty days after entry of a Preliminary Approval Order;
- The filing of briefs in support of final approval of the *Settlement* and in support of *Class Counsel's* petition for attorneys' fees, litigation costs and *Case Contribution Awards* to the *Named Plaintiffs* shall be filed no later than forty-five days before the *Fairness Hearing*;
- Any objections to the *Settlement* must be filed fifteen days before the *Fairness Hearing*;
- Any responses to objections, and supplemental briefs in support of the *Settlement*, must be filed seven days before the *Fairness Hearing*.

The above dates are set forth in the Preliminary Approval Order, ¶¶ 8-12.

III. THE PROPOSED SETTLEMENT SATISFIES THE STANDARDS FOR APPROVAL

A. The Governing Law

[7] The CAFA Notice must be sent no later than ten days from the filing of the Settlement Agreement with the Court which will be January 2, 2020.

To approve a class action settlement, the court must determine whether the settlement agreement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). "This standard includes an assessment of both the procedural fairness of the settlement negotiations and the substantive adequacy of the settlement itself." *In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *9 (E.D. Va. Sept. 23, 2015) ("*NeuStar I*"); *see also Solomon v. Am. Web Loan, Inc.,* 2020 WL 3490606, at *4 (E.D. Va. June 26, 2020) (citing *In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991)). There is "a strong initial presumption that [a class action] compromise is fair and reasonable." *In re Zetia (Ezetimibe) Antitrust Litig.*, 2019 WL 6122038, at *3 (E.D. Va. Oct. 1, 2019) (quoting *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d 654, 663 (E.D. Va. 2001). Approval of a proposed class action settlement is "left within the 'sound discretion of the Court.'" *Solomon*, 2020 WL 3490606, at *4 (quoting *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 252 (E.D. Va. 2009)) ("*Mills II*").

The Fourth Circuit instructs district courts to consider: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation" when determining the fairness of a class action settlement. *Jiffy Lube*, 927 F.2d at 159. When evaluating the adequacy of the settlement, the Fourth Circuit instructs district courts to examine:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Jiffy Lube, 927 F.2d at 159. Additionally, amendments to Rule 23 also took effect on December 1, 2018. The amendments provide preliminary approval should be granted, and notice to the class

authorized, if "the court will likely be able to . . . approve the proposal under Rule 23(e)(2)." FED. R. CIV. P. 23(e)(1(B)(i). Rule 23(e)(2), in turn, now specifies the factors to be considered in determining whether a settlement merits final approval:

> (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);[8] and (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2). Here, the Settlement easily satisfies all of the above standards.

B. The Settlement Satisfies the *Jiffy Lube* Test Underscoring its Fairness

1. Posture of the Case and Extent of Discovery Conducted

The posture of the case and extent of discovery demonstrate this Action is ripe for Settlement. Prior to filing the initial complaint, Plaintiffs' Counsel thoroughly investigated the underlying merits of the action, which included the review of public records regarding the Plan's assets (Form 5500s filed with the Department of Labor) and ManTech's response to Plaintiffs' request for disclosure of documents pursuant to §104(b) of ERISA.[9] Plaintiffs' Counsel retained an expert to assess the management of the Plan. Additionally, Plaintiffs' Counsel researched and analyzed relevant case law to determine potential legal claims. After voluntary dismissal of the initial action and in connection with preparation for mediation, Plaintiffs received and reviewed additional documentation voluntarily produced by Defendants totaling over 4,000 pages.

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[8] Rule 23(e)(3) requires "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3).

[9] *See* fn. 5.

Plaintiffs' Counsel's initiatives during the course of investigation and discovery "clarifie[s] plaintiffs' previous understanding of the strength and weaknesses of their claims and afford[s] plaintiffs the ability to confirm the fairness, reasonableness, and adequacy of the proposed partial settlement." *Mills II*, 265 F.R.D. at 255 (quoting *In re MicroStrategy, Inc. Sec. Litig.*,148 F.Supp.2d 654, 665 (E.D. Va. 2001)). Preliminary approval of the settlement is thus favored. *See NeuStar I*, 2015 WL 5674798, at *10 (fairness determined when parties engaged in formal discovery and class counsel "conducted in-dept reviews of publicly available information").

2. Circumstances Surrounding Negotiations and Experience of Counsel

Throughout the litigation and settlement negotiation processes, Plaintiffs' Counsel has been cognizant of the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses. Gyandoh Decl., ¶15. This, combined with the arm's-length nature of the negotiation of the Settlement Agreement by the experienced advocates for the Parties, and under the auspices of a neutral mediator, strongly support the conclusion the proposed Settlement is fair, reasonable, and adequate. "In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred." *Gagliastre v. Capt. George's Seafood Restaurant, LP*, 2019 WL 2288441, at *3 (E.D. Va. May 29, 2019). Counsel for both Plaintiffs and Defendants are experienced members of the ERISA class action bar, Gyandoh Decl., ¶¶ 13, 19-25, which "further minimizes concerns that the Settling Parties colluded to the detriment of the class's interests." *In re MicroStrategy*, 148 F.Supp.2d at 665.

As discussed more fully *infra*, Section V.C, Plaintiffs' Counsel has extensive experience litigating analogous ERISA class actions. *See also* Gyandoh Decl., ¶¶ 19-25. Thus, "it is entirely warranted for this Court to pay heed to their judgment in approving negotiating, and entering into a putative settlement." *Mills II*, 265 F.R.D. at *255; *see also Neustar I*, 2015 WL 5674798, at *12.

C. The Fourth Circuit's *Jiffy Lube* Adequacy Factors Are Also Satisfied

Having established fairness of the Settlement, the Court must next consider the substantive adequacy of the Settlement.

1.Relative Strength of the Plaintiffs' Case and Applicable Defenses

The first two *Jiffy Lube* factors "compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Mills II*, 265 F.R.D. at 256. Analysis of both factors confirm the Settlement provides adequate relief to Settlement Class participants.

The $1,200,000.00 settlement amount represents approximately 34% of the estimated damages calculated by Plaintiffs. Gyandoh Decl., ¶14. Plaintiffs' recovery compares favorably to settlements in analogous ERISA class actions. *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858(C.D. Cal. July 30, 2018) ("*Urakhchin III*") (approved $12 million settlement, which represented approximately one-quarter of estimated total plan-wide losses of $47 millions); *Johnson v. Fujitsu Tech & Business of Am., Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approved $14 million settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) ("*Sims II*") (approved $24 million settlement representing 19% of estimated damages); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses" since 1995). The recovery will be distributed equitably to class participants based on their average account balances in the Plan. *See* Plan of Allocation.

Plaintiffs are confident in their case, however proceeding through litigation and trial presents significant risks. "[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *Mills II*, 265 F.R.D. at 256. Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions,

the risk is even more considerable. As the United States District Court for the District of New Jersey noted when analyzing the reasonableness of the settlement of ERISA breach of fiduciary duty allegations, "[r]isk is inherent in litigation. In this case, the risks of litigation are great because Plaintiffs' claims involve complex and contested questions of law and fact." *In re: Merck & Co., Inc., Vytorin ERISA Litig.*, No. 08-cv-285, 2010 WL 547613, at *8 (D.N.J. Feb. 9, 2010). Given the similarly complex and contested questions of law and fact here, the same great risks of a trial on the merits are inherent in this Action. Additionally, even if Plaintiffs prevailed on the issue of liability, Defendants would have challenged damages. *Sacerdote v. New York Univ.*, 328 F.Supp.3d 273, 280 (S.D.N.Y. 2018) ("while there were deficiencies in the Committee's processes […] plaintiffs have not proven […] that the Plans suffered losses as a result"). "[T]he damages issue would have become 'a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury.'" *In re MicroStrategy, Inc. Sec. Litig.*, 148 F.Supp.2d 654, 667 (E.D. Va. 2001).

The substantial recovery obtained on behalf of the Settlement Class coupled with the inherent risks of further litigation and trial militate in favor of approving the Settlement. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways").

2. Anticipated Duration and Expenses of Additional Litigation

The Fourth Circuit instructs district courts to examine "the anticipated duration and expense of additional litigation." *Jiffy Lube*, 927 F.2d at 159. Here, the probable costs of continued litigation with respect to both time and money are high. Class actions advanced under ERISA "often lead […] to lengthy litigation." *Kruger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at*1 (D.Minn. July 13, 2015) ("*Kruger II*"). The Settlement in this Action comes at an opportune time given that, if the litigation continues, there would be substantial expense to the Parties associated with necessary factual and expert discovery and associated motion practice. Additionally, this is

a fast-track jurisdiction and proceeding through further litigation and trial could translate to higher expenses to meet the Court's schedule.

While significant informal document productions have occurred, considerable additional formal discovery, both paper and testimonial, would be required before the case would be trial ready, and there would be voluminous briefing ahead in the absence of the proposed Settlement. Absent this Settlement, would have to litigate the refiled Complaint, delving into motion practice on the Complaint and substantial discovery, including numerous depositions (the Plaintiffs, the Defendants and their Rule 30(b)(6) designee(s), other third-party witnesses as well as those of liability and damages experts) as well as briefing on contested class certification and summary judgment motions. Moreover, a trial in this Action would be arduous given the complex factual and legal issues relevant to Defendants' decisions and Plaintiffs' arguments as to why such conduct was imprudent and constituted breaches of Defendants' fiduciary duties under ERISA. Further, even if Plaintiffs prevailed at trial it would likely be years before any putative Settlement Class member received any benefit in light of the likely appeals to follow.

Significant here, too, is the fact that "ERISA class actions based on the same theories as the present matter involve a complex and rapidly evolving area of law." *In re: Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *5 (D.N.J. May 31, 2012) ("*Schering-Plough Enhance*"); *see also Smith v. Krispy Kreme Doughnut Corp.*, No. 05-cv-00187, 2007 WL 119157, at *2 (N.D.N.C. Jan. 10, 2007) (recognizing that "ERISA is a highly complex and quickly-evolving area of the law" as a factor supporting the proposed settlement). Analogous ERISA actions have extended for a decade and endured multiple appeals before a final resolution is reached. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (case initially filed in 2006 and remanded to district court twice); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17,

2015) (case filed September 11, 2006); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (filed in 2007).

Thus, the costs of continued litigation with respect to both time and money are very high and militate in favor of approval of the settlement. The immediate and guaranteed benefit to the Settlement Class provided by the Settlement here outweighs the uncertainty of continued, costly, and time-consuming litigation.

3. Solvency of Defendants

The solvency of Defendants is not at issue in this case. *See, e.g., Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) ("Class Counsel have not expressed any concerns as to the solvency of the defendants or their ability to recover if they were to proceed to trial."). While ManTech could likely withstand a judgment in an amount larger than the Settlement amount, the risks and expenses attendant to continuing this litigation, including the potential for the depletion of available insurance coverage, combined with the immediacy of the benefit to Settlement Class members, easily outweigh this factor.

4. Opposition to the Settlement

The Fourth Circuit instructs district courts to consider the reaction of the Class to the Settlement when approving the settlement. While this factor is indisputably critical to a fairness analysis, it is premature to assess this factor at this stage, as notice to proposed Class members has not yet been provided. As a sister district court reasoned, "[t]he only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to opt out of the settlement class or object to its terms at the Final Fairness Hearing." *In re: M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010). If the Court preliminarily approves the Settlement and authorizes notice to

be sent to the Settlement Class, Plaintiffs' Counsel will address any opposition to the Settlement in the final approval papers in advance of the Fairness Hearing.

D. The Requirements of Fed. R. Civ. P. 23(e)(2) Also Are or Likely Will Be Satisfied

Rule 23(e)(1)(B)(i), as amended, provides preliminary approval should be granted, and notice to the class authorized, if "the court will likely be able to . . . approve the proposal under Rule 23(e)(2)." FED. R. CIV. P. 23(e)(1(B)(i). Rule 23(e)(2) now primarily encompasses the *Jiffy Lube* factors used to determine fairness and adequacy. As a result, because the instant Settlement satisfies the *Jiffy Lube* factors, the requirements of Rule 23(e)(2) are substantially met for purposes of both preliminary and final approval. The three factors not encompassed by the *Jiffy Lube* factors the Court is to consider when determining whether to grant **final** approval are: (1) "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"; (2) "the terms of any proposed award of attorney's fees, including timing of payment"; and (3) whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(C)(ii), (C)(iii) and (D).[10]

As detailed *infra*, Section IV.A, the proposed Notice Plan submitted by the Parties comports with due process. This, combined with the Plan of Allocation submitted by the Parties, satisfies the requirement of Rule 23(e)(2)(C)(ii). Additionally, a proposed maximum of 33 1/3% of the Settlement Amount in attorneys' fees is contained in the proposed Class Notice submitted

[10] There are no agreements other than the Settlement Agreement, that address the terms of the Settlement, thus FED. R. CIV. P. 23(e)(2)(c)(iv) is largely irrelevant. Nonetheless, in connection with dismissing the originally filed complaint without prejudice, the parties executed a tolling agreement that tolled the running of the statute of limitations against Defendants. This allows the Settlement Class Period to begin six years prior to the date of filing of the original complaint (May 15, 2014), instead of six years prior to the date of re-filing the complaint (which would have been December 15, 2014).

by the Parties. This amount is in line with analogous awards in ERISA class action cases and will likely be approved by the Court, so the requirement of Rule 23(e)(2)(C)(ii) will likely be met.[11] Finally, the Plan of Allocation submitted by the parties clearly treats class members equitably relative to each other, thereby satisfying the requirement of Rule 23(e)(2)(D). Here, the Court can easily determine it is likely to grant final approval under Rule 23(e)(2), so preliminary approval is appropriate under Rule 23(e)(1)(B)(i).

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. The Proposed Notice Plan Meets the Requirements of Due Process

In addition to preliminarily approving the Settlement Agreement, the Court must also approve the proposed means of notifying class members. FED. R. CIV. P. 23(c)(2). "Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *Harry M. v. Pennsylvania Dept. of Public Welfare*, 2013 WL 1386286, at *2 (M.D. Pa. April 4, 2013). In order to satisfy due process considerations, notice to Settlement Class Members must 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 & Trust Co.*, 339 U.S. 306, 314 (1950); *Glaberson v. Comcast Corp.*, No. CIV.A. 03-6604, 2014 WL 7008539, at *6 (E.D. Pa. Dec. 12, 2014), quoting *In re: Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *see also Harry M.*, 2013 WL 1386286, at *2. "[T]he best notice under the circumstances, include[es] individual

[11] *See McDonald v. Edward Jones*, 791 Fed.Appx. 638, 640 (8th Cir. 2020) (affirming judgment awarding the class counsel attorneys' fees of 1/3 of the settlement fund); *see also Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *6 (M.D.N.C. Sept. 29, 2016); *Spano v. The Boeing Co.,* 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp*., 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015); *Krueger v. Ameriprise Financial*, 2015 WL 4246879, at *4 (D. Minn. July 13, 2015); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014).

notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B).

As set forth below, Plaintiffs' proposed means of providing Notice to the Settlement Class readily satisfies this standard as well as the mandates of due process. The combination of direct mail and publication of the *Notice* on a dedicated website should cause actual notice to reach a very high percentage of affected Plan participants and beneficiaries.

B. Description of the Notice Plan

As an initial matter, Class Counsel has asked the Court to approve the selection of RG/2 Claims Administration as the Settlement Administrator for the Settlement. *See* Preliminary Approval Order, ¶8. RG/2 is an industry leader in class action settlement administration and has successfully handled dozens of class settlements. *See* https://www.rg2claims.com.

The Notice Plan, includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Class Notice, attached as Exhibit 1.E to the Settlement Agreement, will be sent via First Class mail, postage prepaid, to the last known address of each Settlement Class Member within (30) days of the Court's order granting preliminary approval of the Settlement. SA,[12] Art. 2, §§2.2.4, 2.4, 8.2.2. Additionally, by that same date, the Class Notice, along with other litigation-related documents such as a list of frequently asked questions and the Settlement Agreement with all of its Exhibits, will be posted on a dedicated Settlement website established by Plaintiffs' Counsel. The Class Notice also provides contact information for Class Counsel. Class Notice, p. 2. Class Counsel also will establish and monitor a dedicated, toll-free Settlement telephone number with an Interactive Voice Response system which will have answers to frequently asked questions and also provide to Settlement Class

[12] "SA" refers to the Settlement Agreement.

Members the opportunity to leave a voicemail for Class Counsel should they have any additional questions regarding the Settlement.

The Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23(e). The proposed notices describe in plain English: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees and Plaintiffs' Case Contribution Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Fairness Hearing. Numerous district courts within this Circuit have approved as fair similar notices and/or notice plans.

V. CLASS CERTIFICATION IS APPROPRIATE

In determining whether an action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, a court should preliminarily determine whether the proposed class satisfies the numerosity, commonality, typicality and adequacy of representation criteria set forth in Rule 23(a), as well as at least one of the subsections of Rule 23(b). *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *In re Imprelis Herbicide Marketing, Sales Practices and Products Liability Litig.*, 2013 WL 504857, at *3 (E.D. Pa. Feb. 12, 2013), citing *Manual for Complex Litigation*, § 21.632 (4th Ed. 2004). The Fourth Circuit encourages district courts to "'give Rule 23 a liberal rather than a restrictive construction'" to "'promote judicial efficiency.'" *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 77 (E.D. Va. 2006) (quoting *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 424 (4th Cir. 2003), *cert denied* 542 U.S. 915 (2004)).

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. Numerosity

Numerosity requires the number of persons in the proposed class to be so numerous, joiner of all class members would be impracticable. Fed. R. Civ. P. 23(a)(1). There are more than 10,000[13] participants in the Plan, which is more than sufficient to find that joinder of all parties is impracticable, thereby satisfying Rule 23(a)(1). *See, e.g.*, *Dashiell v. Van Ru Credit Corp.*, 283 F.R.D. 319, 322 (E.D. Va. 2012) (presuming the joinder of 65 individuals to be impracticable); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (generally more than 40 is sufficient).

2. Commonality

"The commonality requirement of Rule 23(a)(2) is satisfied if common questions [are] dispositive and overshadow other issues." *DiFelice*, 235 F.R.D. at 78 (quoting *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (internal citations omitted); *see also Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 199 (E.D. Va. 2015) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("The commonality requirement focuses on the claims of the class as a whole, and whether they 'turn on questions of law applicable in the same manner to each member of the class."). Issues that can be assessed by reference to an "objective standard" are "common to all members of the class." *Amgen v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 459 (2013).

"[T]he central question at issue in this litigation is whether [Defendants] breached [their] fiduciary duty" to minimize the Plan's expenses and administer the Plan with the best interests of the participants in mind. *DiFelice*, 235 F.R.D. at 78. "The resolution of this question does not depend on which participant brings the action on behalf of the Plan, and therefore the primary issue in the case is common to all members of the proposed class." *Id.* (citing *In re Ikon Office*

[13] According to the 2018 Form 5500 submission for the Plan, as of December 31, 2018, the Plan had 11,820 participants with account balances.

Solutions, Inc., 191 F.R.D. 457, 465 (E.D. Pa. 2000) ("[T]he appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs.")); *see also Spano v. the Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (commonality satisfied in ERISA breach of fiduciary class action); *Moreno I*, 2017 WL 3868803, at *5 (same); *Urakhchin v. Allianz Asset Mgmt. of America, L.P.*, 2017 WL 2655678, at *4 (C.D. Cal. June 15, 2017) (same); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014) ("*Krueger I*") (same).

The same is true for the matter currently before the Court. The overarching questions of law and fact applicable to all Settlement Class members are whether the Defendants breached fiduciary duties owed to the Plan and its participants by: selecting and retaining investment options in the Plan despite the high cost of the funds in relation to other comparable investments; failing to investigate the availability of lower-cost share classes of certain mutual funds in the Plan; failing to investigate collective trusts as alternatives to mutual funds, even though they generally provide the same investment management services at a lower cost; and failing to monitor or control the compensation paid for recordkeeping services. These queries are vital to each and every potential Settlement Class Member during the Class Period and, in and of themselves, are sufficient to meet the commonality requirement of Rule 23(a)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011); *Schering-Plough Enhance*, 2012 WL 1964451, at *3 (D.N.J. May 31, 2012) (where the complaint alleged breach of fiduciary duties owed under ERISA, the determination involves issues of law and fact that are identical for all class members thereby satisfying the commonality requirement). However, this Action also presents many common questions of law and fact, applicable to all members of the Settlement Class, which predominate over any questions affecting solely individual potential members, including: (1) whether Defendants were fiduciaries of the Plan; (2) whether the Plan and the Participants were injured by such breaches; and (3) whether the

Class is entitled to damages. As deemed appropriate by other district court decisions in ERISA cases, "[a]ll of these questions are sufficient to satisfy plaintiffs' burden under Rule 23(a)(2) because they all address common issues of owed fiduciary responsibility to the plan participants." *Moore v. Simpson*, 1997 WL 570769, at *4 (N.D. Ill. Sept. 10, 1997); *see also Ikon I*, 191 F.R.D. at 463-65. Consequently, Plaintiffs demonstrate a "level of commonality more than sufficient under Rule 23(a)(2)." *In re: Honeywell Int'l Sec. Litig.*, 211 F.R.D. 255, 260 (D.N.J. 2002).

3. Typicality

Typicality requires "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement typically merges with commonality. *In re The Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 105 (E.D. Va. 2009) ("*Mills I*") (citing *In re BearingPoint, Inc. Sec. Litig.*, 232 F.R.D. 534, 538 (E.D. Va. Jan. 17, 2006)); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). "While the numerosity and commonality prerequisites focus on the characteristics of the class members in comparison to each other, the typicality prerequisite focuses on the general similarity of the named representative's legal and remedial theories to those of the proposed class." *Soutter*, 307 F.R.D. at 208.

Due to the nature of ERISA class action lawsuits, district courts routinely find that the proposed class representatives' claims are "necessarily typical of those of the rest of the class" as the "claims are based on the effect the acts or omissions of [Defendants] had on the value of the Plan." *DiFelice*, 235 F.R.D. at 79. Here, the Plaintiffs' claims "are essentially identical to the claims of any other participant or beneficiary suing pursuant to ERISA 502(a)(2)." *Id.* (citing *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 344 (C.D. Cal. 2005) (typicality found as "[e]ach of the plaintiffs was a Syncor employee and participated in the Plan during the class period.").

Plaintiffs' claims are typical of those of the Settlement Class as all were participants in the Plan during the Class Period. As a result, Plaintiffs and all participants in the Plan, *i.e.*, the Settlement Class members, sustained an economic loss arising out of Defendants' breaches of fiduciary duty in violation of ERISA, a statute that explicitly states that §502(a)(2) claims are brought on behalf of retirement plans for plan-wide relief.

4. Adequacy

Federal Rule 23(a) requires the class representatives and counsel to "fairly and adequately represent the interest of the class." FED. R. CIV. P. 23(a)(4). In assessing this requirement, courts must determine "there are no potential 'conflicts of interest between the named parties and the class they seek to represent.'" *DiFelice*, 235 F.R.D. at 79 (quoting *Amchem Prods.*, 521 U.S. 591, 625 (1997)); *Soutter*, 307 F.R.D. at 212 ("adequacy focuses on evaluating the incentives that might influence the class representative in litigating the action, such as conflicts of interest." (internal citations omitted)). A conflict must be "fundamental" to defeat the adequacy requirement. *Soutter*, 307 F.R.D. at 212-13.

The core of the analysis is whether the named plaintiffs have interests antagonistic to those of the class. FED. R. CIV. P. 23(a)(4). "Class representatives must be part of the class and possess the same interest and suffer the same injury as the class members." *In re: Budeprion XL Marketing & Sales Litig.*, 2012 WL 2527021, at *7 (E.D. Pa. July 2, 2012) (citing *In re Pet Food Products Liability Litig.*, 629 F.3d 333, 343 (3d Cir. 2010)). Here, Named Plaintiffs have no interests antagonistic to those of the absent Settlement Class members as demonstrated by the fact that, ultimately, Named Plaintiffs seek to establish that Defendants breached their fiduciary duties by continuing to offer inferior investment alternatives and pay excessive recordkeeping fees which caused the Plan and Settlement Class members an economic loss. As such, each member of the

Settlement Class, just like the Named Plaintiffs, has a similar interest in recovering losses suffered by the Plan as a result of the conduct of the Defendants. This is proof positive that the interests of Named Plaintiffs in this Action are perfectly aligned with the interests of the absent class members, thereby meeting the first adequacy prong.

Rule 23(a)(4) also analyzes the performance and experience of Class Counsel, based upon the factors set forth in Rule 23(g). *See Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). This factor, discussed more fully *infra* in Section V.C, clearly demonstrates that Plaintiffs' Counsel is qualified to represent the Class.

B. The Proposed Class Meets the Requirements of Rule 23(b)(1)

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b)(1) is satisfied. Here, certification is proper under Rule 23(b)(1), which states that a class may be certified if:

> (1) prosecuting of separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

FED. R. CIV. P. 23(b)(1). Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *Ikon I*, 191 F.R.D. at 466. Certification under both sections of Rule 23(b)(1) is common in ERISA breach of fiduciary duty cases because of the defendants' alleged "unitary treatment" of the individual members of the proposed class. *Id.* (internal citation omitted); *see also* FED. R. CIV. P. 23(b)(1)(B), Advisory Comm. Notes to 1996 Amendment (stating that certification under 23(b)(1) is appropriate in cases

charging breach of trust by a fiduciary to a large class of beneficiaries). "Because of ERISA's distinctive representative capacity and remedial provisions, ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (internal citations omitted). Here, the proposed Settlement satisfies the requirements of both Rule 23(b)(1)(A) and (B).[14]

The fiduciary duties imposed by ERISA are "duties with respect to a plan" that are intended to protect the "interest of the participants and beneficiaries" collectively. *See* 29 U.S.C. § 1104(a). In fact, "separate lawsuits by various individual Plan participants to vindicate the right of the Plan could establish incompatible standards to govern Defendants' conduct, such as […] determinations of different 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Krueger I*, 304 F.R.D. at 577; *see also Shanehchian v. Macy's, Inc.*, 2011 WL 883659, at *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible.").

Class certification has been granted under Rule 23(b)(1)(B) by numerous district courts.[15]

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[14] *See also 6 Hochstadt v. Bos. Sci. Corp.,* 708 F. Supp. 2d 95, 105 (D. Mass. 2010) ("[I]n light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held.") (emphasis added) (internal citations omitted); *Tussey v. ABB, Inc.,* 2007 WL 4289694, at *8 (W.D. Mo. Dec. 3, 2007) ("Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b).").

[15] *See, e.g.*, *Cassell v. Vanderbilt Univ.*, No. 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Vellali v. Yale Univ.*, 333 F.R.D. 10 (D. Conn. Sept. 24, 2019); *Stevens v. SEI Investments Co.*, ECF No. 40 (E.D. Pa. July 31, 2019); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Krueger I,* 304 F.R.D. at 577; *Tracey v. MIT*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Hochstadt,* 708 F. Supp. 2d at 105; *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Sacerdote*

Additionally, class certification here is also appropriate under Rule 23(b)(1)(B) as adjudication on behalf of one Plan participants would effectively be dispositive of claims brought by other class members. 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). "[T]his case falls squarely within the meaning articulated by the Advisory Committee as Plaintiffs allege breaches of fiduciary duties affecting the Plans and the thousands of participants in the Plans." *Shanehchian*, 2011 WL 883659, at *10.

Here, the Complaint alleges breaches of fiduciary duties under ERISA. Therefore, the only remedy available to participants in the Plan is Plan-wide relief, including the restoration of losses. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985). Thus, actions for breaches of fiduciary duty under ERISA are, by law, representative actions which, if successful, will cause Defendants to be obligated to provide relief applicable to all participants in the Plan. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) ("In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held.")

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v. New York Univ., 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Daugherty v. Univ. of Chicago*, 2018 WL 1805646 (N.D. Ill. Jan. 10, 2018); *Harris v. Koenig,* 271 F.R.D. 356 (D.D.C. Sept. 16, 2010); *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012); *In re Northrup Grumman Corp. ERISA Litig.*, 2011WL 3505264 (C.D. Cal. Mar. 29, 2011); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018) *Karg v. Transamerica Corp.*, 2020 WL 3400199 (N.D. Iowa March 25, 2020); *Urakhchin I*, 2017 WL 2655678, at *8 (C.D. Cal. June 15, 2017); *Cates v. The Trustees of Columbia University in the City of New York et al*, 1:16-cv-06524, ECF No. 210 (S.D.N.Y. Nov. 13, 2018).

Given the unique "group-based" relief offered under ERISA for violations of fiduciary duties owed to participants in covered benefit plans, an action such as this is a textbook case for class treatment under Rule 23(b)(1)(B). Thus, given the nature of this case and the relief sought on behalf of the Class, the proposed Settlement Class meets the requirements of FED. R. CIV. P. 23(b)(1).[16]

C. Capozzi Adler Should be Appointed Counsel for the Class

Federal Rule 23(g) specifies that, unless a statute provides otherwise, a court that certifies a class must appoint Class Counsel, and that an attorney appointed to serve as Class Counsel "must 'fairly and adequately represent the interests of the class.'" *Donovan v. St. Joseph County Sheriff*, 2012 WL 1601314, at *8 (N.D. Ind. May 3, 2012), quoting FED. R. CIV. P. 23(g)(4). Rule 23(g) directs consideration of: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *In re: Processed Egg Products Antitrust Litig.*, 284 F.R.D. 249, 262 (E.D. Pa. 2012), citing FED. R. CIV. P. 23(g)(1)(A)(i)-(iv).

Plaintiffs retained attorneys that are highly qualified, experienced, and able to litigate this matter. Capozzi Adler, P.C., and lead counsel Mark K. Gyandoh, Esquire, Plaintiffs' Counsel in

[16] In the alternative, certification under subsection (b)(1)(A) is also appropriate. In fact, it is not uncommon for courts to certify ERISA class actions under both subsections of Rule 23(b)(1). *See, e.g.*, *Schering-Plough Enhance*, 2012 WL 1964451, at *3 (D.N.J. May 31, 2012) (finding certification appropriate under Rule 23(b)(1)(A) or (B)). A number of district courts recognize the nature of this type of case, which challenges defendants' plan-wide conduct, making this result particularly appropriate. *See, e.g.*, *In re: Merck & Co., Inc. Sec., Der. & ERISA Litig.*, 2009 WL 331426, at *12 (certifying class under Rule 23(b)(1)(A) and noting the strong the risk of establishing inconsistent standards under ERISA given that the "central element of the prudence claims is not an individual matter…"). Accordingly, the Court may also certify the Settlement Class under Rule 23(b)(1)(A).

this Action, have substantial experience litigating similar ERISA class action cases along with other complex litigation and are well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement. Mr. Gyandoh, Chair of the Fiduciary Practice Group at Capozzi Adler, is a highly qualified ERISA class action attorney and unequivocally recommends this Settlement. Capozzi Adler has been named interim Lead Class Counsel or Co-Lead Class Counsel in numerous breach of fiduciary duty class actions in this District and across the nation. Gyandoh Decl., ¶¶ 23-24. For example, recently, Capozzi Adler was appointed interim class counsel in *Bilello, et al., v. Estee Lauder, Inc., et al.,* No. 1:20-cv-04770-JMF (S.D.N.Y.) (ECF 11), which is an analogous breach of fiduciary duty action.

Throughout the litigation Class Counsel has used its experience and access to resources to investigate and litigate Plaintiffs' underlying allegations, which ultimately led to the Settlement in this Action. Class Counsel recommends this Settlement as the best solution for Settlement Class members. The retention of highly qualified counsel, coupled with the alignment of interests between Named Plaintiffs and the Settlement Class Members, satisfies the requirements of Rules 23(a)(4) and 23(g).

VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully move this Court to grant their Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, Approval of Class Notice, and Scheduling of a Fairness Hearing.

Dated: December 29, 2020

Respectfully submitted,

/s/ *Charles L. Williams*

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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