UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SUSAN GLEASON, CANDI GABRIELSE, Individually, and as representatives of a Class of Participants and Beneficiaries of the Bronson Healthcare Group, Inc. 403(b) Tax Sheltered Matching Plan,

Plaintiffs,

v.

BRONSON HEALTHCARE GROUP, INC.,

and

BOARD OF DIRECTORS OF BRONSON HEALTHCARE GROUP, INC.,

and

JOHN DOE 1-30,

Defendants

Case No. 1:21-cv-00379-HYJ-PJG

Judge: Hon. Hala Y. Jarbou

Magistrate Judge Phillip J. Green

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

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I. INTRODUCTION

Plaintiffs Susan Gleason and Candi Gabrielse ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of their class action settlement with Defendants Bronson Healthcare Group, Inc. and the Board of Directors of the Bronson Healthcare Group, Inc. ("Defendants") relating to the management of the Bronson Healthcare Group, Inc. Tax Sheltered Matching Plan ("Bronson Plan").[1] While joining in the relief requested by Plaintiffs, Defendants do not agree with all the averments, statements, allegations, and claims made by Plaintiffs in this Memorandum of Law in Support of the Motion for Preliminary Approval of Settlement, ancillary pleadings, and the attached Exhibits.

Under the terms of the proposed Settlement, a Gross Settlement Amount[2] of $3.0 million will be paid to resolve the claims of Settlement Class Members who participated in the Plan during the subject period. This is a significant recovery for the Class in relation to the claims that were alleged and falls well within the range of negotiated settlements in similar ERISA cases.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that notice may be disseminated to the class. Among other things:

- The Settlement was negotiated at arm's length with the assistance of a respected mediator;
- The Settlement provides for significant monetary relief that is on par with other settlements;
- The Settlement conveniently provides for automatic distribution of the settlement proceeds to the accounts of current and former employees who are still Plan participants;
- The Released Claims are tailored to the claims that were asserted in the action or could have been asserted based on the same factual predicate;
- The proposed Settlement Class is consistent with the requirements of Rule 23;

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

[2] Except as otherwise defined herein, all capitalized terms used herein shall have the same meaning as ascribed to them in the Settlement Agreement.

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

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notice and authorizing distribution of the Notice to the Settlement Class; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the accompanying Preliminary Approval Order.

II. BACKGROUND

A. The Pleadings

Plaintiffs Susan Gleason and Candi Gabrielse filed this action on May 6, 2021. *Dkt. 1.* In their Complaint, Plaintiffs allege that during the putative Class Period (May 6, 2015 through the date of judgment), Defendants, as fiduciaries of the Plan, breached the duties they owed to the Plan, to Plaintiffs, and to the other Participants of the Plan by, among other things: (1) authorizing the Plan to pay unreasonably high fees for retirement plan services ("RPS"); and (2) maintaining certain funds in the Plan despite the availability of identical or similar investment options with lower costs and better performance. *Id.* Defendants deny these allegations. On June 29, 2021, the Court granted Defendants' motion to extend the time to answer or otherwise respond to Plaintiff's Complaint until July 30, 2021. *Dkt. 9*. At the Parties' request, the Court then stayed the litigation pending mediation and the negotiation of the present Settlement. *See Dkts. 10–13*.

B. Mediation and Settlement

The Parties engaged in a full-day mediation with a nationally recognized, neutral mediator, Robert Meyer, on November 2, 2021.[3] *Secunda Decl. ¶ 10*. After extensive arm's length negotiations, the Parties reached a settlement in principle, and then prepared the comprehensive Settlement Agreement that is attached to this motion. *Id. ¶ 11*; *Dkt. 12.*

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement applies to the following Settlement Class:

> All participants and beneficiaries of the Bronson Healthcare Group, Inc. Tax Sheltered Matching Plan from May 6, 2015 through January 10, 2022.

Settlement ¶ E. There are approximately 21,528 Settlement Class Members. *Secunda Decl. ¶ 3.*

B. Monetary Relief

Under the Settlement, Bronson Healthcare will contribute $3.0 million to a common settlement fund. *Settlement ¶ 12.* After reductions for any Attorneys' Fees and Costs, Administrative Expenses, and class representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id. ¶¶ 14, 22.*

The Plan of Allocation shall be prepared by Class Counsel and submitted to the Court for approval in connection with Final Approval of the Settlement. *Settlement ¶ 29.* Class Counsel shall retain the Settlement Administrator to calculate the amounts payable to Settlement Class Members. *Id. ¶ 30.* For those Settlement Class Members with Plan accounts as of the date of entry of the Final Approval Order (the "Account Members"), the distribution will be made into his or her Plan account. *Id. ¶ 31.* For those Settlement Class Members who no longer have an account in the Plan

[3] 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. B.*

at the time of the distribution of the share amounts owed to Class Members (the "Non-Account Members"), the distribution will be made from the Settlement Fund by the Settlement Administrator.[4] *Id.* ¶ *32*

C. Release of Claims

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

> [C]oncerning the Plan (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), including, without limitation, all claims asserted in the Complaint for losses suffered by the Plan, or by Plan' participants or beneficiaries, whether accrued or not, whether already acquired or acquired in the future, whether known or unknown, in law or equity, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise, arising out of any or all of the acts, omissions, facts, matters, transactions or occurrences that are, were or could have been alleged, asserted, or set forth in the Complaint, so long as they are related to any of the allegations or claims asserted in the Complaint, or would be barred by principles of *res judicata* had the claims asserted in the Complaint been fully litigated and resulted in a final judgment or order, including but not limited to claims that Defendants and/or any fiduciaries of the Plan breached ERISA fiduciary duties during the Class Period or engaged in any prohibited transactions in connection with: (a) the selection, retention and/or monitoring of the investment options available in the Plan, or any of them (including any of the suite of Fidelity Freedom Funds referenced in the Complaint); (b) the appointment and/or monitoring of the Plan' fiduciaries and service provider; (c) the recordkeeping fees, administrative fees, and expenses incurred by the Plan; (d) the prudence and loyalty of the Plan' fiduciaries; and/or (e) any claims that Defendants, or any other fiduciary or service provider to the Plan, engaged in any transaction(s) prohibited by ERISA §§406-408, 29 U.S.C. 1106-1108, in connection with the operative facts set forth in the Complaint.

Id. ¶ *7.* The Released Claims do not include claims to enforce the Settlement Agreement. *Id.* ¶¶ *10-11*.

[4] Under no circumstances will any monies revert to Defendants. Any checks that are uncashed will be paid into the Plan for the purpose of defraying administrative expenses. *Id.* ¶¶ *19, 20.*

D. Class Notice and Settlement Administration

Class Members will receive notice of the settlement via first-class U.S. Mail. *Id. ¶ 30, & Exs. 1 & 2*. To the extent that Class Members would like more information, the Settlement Administrator[5] will establish a Settlement Website on which it will post the Settlement Agreement, Notices, and relevant case documents, including the Complaint and a copy of all Court orders related to the Settlement. *Settlement ¶ 30 and Exs. 1, 2.* The Settlement Administrator also will establish a toll-free telephone line that will provide the option of speaking with a live operator if callers have questions. *Id.*

E. Attorneys' Fees and Administrative Expenses

The Settlement requires that Class Counsel file their Motion for Attorneys' Fees and Costs at least 28 days prior to the final fairness hearing, and more than two weeks before the Independent Fiduciary files its report. *Id. ¶ 27.* Under the Settlement, the requested fees may not exceed one-third of the Gross Settlement Amount. *Id. ¶ 24.* In addition, the Settlement provides for recovery of Administrative Expenses related to the Settlement, and for service awards up to $7,500 per Class Representative. *Id ¶ 28.*

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. ¶¶ 23, 38(c)*; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830. The Independent Fiduciary will issue its report at least 14 days before the final Fairness Hearing, *Settlement ¶ 38(c)*, so it may be considered by the Court.

[5] Analytics Consulting, LLC has been selected as the Settlement Administrator, and has extensive experience administering similar ERISA class action settlements. *Id. ¶¶ 21-22; Secunda Decl. ¶ 28 & Ex. C.*

IV. ARGUMENT

A. Standard of Review

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

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

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class;
> (iii) the terms of any proposed award of attorney's fees; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The rule largely encompasses the factors that have been employed by the Sixth Circuit:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

See Macy v. GC Servs. Ltd. P'ship, 2019 WL 6684522, at *2 (W.D. Ky. Dec. 6, 2019) (citing *Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016); *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)).[6]

At this stage, a settlement on its face represents a bargained give and take between the litigants that is presumptively valid. *See Berry v. Sch. Dist. of City of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard. For the reasons that follow, this Court should grant preliminary approval of the Settlement and authorize notice to the Settlement Class.

B. The Settlement Meets the Standard for Preliminary Approval

1. The Class Is Adequately Represented

The record reflects that the Class is adequately represented. Class Counsel are experienced ERISA litigators with a proven track record. *See Secunda Decl. ¶¶ 25–27.* The named Plaintiffs are also adequate class representatives, who have diligently pursued this action on behalf of the Class after acknowledging their duties as class representatives. *See Gleason Decl. ¶¶ 2–3*; *Gabrielse Decl. ¶¶ 2–3.*

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

Where experienced counsel have negotiated a settlement at arm's-length, with the help of a nationally recognized, experienced mediator, a strong initial presumption is created that the compromise is fair. *See In re Skelaxin (Metaxalone) Antitrust Litig.*, 2015 WL 13650515, at *2 (E.D. Tenn. Jan. 16, 2015) ("This presumption is appropriate here and, in any event, the

[6] The Sixth Circuit does not appear to have considered the new version of Rule 23(e)(2). *See Macy*, 2019 WL 6684522, at *2. Since the amendment, courts within the Sixth Circuit have been applying both sets of factors. *See, e.g., Elliott v. LVNV Funding, LLC*, No. 3:16-cv-00675-RGJ, 2019 WL 4007219 at *9, 2019 U.S. Dist. LEXIS 143692 at *18 (W.D. Ky. Aug. 23, 2019) (citing *Peck v. Air Evac EMS, Inc.*, No. CV 5:18-615-DCR, 2019 WL 3219150, 2019 U.S. Dist. LEXIS 11826 (E.D. Ky. July 17, 2019)).

undisputed evidence shows that the settlement was negotiated in good faith and without collusion. Arms-length settlement negotiations took place under the auspices of a mediator appointed by this Court."). That is exactly the situation here: The settlement negotiations took place in the context of an arm's length mediation session before a highly-regarded and impartial mediator. *See Secunda Decl. ¶ 10 & Ex. B*.

Also, relevant here: (1) Class Counsel undertook an extensive investigation of the factual and legal bases for Plaintiffs' claims prior to commencing the action, *Secunda Decl. ¶ 8*; and (2) Class Counsel had the necessary experience and qualifications to evaluate the Parties' legal positions, *id. ¶¶ 12–27.* These circumstances further favor approval of the Settlement. Courts in this Circuit consistently approve class action settlements reached through arms-length negotiations after meaningful mediation discovery. *See Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021) (citing *See Koenig v. USA Hockey*, 2012 WL 12926023, at *4 (S.D. Ohio Jan. 10, 2012); *see also Wong v. Accretive Health, Inc*., 773 F.3d 859, 864 (7th Cir. 2014) (noting that, "although formal discovery had not commenced, [plaintiffs] had access to extensive public documents," and settlement was reached "after an arm's-length negotiation where the parties' positions on liability and damages were extensively briefed and debated" before an experienced mediator); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 133, at *5 (N.D. Ill. Sept. 20, 2018) ("The negotiations were supported by a robust investigation before commencement of the Lawsuit; the production and review of confidential documents … during mediation discovery; and extensive legal and factual research on the issues in the case.").

3. The Settlement Terms Are Fair and Adequate

a. The Monetary Relief Is Significant

The product of these serious and informed negotiations is a Settlement that provides significant benefits to the class.

The negotiated monetary relief represents a significant portion of the alleged losses sustained by the Plans. For purposes of mediation, Plaintiffs estimated that the total retirement plan fees (RPS) exceeded a reasonable amount by $5.89 million, and the total investment losses were approximately $10.49 million, for a total loss of $16.38 million. *Secunda Decl. ¶ 4 & n.1.* Based on this estimate, the $3.0 million recovery represents over half of the allegedly excessive RPS fees and nearly a fifth of the total estimated losses. This is on par with numerous other ERISA class action settlements that have been approved across the country.[7]

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

In the absence of a settlement, Plaintiffs would have faced potential risks. At the time of settlement, Defendants' were planning to file a motion to dismiss.[8] In the event the motion was denied, there was a risk that the Court might have dismissed the claims on summary judgment. If the case proceeded to trial, the Defendants still might have prevailed.[9] Finally, even if Plaintiffs prevailed on liability, issues regarding loss-causation would have remained. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (determination of investment losses in breach of fiduciary duty

[7] *See, e.g.*, *Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, Dkt. 95 at 10 (Mar. 24, 2021), *approved* Dkt. 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 17-cv-00563, Dkt. 211 (May 20, 2020), *approved* 2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (16% of alleged losses); *Price v. Eaton Vance Corp.*, No. 18-12098, Dkt. 32 at 12 (May 6, 2019), *approved* Dkt. 57 (D. Mass. Sept. 24, 2019) (23% alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858 (C.D. Cal. July 30, 2018) (25% of estimated losses); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *6–7 (N.D. Cal. May 11, 2018) (approximately 10% of losses under Plaintiffs' highest model); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

[8] Motions to dismiss have been granted in other ERISA class action cases in this circuit. *See, e.g.*, *Forman v. TriHealth, Inc.*, 2021 WL 4346764, at *9 (S.D. Ohio Sept. 24, 2021) (motion to dismiss granted); *Stark v. Keycorp*, 2021 WL 1758269, at *14 (N.D. Ohio May 4, 2021) (motion to dismissed granted in part)

[9] *See, e.g.*, *Rozo v. Principal Life Ins. Co.*, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), *aff'd*, 9 F.4th 95 (2d Cir. 2021); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019).

cases is "difficult").

At a minimum, continuing the litigation would have resulted in complex and costly proceedings, including expert witness testimony, and significantly delayed any relief to the Class. ERISA cases such as this may take up to a decade before final resolution, sometimes going through multiple appeals.[10] The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See Karpik*, 2021 WL 757123, at *4 ("The complexity inherent in class actions is amplified in ERISA class actions. Indeed, it is well-recognized that 'ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation.'") (quoting *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015)).

None of this is to say that Plaintiffs lacked confidence in their claims. However, given the risks and costs of litigation, it was reasonable for Plaintiffs to reach a settlement on these terms. *See Karpik*, 2021 WL 757123, at *5 ("The Court finds that this complexity, along with the potential risk, cost, and additional delay, strongly favors approval of this Settlement, which secures an immediate, substantial benefit for the Class Members.").

4. The Proposed Method of Distributing Relief to The Class Is Effective

Consistent with numerous other ERISA settlements that have received court approval,[11] Participants will have their Plan accounts automatically credited with their share of the Settlement. *See supra* at 3–4. This method of distribution is both effective and efficient.

[10] *See, e.g.*, *Spano v. Boeing Co.*, 2016 WL 3791123, at *1, 4 (N.D. Ill. Mar. 31, 2016) (9 years); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015) (8.5 years); *Beesley v. Int'l Paper Co.*, No. 3:06-cv-00703, Dkt. 559 (S.D. Ill. Jan. 31, 2014) (more than 7 years).

[11] *See, e.g.*, *Kinder v. Koch Indus., Inc.*, 2021 WL 3360130, at *1–2 (N.D. Ga. July 30, 2021); *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *2 (S.D. Ohio Feb. 18, 2021); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 122-1 § 9 (N.D. Ill. Aug. 6, 2018).

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

The amount of any fee award is reserved to the Court in its discretion. *See Settlement ¶ 24.* However, Class Counsel have agreed to limit their request to one-third of the settlement amount. *Id.* This is the amount typically awarded in complex ERISA cases such as this. *See Bell v. Pension Comm. of ATH Holding Co.*, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting cases).

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

There are no side agreements relating to the Settlement. As the Settlement plainly and expressly states, "[t]his Agreement and the attached Exhibits, incorporated herein by reference, constitute the entire agreement of the Parties with respect to the subject matter hereof, and may not be amended, or any of their provisions waived, except by a writing executed by all Parties hereto." *Settlement ¶ 46.*

C. The Settlement Treats Class Members Equitably

Finally, the Settlement also treats Class Members equitably. As noted above, the Settlement Amount will be allocated among eligible Class Members on a *pro rata* basis, the same allocation formula is used to calculate settlement payments for all eligible Class Members, and that formula is tailored to the claims asserted in the case. *See supra* at 3–4; *Secunda Decl. ¶ 6*. This further supports approval of the Settlement.

V. THE CLASS NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

The Court also must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here, as the Settlement Administrator will individually mail notices of the Settlement to Class Members. *Settlement ¶ 30.* This type of notice is presumptively reasonable. *See Phillips Petrol.*

Co. v. Shutts, 472 U.S. 797, 812 (1985); *Snyder v. Ocwen Loan Serv'g*, 2019 WL 2103379, at *8 (N.D. Ill. May 14, 2019). Moreover, the content of the Notices is also reasonable, as they contain information regarding the terms of the Settlement, the claims asserted in the action, the definition of the class, the scope of the class release, the process for making an objection, Class Members' right to appear at the Fairness Hearing, and the proposed attorneys' fees, expenses, and service awards. *See Settlement Exs. 1–2*.

VI. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Finally, this Court should certify the Settlement Class for settlement purposes.[12] "ERISA class actions are commonly certified" under Rule 23 because ERISA breach of fiduciary duty claims are brought on behalf the plan as a whole. *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). That is precisely the nature of this action. *See Am. Compl. (Dkt. 40)* ¶ *45* (citing 29 U.S.C. §§ 1109, 1132(a)(2)).

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

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

Numerosity. As noted above, there are approximately 21,528 Class Members. *See supra* at 3. This far exceeds the threshold for numerosity. *See Neil*, 275 F.R.D. at 260.

Commonality. "[T]he commonality requirement is typically easily satisfied in ERISA cases." *Shanechian v. Macy's, Inc.*, 2011 WL 883659, at *3 (S.D. Ohio March 10, 2011); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004) ("In general, the

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

question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries."). Here, as in other ERISA cases, there are common questions, such as (1) whether the Plans' RPS expenses were excessive; (2) whether it was prudent to retain the at-issue Fidelity Freedom funds in the Plan; (3) whether Defendants breached their fiduciary duties to the Plans; and (4) whether the Plans suffered losses from the alleged fiduciary breaches. Accordingly, commonality is satisfied. *See, e.g.*, *Neil*, 275 F.R.D. at 260–61; *Godfrey v. GreatBanc Tr. Co.*, 2021 WL 679068, at *4 (N.D. Ill. Feb. 21, 2021).

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

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

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

Godfrey, 2021 WL 679068, at *5–6.

For their part, Class Counsel are experienced ERISA litigators. *See supra* at 7; *Secunda Decl.* ¶¶ *25–27.* Thus, Class Counsel are also adequate to represent the Class.

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

In addition to meeting the requirements of Rule 23(a), the proposed Class satisfies Rule 23(b)(1). Under Rule 23(b)(1), a class may be certified if prosecution of separate actions by individual class members would create a risk of:

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

Fed. R. Civ. P. 23(b)(1). The claims here plainly satisfy this test because they are brought derivatively on behalf of the Plans under ERISA, *see* 29 U.S.C. §§ 1109 and 1132(a)(2), and the outcome will necessarily affect the participants in the Plans and the Plans' fiduciaries. *See Godfrey*, 2021 WL 679068, at *7. Indeed, courts have held that "breach of fiduciary duty claims brought [section 1132(a)(2)] are 'paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.'" *Neil*, 275 F.R.D. at 267–68 (collecting cases); *In re Household Int'l, Inc. ERISA Litig.*, 2004 WL 7329911, at *2 (N.D. Ill. Nov. 22, 2004).[13] This case is no exception.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Parties' Class Action Settlement Agreement; (2) approve the proposed Settlement

[13] 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).

Notice and authorize distribution of the Notice to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

Dated this 10th day of January, 2022

WALCHESKE & LUZI, LLC

s/ Paul M. Secunda
James A. Walcheske*
Scott S. Luzi*
Paul M. Secunda**
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: January 10, 2022

s/Paul M. Secunda
Paul M. Secunda