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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SALVADORA ORTIZ and THOMAS SCOTT,

Plaintiffs,

vs.

AMERICAN AIRLINES, INC., THE AMERICAN AIRLINES PENSION ASSET ADMINISTRATION COMMITTEE and AMERICAN AIRLINES FEDERAL CREDIT UNION,

Defendants.

§

CIVIL ACTION NO. 4:16-cv-00151-A

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR (I) CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASSES; (II) APPOINTMENT OF LEAD AND CLASS COUNSEL; (III) PRELIMINARY APPROVAL OF SETTLEMENT; AND (IV) APPROVAL OF FORM AND MANNER OF NOTICE

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MEMORANDUM OF LAW

I. Introduction

Plaintiffs Salvadora Ortiz and Thomas Scott ("Plaintiffs") respectfully submit this memorandum in support of their unopposed motion for an order: (1) conditionally certifying the Settlement Classes;[1] (2) appointing Lead and Class Counsel; (3) preliminarily approving the Settlement; and (4) approving the form and manner of notice to Class Members of the Settlement.

Plaintiffs and Defendants seek to compromise and settle all issues and claims alleged in the Complaint filed as Docket No. 1 (the "Complaint"). To that end, Plaintiffs and Defendants have agreed to settle all claims in the Complaint. Class Counsel have determined that the Settlement will provide fair and adequate relief to the proposed Settlement Classes for the claims alleged in the Complaint (which are brought under the Employee Retirement Income Security Act ("ERISA")) during the period February 10, 2010 to the date of the Preliminary Approval Order ("Relevant Period").

In short, Plaintiffs are participants and beneficiaries of the American Airlines 401(k) Plan, formerly known as the $uper $aver, a 401(k) Capital Accumulation Plan for Employees of Participating AMR Corporation Subsidiaries (along with any and all constituent, predecessor and successor plans, including the American Airlines, Inc. 401(k) Plan for Pilots, the Envoy Air, Inc. 401(k) Plan, the Envoy Air, Inc. Puerto Rico Savings Plan and the Employee Savings Plan, "the Plan"). Plaintiffs allege that the Plan suffered losses from ERISA-violating conduct by the Defendants. Defendants dispute these allegations. In the Settlement Agreement, Defendants agree to make certain structural changes to the Plan which are necessarily applicable to all current Plan participants and therefore a non-opt-out Structural Relief Class, appropriately certified under Rule

[1] Capitalized terms herein have the definitions set forth in the Settlement Agreement and Release, which is submitted herewith as Exhibit 1 to Plaintiff's Appendix (APP3-58).

23(b)(2), is proposed. Defendants have also agreed to make a monetary payment to members of a Monetary Relief Class to be certified under a Rule 23(b)(1) non-opt-out class. Plaintiffs' claims are brought under Section 502(a)(2) and 502(a)(3) in their representative capacity on behalf of the Plan, and individual claims do not exist independently of the Plan's claims on behalf of all participants. As part of the Settlement, the Plan, based on the evaluation and recommendation of an independent fiduciary, will release its claims against the Defendants, which will effectively release the claims for all participants in the Plan. Accordingly, an opt-out procedure would not preserve the claims of participants wishing to opt out.

The Settlement is fair and meets the requirements for preliminary approval. In the process of negotiating and agreeing to the terms set forth in the Settlement Agreement, Class Counsel concluded that the Settlement Agreement is fair, reasonable, provides benefits to the Settlement Classes that justify the corresponding release of claims, and is in the best interests of the Settlement Classes. In reaching this conclusion, Class Counsel considered: (1) the substantial benefits, including monetary and non-monetary relief, afforded to the Settlement Classes by the Settlement; (2) the risks and uncertainties attendant to complex litigation such as the instant case; (3) the expense and length of time necessary to prosecute claims through trial and any subsequent appeals; and (4) the desirability of consummating the Settlement Agreement promptly to provide effective relief to the members of the Settlement Classes. Plaintiffs and Class Counsel believe that the terms set forth in the Settlement Agreement are fair, reasonable, adequate and in the best interests of the Settlement Classes. Thus, Plaintiffs petition the Court for an Order:

(1) conditionally certifying the Monetary Relief Class Structural Relief Class as non-opt out classes;

(2) appointing Lead and Class Counsel;

(3) preliminarily approving the Settlement; and

(4) directing notice to the Class Members and approving the plan and form of notice.

In support of this Motion, Plaintiffs submit the following documents:

- Settlement Agreement executed by the parties, attached hereto as Exhibit 1, including as exhibits a proposed Preliminary Approval Order, proposed Notice, and proposed Judgment (APP3-58);
- Declaration of John Nestico ("Nestico Decl."), one of Plaintiffs' Counsel (APP59-87).

II. SUMMARY OF CLAIMS AND DEFENSES

A. Claims

Plaintiffs, individually and on behalf of all similarly situated individuals, brought claims in their capacities as participants in the Plan against Defendants. The Complaint alleges that Defendants violated ERISA §§ 404 and 406, 29 U.S.C. §§ 1104, 1106, as further described below.

The lawsuit asserts that Defendants violated ERISA by imprudently failing to include a stable value fund either in place of or in addition to the American Airlines Credit Union Demand Deposit Option (the "Credit Union Option") among the designated Investment alternatives offered by the Plan, which would have provided substantially greater investment returns while still preserving principal and providing liquidity. The Complaint further alleges that the selection of the Credit Union Option was influenced by the relationship between American Airlines and the Credit Union and, therefore, the Credit Union Option was not selected solely in the best interest of Plan participants, in violation of American Airlines' and the Committee's fiduciary duties and responsibilities under ERISA to the Plan and participants. Finally, the Complaint alleges that the Credit Union, as a fiduciary holding Plan assets, used Plan assets for its own benefit and for its own account, which constitutes a prohibited transaction and a violation of the Defendants' responsibilities under ERISA to the Plan and its participants. ERISA requires that plan fiduciaries act solely in the interest of plan participants when making decisions with respect to selecting,

removing, replacing, and monitoring a plan's investments. Plaintiffs here allege that Defendants are plan fiduciaries and failed to fulfill these basic fiduciary duties by offering investment options that benefitted American Airlines Credit Union.

Based upon these allegations, Plaintiffs brought claims against Defendants for breaches of duties of loyalty in violation of § 404(a)(1)(A) of ERISA and for engaging in prohibited transactions in violation of § 406 of ERISA. The Complaint seeks, *inter alia*, declarations that Defendants breached fiduciary obligations and violated ERISA § 406; disgorgement of fees paid or incurred by the Plan; and restoration by Defendants to the Plan of all losses resulting from Defendants' ERISA violations.

B. Defenses

Defendants deny the allegations in Plaintiffs' Complaint and assert that their conduct was entirely proper. Defendants assert, and would continue to assert should the litigation continue, a number of defenses to Plaintiffs' claims. For example, Defendants contend that the selection of the Credit Union Option was entirely appropriate, that it met the requirements of ERISA by providing a reasonable rate of return, substantial liquidity and a greater level of security and less risk than a stable value fund due in part to the deposit insurance provided by the federal government through the National Credit Union Administration. Defendants assert that Plaintiffs' claims do nothing more than second-guess the reasonable investing judgment of American Airlines and the Committee based purely on hindsight, which is not actionable under ERISA. Defendants further assert that there is a statutory exemption from the prohibited transaction rules that expressly permits the investment of all or a portion of the Plan's assets in bank deposits, including the Credit Union Demand Deposit Option. The Credit Union further denies that it ever used Plan assets for its own benefit.

III. LITIGATION HISTORY AND SETTLEMENT NEGOTIATIONS

Before filing the Complaint, Class Counsel undertook extensive investigation to support the allegations and claims in the Complaint. Nestico Decl. ¶¶4 – 6 (APP61-63). Among other things, Class Counsel, working with industry experts and ERISA consultants, examined and evaluated Department of Labor filings from the Plan and peers; Department of Labor filings from parties in interest to the Plan; the investment structure of the Plan in comparison with other types of retirement plans; plan studies and surveys addressing various types of fixed-income investment alternatives available to plan sponsors, including historic risk and return characteristics of those alternatives; industry surveys and studies addressing the performance of stable value funds over time, including periods of high market volatility; professional publications discussing various types of stable value products such as insurance company guaranteed investment contracts, insurance company pooled separate accounts, and separately managed synthetic guaranteed investment contracts; as well as the prevalence of stable value funds in ERISA qualified retirement plans; rules of the Financial Accounting Standards Board governing the requirements of and accounting for stable value funds; and other research regarding the use of demand deposits for long-term investing in qualified retirement plans. *Id.* at ¶4 (APP61). Class Counsel, working with consultants, constructed estimated damages models for the Plan extrapolating from the publicly available, but necessarily non-plenary information. *Id.* at ¶5 (APP63). Later, Class Counsel, working with experts and consultants, incorporated information shared by Defendants in mediation into these models. *Id.* at ¶6 (APP63). This work by Class Counsel is evident in the Complaint.

After the initial Complaint was filed, the Parties agreed to conduct confidential discussions about the Complaint's allegations and theories. *Id.* at ¶7 (APP63). A private mediation was arranged with the Honorable Faith Hochberg of Hochberg ADR. *Id.* at ¶7 (APP63). Judge Hochberg has extensive experience in mediating complex class actions, including class actions

involving claims of ERISA violations. The parties exchanged mediation briefs and other supporting documents in advance of the June 6, 2016 mediation. Nestico Decl. ¶7 (APP63). At the day-long mediation, the parties were able to reach tentative agreement on some, but not all, key terms. *Id.* at ¶7 (APP63).

Subsequent to the mediation, on or about June 7, 2016, Judge Hochberg made a mediator's proposal to the parties, *i.e.*, a proposal offered on a take-it-or-leave-it basis. *Id.* at ¶7 (APP63). The parties accepted Judge Hochberg's proposed terms on June 14, 2016. *Id.* at ¶7 (APP63).

Thereafter, the parties prepared and executed the Settlement Agreement, memorializing the terms of the Settlement for which Plaintiffs now seek preliminary approval. *See* Settlement Agreement, attached as Exhibit 1 (APP3-59). The terms of the Settlement Agreement were the result of extensive, arm's-length, and protracted negotiations, before, during, and after the mediation. *Id.* at ¶10 (APP65).

IV. TERMS OF THE SETTLEMENT AGREEMENT

The material terms of the Settlement Agreement are summarized below.

A. Benefits to the Structural Relief and Monetary Relief Classes.

Defendants have agreed to make a monetary payment of $8.8 million USD ("Monetary Relief"). *See* Settlement Agreement, Section 4.1. In addition to the monetary payment, the relief provided in the Settlement includes substantial affirmative relief. Defendants will implement the following changes to the Plan (the "Structural Relief"), unless otherwise noted: the Plan shall retain the services of an unaffiliated investment consultant to assist the American Airlines Pension Asset Administration Committee (the "Committee") or its successor in selection of an appropriate "stable value fund" which, for this purpose, shall be defined as a designated investment alternative in the Plan that will provide capital preservation, liquidity, and steady, positive returns that are expected to exceed the returns of money market investments over time. The ultimate selection of

the fund will be within the discretionary authority of the Committee, but shall be derived from the competitive selection process employed by, and based on the recommendations of, the investment consultant. The fund may be in the form of any of the stable value products available in the marketplace, which may include the stable value product added to the Plan at the end of 2015, provided the above conditions are met. *See* Settlement Agreement, Section 3.2, *et seq.* (APP16)

The Structural Relief that Defendants will make as part of the Settlement have significant value to the Plan's participants. Class Counsel estimates that the future monetary value to participants of the affirmative relief provided for in the Settlement is between $30,000,000 to $48,000,000 for the three-year following the implementation of the Structural Relief, based on certain assumptions. Nestico Decl. ¶8 (APP64).

In addition, Defendants may select an independent fiduciary to provide such authorization as may be required by Prohibited Transaction Exemption 2003-39. Settlement Agreement, Section 2.9 (APP14). All costs reasonably borne by the independent fiduciary, including the reasonable fees of the independent fiduciary, shall be borne by the Settlement Fund up to $25,000. Fees and expenses of the independent fiduciary in excess of $25,000 will be borne by the Company. *Id.*

After payment of any incentive awards to Plaintiffs and attorneys' fees and expenses approved by the Court; independent fiduciary fees; settlement administration costs; and taxes and tax-related costs, the remaining settlement amount ("Distributable Settlement Amount"), Settlement Agreement Section 4.2, shall be allocated among the Monetary Relief Class Members on a pro rata basis predicated upon their Average Plan Account Balances subject to the Plan of Allocation described in Exhibit C to the Settlement Agreement. As set forth in Settlement Exhibit C (APP56-58):

(1) Subject to the minimum allocation threshold described in (3) below, Monetary Relief Class Members who no longer have a positive balance in their Plan account as of the Distribution Date will receive a check from the Settlement Administrator.

(2) All other Monetary Relief Class Members, *i.e.*, Monetary Relief Class Members who have a Plan account with a positive balance as of the Distribution Date, will receive settlement proceeds into their Plan account in the amount provided for by the Plan of Allocation. To the extent feasible and ascertainable, those settlement proceeds will be invested based on the participant's election mix for new contributions or, if no such election is in effect, to the applicable qualified default investment option.

(3) No Former Participant (defined as Monetary Relief Class Member that maintained a balance in the Plan after February 9, 2010, but who is not carrying a balance in the Plan on the Distribution Date) whose allocation will be smaller than $10, shall receive any distribution.

B. Case Contribution Award to Plaintiffs and Attorneys' Fees and Costs

Subject to Court approval, Class Counsel's fees and expenses, and a case contribution award payment to Plaintiffs shall be paid from the Settlement Fund prior to distribution of funds to the Monetary Relief Class. Settlement Agreement, Section 4.2 (APP19-20). The Plaintiffs shall petition the Court for an award not to exceed $5,000 in recognition of their service as class representatives. Settlement Agreement, ¶ 8.1 (APP25). Plaintiffs shall also be entitled to further distribution under this settlement as Monetary Relief Class Members. Class Counsel will petition the Court for an award of attorneys' fees which petition in any event not seek attorneys' fees exceeding one-third of the Settlement Fund, plus expenses. Settlement Agreement, *Id.* at 8.2 (APP25). Defendants agree that they will not object to the requests of Plaintiffs for a contribution award or to the request of Class Counsel for attorneys' fees and expenses. *Id.* All requests obviously are subject to Court approval.

C. Release of Claims

Plaintiffs and the Settlement Classes will provide a release to Defendants and the other Released Parties pursuant to Sections 1.3 and 6.1 of the Settlement Agreement, and covenants not

to sue relating to any claims arising out of or relating in any way to the subject matter of the Action. *Id.* at 6.2 (APP20). The release will include direct and derivative claims, claims on behalf of any class, claims under ERISA, common law and any other statute, in each with respect to the claims covered by the Complaint, and shall extend to all Defendants, including each of their present, past, and future predecessors, successors, parents, subsidiaries, affiliates, divisions, assigns, officers, directors, committees, employees, fiduciaries, administrators, actuaries, agents, insurers, representatives, attorneys, retained experts and trustees. *Id.* (APP20).

Plaintiff and the Settlement Classes further covenant not to sue Defendants with respect to the structural change Defendants have agreed to make to the. *Id.* at 6.2 (APP20).

D. Notice and Proposed Schedule of Events

The Settlement Agreement provides that the Company or its agent shall provide the Settlement Administrator with the names and last known addresses and if applicable, e-mail addresses, of Monetary Relief Class Members for the purpose of providing notice of the proposed settlement. Settlement Agreement Section 6.4 (APP23-24).

The proposed Class Notice, Exhibit B to the Settlement Agreement, provides all the information necessary to inform Monetary Relief Class Members about the nature of this lawsuit, the terms of the Settlement, including both monetary and prospective relief, and the procedures for entering an appearance to be heard or to object to the Settlement. In addition, Class Counsel will make available to Monetary Relief Class Members and to Structural Relief Class Members key court documents, including the operative Complaint, this Motion and all related documents, including the Settlement Agreement and Class Notice, via the website www._____.com. The Monetary Relief Class Notice will also be mailed by U.S. mail, first class. Class Counsel anticipate that Monetary Relief Class Member mailing information supplied by Defendants will be accurate for two reasons. First, many Monetary Relief Class Members are current employees

of American Airlines (or one of its subsidiaries) for which American Airlines almost certainly has valid mailing addresses, and former American Airlines employees who continue to have a balance in the Plan and for whom the Plan's recordkeeper maintains current contact information. For undelivered or returned mail to Monetary Relief Class Members, the Settlement Administrator will engage in typical, standardized search processes to identify and locate Monetary Relief Class Members. Structural Relief Class Members will also receive advance written notice of any change in the Plan's investment lineup resulting from the competitive process required as part of the Structural Relief, in a manner consistent with Department of Labor regulations.

Plaintiffs and Defendants agree to the following schedule of events subject to the Court's approval:

Event	Timing
Preliminary Approval Hearing	TBD
Defendants to provide Settlement Administrator with class list and Class contact information	Twenty days after Preliminary Approval Order
Mail Settlement Notice	Thirty days after Preliminary Approval Order
Settlement Administrator's declaration on Notice	Thirty-five days after Preliminary Approval Order
Plaintiffs' motions for final approval of the Settlement, and for an award of attorneys' fees and expenses, and Plaintiffs' contribution awards	Thirty days before Fairness Hearing
Objections to the Settlement and notice of intention to appear at Fairness Hearing	Fifteen days before Fairness Hearing
Independent Fiduciary report (if hired)	Fifteen days before Fairness Hearing

Response to Objections	Seven days before Fairness Hearing
Fairness Hearing	TBD (not less than 75 days after Preliminary Approval Order and not less than 100 days after filing of Motion for Preliminary Approval)

V. JUSTIFICATION FOR SETTLEMENT

A. The Court should certify the Settlement Classes because the requirements of Rules 23(a), 23(b)(1), 23(b)(2), and 23(g) of the Federal Rules of Civil Procedure are satisfied.

In connection with preliminary approval of the settlement, Plaintiffs seek class certification for settlement purposes. As part of the settlement, Plaintiffs propose solely for purposes of agreeing to settle the claims and without waiving any defenses to class certification should the settlement not be approved, and Defendants do not object to, certification of the Monetary Relief Class defined as follows:

> The "Monetary Relief Class" will consist of all current and former participants in the Plan who maintained a balance of any amount in the Plan at any point during the period from February 10, 2010 to the date of the Preliminary Approval Order, and who invested directly or indirectly in any of the following capital preservation options at any time from February 10, 2010 to the date of entry of the Preliminary Approval Order:
>
> (i) The American Airlines Federal Credit Union Option;
> (ii) The Fidelity Institutional Money Market – Money Market Portfolio; or
> (iii) The Fidelity Managed Income Portfolio II (collectively the "Fixed Income Options").
>
> ;

and certification of the Structural Relief Class as follows:

> The "Structural Relief Class" will consist of all participants in the Plan on or after the date of entry of the Preliminary Approval Order.

Certification of a class action is governed by Fed. R. Civ. P. 23. Rule 23(a) provides that a class action may be maintained if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a), Fed. R. Civ. P. Moreover, a class action must satisfy at least one of the requirements set forth in Rule 23(b)(1), (2) or (3). Here, Plaintiffs seek certification of the Monetary Relief Class under Rule 23(b)(1) and certification of the Structural Relief Class under Rule 23(b)(2).

1. The Settlement Classes Satisfy the Requirements of Rule 23(a).

a) Members Of The Settlement Classes Are So Numerous That Joinder is Impracticable.

Members of the Settlement Classes satisfy the numerosity requirement because they are composed of thousands of persons, in numerous locations. According to the Plans' annual financial statements, as of the most recent Form 5500 and Financial Statement for the Plan (for Plan Year 2014), the Plan had over 94,000 participants with account balances. The number of Settlement Class Members is so large that joinder of all its members is impracticable and thus, the numerosity element easily satisfied. *See Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981). Moreover, courts have held that a lesser showing of numerosity may be required when the defendants' alleged conduct uniformly affects the entire class. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983) (adding that, in close situations, the balance should be struck in favor of finding the numerosity requirement satisfied). Here, Defendants' alleged conduct affects the entire class on a uniform basis.

b) Common Questions of Law and Fact Here Exist.

Rule 23(a) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a). "The test for commonality is not demanding," *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) (quotations and citations omitted), and Rule 23(b)(3)'s more stringent

predominance requirement subsumes the question of commonality, *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 627 (D. Kan. 1996). Consequently, "there is no reason to separately analyze commonality," and the following analysis establishes that the Settlement Class satisfies both criteria. *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 385 (D. Kan. 1998). "Predominance [and thus commonality] is a test readily met in certain cases." *Amchem*, 521 U.S. at 625 (citing Fed. R. Civ. P. 23 advisory committee notes). That is precisely the case here.

Here, there are numerous questions of law or fact common to both classes and central to the case including, but not limited to:

a. Whether Defendants were fiduciaries to the Plan;

b. Whether Defendants were responsible for monitoring and making decisions with respect to the investments in the Plan;

c. Whether Defendants breached their fiduciary duties to the Plan by imprudently selecting a low-risk, income-producing fixed-income investment alternative for the Plan that produced an unacceptably low rate of return compared to other available alternatives with comparable risk profiles and liquidity profiles;

d. Whether the investment decisions made by Defendants were solely in the interests of the Plan's participants and beneficiaries;

e. Whether Plan assets may be invested with American Airlines Federal Credit Union;

f. Whether the Plan suffered losses as a result of Defendants' fiduciary breaches.

Each of these questions is not only common to the Settlement Classes, but will generate common answers apt to drive the resolution of the litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). As such, Plaintiffs' allegations clearly meet the Rule 23(a)(2) standard for commonality.

c) Plaintiff's Claims are Typical of the Claims of the Settlement Classes.

The typicality requirement of Rule 23(a)(3) is satisfied when other members of the class have the same or similar grievances as the plaintiff. The burden is fairly easily met so long as

other class members have claims similar to the named plaintiff. *City of Dallas*, 254 F.3d at 571. Where "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented," typicality is satisfied "irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). "The typicality requirement is often met in putative class actions brought for beaches of fiduciary duty under ERISA." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 143 (S.D.N.Y. 2010).

Here, all members of the Settlement Classes invested or will invest retirement assets in the Plan. Thus, Defendants' alleged misconduct harmed all Class Members in the same way, in that the Complaint alleges that class members lost millions of dollars in the form of lower returns on their investments than they would have otherwise experienced. Thus, Plaintiffs' claims arise from the same course of conduct that gave rise to the claims of other Class Members.

d) Plaintiffs Will Fairly and Adequately Represent the Settlement Classes.

"The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997) (citing *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n.13 (1982)). The requirement encompasses two separate inquiries: "(1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003) (internal citations omitted). Moreover, "[o]nly conflicts that are fundamental to the suit and

that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012).

Plaintiffs, who suffered losses as participants in the Plan, have no interests that are adverse to the interests of any of the members of the Settlement Classes. Current Plan participants share a common goal: participating in a well-run retirement plan that provides an array of prudent investment options at a reasonable cost. The prospective relief here has significant value to current and future participants. Current and former participants will also benefit from the substantial monetary relief provided for by the Settlement. In sum, Plaintiffs stand in the same shoes as the other members of the Settlement Classes with the same incentives to pursue and consummate a fair and reasonable settlement.

2. The Monetary Relief Class Satisfies the Requirements of Rule 23(b)(1).

Rule 23(b)(1) provides that a class may be certified if the Rule 23(a) prerequisites are met and "prosecuting 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). "[T]he Advisory Committee Notes to the 1966 Amendment of Rule 23(b)(1)(B) specifically state that certification is especially appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142 (S.D.N.Y. 2010).

Courts routinely certify class actions alleging breach of ERISA fiduciary duties pursuant to Rule 23(b)(1). *See, e.g., Krueger v. Ameriprise Financial, Inc.*, 304 F.R.D. 559, 575-578 (D.

Minn. 2014); *Pashchal v. Child Development, Inc.*, No. 4:12-CV-0184, 2014 WL 112214, at *6 (E.D. Ark. Jan. 10, 2014); *In re Beacon Assocs. Litig.* 282 F.R.D. 315, 341-42 (S.D.N.Y. 2012); *Jones v. NovaStar Financial, Inc.*, 257 F.R.D. 181, 192-194 (W.D. Mo. 2009); *In re Marsh ERISA Litig.*, 265 F.R.D. at 142-44; *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 74-77 (S.D.N.Y. 2006); *Banyai v. Mazur*, 205 F.R.D. 160, 165 (S.D.N.Y. 2002) (same). *See generally In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585 (3d Cir. 2009) ("breach of fiduciary 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").

As an ERISA breach of fiduciary duty action, this lawsuit is a typical 23(b)(1) class action. Prosecution of separate actions by individual members would create the risk of (a) inconsistent or varying adjudications with respect to individual members of the Monetary Relief Class that would establish incompatible standards of conduct for the Plan, and (b) because Plaintiffs' claims are brought under Section 502(a)(2) and 502(a)(3) in their representative capacity on behalf of the Plan, and individual claims do not exist independently of the Plan's claims on behalf of all participants, adjudications with respect to individual class members, 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. . It would be wholly impractical, if not potentially unlawful, for American Airlines to provide different remedies for different employees depending on the outcome of individual actions.

Thus, a class-wide settlement is the superior method for the fair and efficient resolution of this controversy. Joinder of all members of the Monetary Relief Class is impracticable. The losses suffered by some of the individual members of the Monetary Relief Class may be small, and it would therefore be impracticable for individual members to bear the expense and burden of

individual litigation to enforce their rights. Moreover, Defendants, as alleged fiduciaries of the Plan, were obligated to treat all Monetary Relief Class Members similarly as the Plan's participants pursuant to written plan documents and ERISA, which impose uniform standards of conduct on fiduciaries. Individual proceedings, therefore, would pose the risk of inconsistent adjudications. Given the nature of these allegations, no Monetary Relief Class Member has an interest in individually controlling the prosecution of the case at bar, and Plaintiffs are not aware of any difficulties likely to be encountered in the management of this case as a class action.

3. The Structural Relief Class Satisfies the Requirements of Rule 23(b)(2).

The Court should certify the Structural Relief Class under Rule 23(b)(2) because Defendants have acted or refused to act on grounds that apply generally to the class, so that the Structural Relief proposed is appropriate respecting the class as a whole. Again here, Defendants, as alleged fiduciaries of the Plan, are obligated to treat all Structural Relief Class Members similarly as the Plan's participants pursuant to written plan documents and ERISA, which imposes uniform standards of conduct on fiduciaries. The final injunctive relief represented by the Structural Relief in the Settlement Agreement is appropriate for, and indeed can only be applied to, the class as a whole.

4. The Court Should Appoint Lead and Class Counsel.

Fed. R. Civ. P. 23(g) requires a court to appoint lead counsel. In appointing lead counsel, the Court "must" consider:

(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

Fed. R. Civ. P. 23(g)(1)(A). The Court "may" also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

All these factors support appointment of Schneider Wallace Cottrell Konecky Wotkyns, LLP and Friedman Suder & Cooke, PC as Lead and Class Counsel for the Settlement Classes. Class Counsel worked closely with industry experts and ERISA consultants to investigate the claims, performed numerous analyses of complex financial and investment data, and reviewed thousands of pages of Plan documents, financial statements, prospectuses, studies, surveys, and other information and data to prepare the Complaint. Nestico Decl. ¶4 (APP61-62). As the detailed and substantive allegations in the Complaint reflect, the Complaint is the product of hundreds of hours of extensive and careful research and analysis. *Id.* ¶¶ 4 – 6 (APP61-63).

Class Counsel has substantial experience with ERISA litigation, including class action litigation. Schneider Wallace has represented plaintiffs in ERISA class actions, including as co-lead counsel: *Dennard v. Transamerica Corporation*, No. 1:15-cv-00030-EJM (N.D. Ia; $3.8 million cash and approximately $8 million in prospective fee reductions in 2015); *Bilewicz v. FMR LLC*, No. 13-10636 (D. Mass.; $12 million cash and structural changes in 2014); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State Street Bank & Trust Co.*, Civ. Action No. 10-10588 (D. Mass.; $10 million cash settlement in 2014); *Diebold v. Northern Trust Investments*, Civil Action No. 09-7203 (N.D. Ill; $36 million cash settlement in 2015).

Schneider Wallace has settled three recent ERISA class action for a combined total of $70 million.[2] For the past several years, Schneider Wallace has committed time, energy and resources to investigating misconduct by broker-dealers, investment advisers and retirement plan fiduciaries and retained an expert consulting firm to help identify fiduciaries who are selecting imprudent investments for and/or charging excessive fees to the retirement plans they service. Schneider Wallace has been particularly active in this area, serving as lead class counsel in *Rozo v. Principal Life Insurance Co.*, No. 4:14-cv-00463 (S.D. Iowa), for example; a class action filed recently by Schneider Wallace alleging that Principal Life breached its fiduciary duties to the retirement plans that invested in guaranteed investment contracts ("GICs") that paid Principal excessively high fees and allowed Principal to retain unreasonable and excessive profits.[3] *See also Teets v. Great-West Life & Annuity Ins. Co.*, a putative class action recently filed by Schneider Wallace and Bernstein Law and their co-counsel alleging that Great-West breached its fiduciary duties to the retirement plans that invested in its GICs by using its discretionary authority under the contracts to pay itself excessively high fees and to retain unreasonable and excessive profits.[4]

A fuller description of Schneider Wallace's experience litigating complex class actions are attached as Exhibits A and B, respectively, to the Nestico Declaration (APP67-82). The remaining Plaintiffs' counsel also are extremely well-qualified and highly experienced in ERISA and

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[2] *See Glass Dimensions, Inc. v. State Street Corp.,* No. 1:10-cv-10588 (D. Mass.) ("*Glass Dimensions*") (ERISA class action alleging defendants collected excessive securities lending fees from plan participants settled for $10 million); and *Diebold v. Northern Trust Investments*, No. 1:09-cv-01934 (N.D. Ill.) ("*Diebold*") (settled for $36 million) and *Louisiana Firefighters' Retirement System et al. v. Northern Trust Investments, N.A.,* C.A. No. 09-7203A (N.D. Ill.) ("*Firefighters*") (settled for $24 million) (the *Diebold* and *Firefighters* actions asserted that Northern Trust breached its ERISA fiduciary duties to a class of retirement plans by charging retirement plan participants excessive fees and by imprudently investing cash collateral received through its securities lending program).

[3] *Rozo v. Principal Life Insurance Co.*, No. 4:14-cv-00463 (S.D. Iowa).

[4] *Teets v. Great-West Life & Annuity Ins. Co.*, No. 14-cv-002330 (D. Colo.).

complex litigation. All of Plaintiffs' counsel made valuable and substantial contributions to the successful result obtained for the Settlement Classes.

A. The Court Should Grant Preliminary Approval of the Settlement Because the Settlement is Fair, Adequate and Within the Range of Settlements Typically Approved In This Circuit.

1. The Standards for Preliminary Approval.

Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled or compromised without approval by the Court. Judicial approval is required regardless of whether the action is certified for trial and later settled or is certified for purposes of settlement. Manual for Complex Litigation (Fourth) § 21.61 (2004). Ultimately, to approve the proposed settlement the Court must determine that it is fair, reasonable and adequate. *In re Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013).

Judicial policy favors settlements, particularly in class actions where litigation is lengthy and the results are unpredictable. *See, e.g., Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (noting settlements are favored because litigation is "notoriously difficult and unpredictable."); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). Approval of a proposed settlement is within the sound discretion of the district court, and the "cardinal rule is that the district court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *Cotton*, 559 F.2d at 1330.

Determining the fairness of a settlement is a two-stage inquiry: (1) preliminary approval and (2) final approval after notice has been provided to the class and a fairness hearing has been held. *See McNamara*, 214 F.R.D. at 426. At the final stage, the Court must consider the following six factors (the "*Reed* factors") before approving a settlement: (1) the assurance that there is no

fraud or collusion behind the settlement; (2) the stage of proceedings and the amount of discovery completed; (3) the probability of success on the merits; (4) the range of possible recovery; (5) the complexity, expense and likely duration of the litigation; and (6) the opinions of class counsel, class representatives and absent class members. *Reed*, 703 F.2d at 172; *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982).

At this juncture, Plaintiffs request that the Court take the first step in the settlement approval process and grant preliminary approval of the proposed settlement. At the preliminary stage the inquiry is narrow, and the Court need not perform an in-depth evaluation of the *Reed* factors. *See, e.g., McNamara*, 214 F.R.D. at 430-31 (preliminarily approving settlement without evaluating the *Reed* factors); *In re OCA, Inc. Sec. & Derivative Litig.*, No. CIV A 05-2165, 2008 WL 4681369, at *11-14 (E.D. La. Oct. 17, 2008). "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Id.*; see also Manual for Complex Litigation (Third) at §30.41.

Given the complexities of this lawsuit, the Settlement represents a favorable resolution and eliminates the risk that the Settlement Classes might recover less or nothing. As long as there are no "obvious deficiencies" in the fairness of the settlement or other reasons to doubt that a settlement will meet the Fifth Circuit's criteria for final approval, then preliminary approval is appropriate. *See McNamara*, 214 F.R.D. at 430. So it is here.

Because class members will subsequently receive notice and have an opportunity to be heard on the settlement, the Court need not review the settlement in detail at this juncture; instead,

preliminary approval is appropriate so long as the proposed settlement falls within the range of possible judicial approval. *See McNamara*, 214 F.R.D. at 430.

2. The Proposed Settlement Is Fair and Within the Range of Settlements Typically Approved In This Circuit.

a. The Settlement Is the Result of Serious, Arm's-Length and Informed Negotiations.

An indication of whether a settlement is fair and reasonable is whether it is the product of serious, arm's-length negotiations coupled with extensive analysis and investigation. Extensive negotiations and investigations minimize concerns that the Settlement Agreement might be the result of collusion among opposing parties or their counsel to undermine the interests of the class for their own benefit.

The Settlement here was achieved through extensive, arm's-length negotiations under the guidance of Judge Faith Hochberg. Judge Hochberg has extensive experience mediating complex class actions.[5] In addition to the in-person mediation session, Judge Hochberg communicated with the parties by phone and email to achieve Settlement. With her assistance, the parties ultimately reached agreement and executed a memorandum of understanding summarizing the key terms on June 14, 2016.

The Complaint in the Action was the product of hundreds of hours of extensive and careful research and analysis. Plaintiffs' Counsel worked closely with consultants to investigate the claims, with numerous analyses of complex financial and investment data, in addition to reviewing Plan documents, financial statements, prospectuses, studies, surveys, and other information and data to prepare the Complaint. Prior to mediating with Judge Hochberg, the parties exchanged confidential information so that the parties could more accurately value the claims. The parties

[5] Judge Hochberg's experience and qualifications are detailed at http://www.judgehochberg.com/ (Last viewed June 30, 2016).

prepared detailed, substantive mediation briefs before mediation. The parties' respective positions and arguments were also subjected to vigorous questioning and analysis by the mediator. Importantly, since the parties agreed in principle to a settlement structure, Class Counsel have been undertaking discovery to confirm the accuracy and truthfulness of the facts Plaintiffs' relied upon in connection with the Settlement, which, upon completion, will have entailed the review of years of records of the Plan's relevant fiduciary committees and interviews of key individuals. In sum, Plaintiffs' and Class Counsel's intense and detailed pre-complaint investigation, the pre-mediation meetings, the mediation briefing, the sharing of information during mediation, the involvement of Judge Hochberg, and subsequent confirmatory discovery indicate that the Settlement is a product of arms-length negotiations and robust investigation. *Cf. In re Puerto Rican Cabotage Antitrust Litig.*, 815 F.Supp.2d 448, 473-74 (D.P.R. 2011) (although formal discovery had not commenced, class counsel's substantial investigation and informal discovery permitted court to conclude the parties had sufficient information to make an informed decision about the settlement); *Rossi v. Procter & Gamble Co.*, No. 11-7238, 2013 WL 5523098, at *7 (D.N.J. Oct. 3, 2013) (although case was early in discovery, class counsel's substantial pre-suit investigation contributed to finding that parties had conducted sufficiently thorough investigation of the facts supporting settlement).

Finally, as detailed in Exhibits A and B to the Nestico Declaration, Plaintiff's Counsel are experienced in complex class actions, including ERISA class actions involving 401(k) plans.

b. The Relief Obtained by the Settlement Agreement and the Allocation of Monetary Compensation to the Monetary Relief Class is Fair and Reasonable.

Significantly, the Settlement Agreement offers cash compensation in the aggregate amount of $8.8 million USD, with the net amount (after payment of such attorneys' fees and costs, including notice and related costs, and Plaintiffs' Case Contribution Awards as may be allowed by the Court) guaranteed to be paid to the Monetary Relief Class Members. There will be no claims

process and therefore no reversion of any part of the Settlement Funds to Defendants based upon the failure to make a claim.

Per the Settlement Agreement, each Monetary Relief Class Member will be paid in proportion to the average account balance he or she held in the Fixed Income Options of the Plan, except that no Former Participant (defined as Monetary Relief Class Member that maintained a balance in the Plan after February 9, 2010, but who is not carrying a balance in the Plan on the Distribution Date) whose allocation would be smaller than $10 shall receive any distribution.. Further, the Plan measures applicable to the Structural Relief Class that the Plan will make as part of this settlement have significant value to the Structural Relief Class, as detailed above.

It is well-settled that a proposed settlement is not to be measured against a hypothetical ideal result that might have been achieved. *See, e.g.*, *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("This court has aptly held that it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators."); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'").

A class settlement need not recover the maximum damages that would be provable after establishing liability at trial, and the recovery of a fraction of that amount is reasonable, particularly in a complex and risky case such as the one at bar. Indeed, even recoveries representing a very small percentage of the defendant's maximum exposure may be found to be fair, adequate and reasonable. *See, e.g.*, *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("A

settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery."); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Under the circumstances presented here, where the proposed Settlement Classes face numerous opportunities for defeat, including dismissal, denial of class certification, summary judgment, trial, and appeal, not to mention the years of delay should this Action proceed through an appeal, the Settlement Agreement for which the parties seek this Court's approval represents the best realistic recovery for all members of the Settlement Classes now, and it is well within the range of settlements approved in this Circuit.

These are considerations taken into account by Class Counsel in negotiating and evaluating the fairness of the Settlement and determining that entering into the Settlement is in the best interests of the Settlement Classes. As the case law establishes, the Court should not upend that determination at this stage so long as the proposed Settlement falls within a reasonable range of possible approval and was the product of arm's-length negotiations and vigorous investigation, as here. Although continuing the litigation could conceivably have resulted in a greater recovery for members of the Settlement Classes, the recovery offered through the Settlement is guaranteed, substantial and not dependent on a claims process or other limitation in getting the proceeds of the Settlement Fund to Monetary Relief Class Members and the benefits of the Structural Relief to the Structural Relief Class Members. The Settlement represents a reasonable compromise given the risks, delay and expense of pursuing the litigation on the merits, including a probable appeal of any judgment in favor of the Settlement Classes and of a Court order certifying the Settlement Classes. *See, e.g., Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) ("Settlements of

shareholder derivative actions are particularly favored because such litigation is notoriously difficult and unpredictable."); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). The immediacy of the recovery and the guarantee that all members of the Settlement Classes will recover argue for approval of the Settlement Agreement.

B. The Court Should Approve the Form and Manner of Class Notice and Direct that Notice be Provided to Class Members in Accordance with the Settlement Agreement

Pursuant to Federal Rule of Civil Procedure 23(e)(1) and (e)(5), the Settlement Agreement provides for Notice to the Monetary Relief Class, and an opportunity for Monetary Relief Class Members to object to approval of the Settlement. *See* Settlement Agreement, Exhibit 2 (APP48-55). The parties have agreed, subject to Court approval, to a notice plan which calls for individual mailed Notice that will provide Monetary Relief Class Members with sufficient information to make an informed decision about whether to object to the proposed Settlement. *Id.* The Notice informs Monetary Relief Class Members of the nature of the action, the litigation background and the terms of the agreement, including the definition of the Settlement Classes, the relief provided by the Settlement, the intent of Class Counsel to seek fees and costs, the Case Contribution Awards payable to Plaintiffs, and the scope of the release and binding nature of the Settlement on Settlement Class Members. In addition, the Notice informs the Monetary Relief Class Members that additional documents, including the Complaint, Settlement Agreement, this Motion (including exhibits), are available via the website www._____.com. The Notice also describes the procedure for objecting to the Settlement and states the date, time and place of the final approval hearing. *Id.* This Notice and the manner in which it will be disseminated to Monetary Relief Members satisfy Rule 23(e)(1) and constitutional due process concerns and should approved. The Notice will be continuously available to the Structural Relief Class on the

Settlement Website and on the Plan's website. Additionally, DOLregulations require that the Plan Administrator provide all Plan participants, which includes all members of the Structural Relief Class, at least thirty-days' advance notice of any changes to the Plan's investment lineup resulting from the Structural Relief.

Finally, the Court should approve Plaintiffs' Counsel's selection of a Settlement Administrator and appoint KCC Class Action Services, LLC as Settlement Administrator, charged with undertaking the responsibilities described in the Settlement Agreement. Such an order is necessary to establish a reasonable and efficient process for disseminating notice, providing the opportunity for Settlement Class Members to object to approval of the Settlement and for the Court to later consider final approval of the Settlement.

VI. CONCLUSION

As set forth above, the Settlement meets the standard for preliminary approval. Accordingly, Plaintiffs respectfully request that the Court issue an Order: (1) conditionally certifying the Settlement Classes; (2) appointing Lead and Class Counsel; (3) preliminarily approving the Settlement; and (4) approving form and manner of notice to Class Members of the Settlement.

Dated: July 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of July, 2016, I served a copy of the above and foregoing document, via first class mail, on the following:

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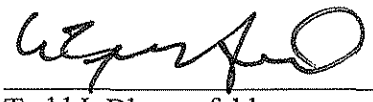

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