UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT ILLINOIS
EASTERN DIVISION

WINIFRED J. DAUGHERTY, et al. on behalf of themselves and a class,

Plaintiffs,

vs.

THE UNIVERSITY OF CHICAGO,

Defendant.

Civil Action No. 17-cv-03736

Hon. Ruben Castillo

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT AND RELATED MATTERS

I. INTRODUCTION

Plaintiffs Winifred Daugherty, Walter James, and Gloria Jackson ("Plaintiffs"), individually and on behalf of all others similarly situated, and the University of Chicago (the "University") have entered into a Class Action Settlement (the "Settlement") to resolve all claims asserted in this ERISA lawsuit in exchange for a $6.5 million cash payment. As is required by Prohibited Transaction Exemption 2003-39, 68 FR 75632 (Dec. 31, 2003), an independent fiduciary will review and determine whether to authorize the proposed Settlement on behalf of the University of Chicago Retirement Income Plan for Employees ("ERIP") and the University of Chicago Contributory Retirement Plan ("CRP", together, the "Plans").

Plaintiffs respectfully submit this Memorandum of Law in support of their unopposed motion for entry of an order that will (i) preliminarily approve the proposed $6.5 million Settlement[1] of the claims asserted in this Action; (ii) certify the two proposed Settlement Classes; (iii) approve the form and manner of giving notice of the proposed Settlement and related matters to members of the affected Settlement Classes; (iv) appoint Class Counsel; (v) appoint a Settlement Administrator; and (v) set a date for a hearing on final approval of the Settlement, the Plan of Allocation, and the motion for Plaintiffs' Case Contribution Awards and an award to Co-Lead Counsel of Attorneys' Fees and Expenses.

The proposed Settlement is fair, reasonable, adequate, and in the best interests of Class members. It provides a substantial and immediate benefit to them in the form of a multi-million dollar cash payment. It is the product of hard-fought litigation, which included substantial motion practice, the exchange and review of key documents, the retention of knowledgeable and qualified

[1] All capitalized terms used herein shall have the meaning ascribed to them in the Class Action Settlement Agreement and Release dated May 22, 2018 ("Settlement Agreement") entered between Plaintiffs and Defendant, the University of Chicago. The Settlement Agreement with all exhibits thereto is being filed as an exhibit to Plaintiff's accompanying motion for preliminary approval.

experts on both sides who performed critical damage analyses, and arm's-length negotiations between experienced ERISA class-action counsel directed by a seasoned and respected mediator who is a former federal magistrate judge in this Court. The benefit of the proposed Settlement must be considered in the context of the risk that further protracted litigation might lead to no recovery, or to a smaller recovery for Plaintiffs and proposed Class members. Defendant mounted a vigorous defense at all stages of the litigation, and Plaintiffs expect that it would have continued to do so during protracted discovery and trial and potentially through appeal.

In evaluating the terms of the Settlement Agreement, Class Counsel have concluded that the benefits provided to the Classes make the Settlement in the best interests of Class Members in light of, among other considerations: (1) the substantial monetary relief afforded to Class Members; (2) the risks and uncertainties of complex litigation such as this action; (3) the expense and length of time necessary to prosecute this action through trial and any subsequent appeals; and (4) the desirability of consummating the Settlement Agreement to provide prompt, effective relief to the Class Members. In light of these factors, and as discussed further below, Plaintiffs believe that the proposed fair and reasonable Settlement merits preliminary approval.

II. LITIGATION AND SETTLEMENT HISTORY

A. Description of the Action

On May 18, 2017, Plaintiffs[2] filed a class action complaint in this Court alleging that the University violated ERISA by imprudently selecting and maintaining certain investment options in the Plans.

The initial Complaint asserted that the University breached its ERISA fiduciary duties of loyalty and prudence by failing to prudently monitor two of Plans' investment options – the CREF

[2] The original Complaint included Steven Millard as a named Plaintiff, but Mr. Millard voluntarily dismissed his claims. *See* ECF No. 5.

Stock Account and the TIAA Real Estate Account. Plaintiffs further alleged that the University improperly paid excessive recordkeeping and administrative fees to the Plans' service providers by, among things, retaining two recordkeeping companies when one would have sufficed and would have been less expensive. Plaintiffs also claimed violation of ERISA's prohibited transactions rules with respect to the Plans' participant loan program.

On July 18, 2017, the University filed a motion to dismiss the Complaint in its entirety for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and for lack of standing as to the loan claim and as to the claims related to one of the plans (the Contributory Retirement Plan or "CRP") pursuant to Rule 12(b)(1). The University argued that the Complaint failed to allege sufficiently that the University breached its duty of loyalty, that the Plans paid excessive recordkeeping fees, that the University's process for evaluating investment options was deficient, and that the investment options at issue experienced chronic underperformance.[3] The University also moved to strike the jury demand.

On September 22, 2017, the Court issued an opinion granting in part and denying in part the University's motion to dismiss. The Court dismissed with prejudice the Complaint's claim that the University breached its duty of loyalty. It also dismissed with prejudice, on standing grounds, the Complaint's claims that the Plans offered a loan program that violated ERISA's prohibited transaction rules, and plaintiffs' claims related to CRP. The Court denied the University's motion to dismiss the breach of duty of prudence claims alleged in the Complaint regarding the ERIP. The Court also struck Plaintiffs' jury demand.

On October 27, 2017, Plaintiffs filed a First Amended Complaint ("FAC"). To address the Court's ruling on standing, the FAC added Plaintiff Walter James, a participant in the CRP, as a

[3] *See generally* ECF No. 20.

named Plaintiff. The FAC asserts that the University breached its ERISA duty of prudence by allowing the CRP and the ERIP to be charged excessive amounts for recordkeeping and administrative services and by failing to monitor prudently two of the Plans' investment options, the CREF Stock Account and the TIAA Real Estate Account.

On November 10, 2017, the University answered the FAC. On the same date, it filed a second motion to dismiss on standing grounds, this time directed to Count I of the FAC, which concerned the excessive recordkeeping and administrative fees and expenses relating to the CRP plan. The Court denied Defendant's motion on January 10, 2018. On January 24, 2018, the University amended its answer to the FAC.

B. Discovery

While the motion practice was underway, Plaintiffs began discovery in earnest. They served two document requests and a set of interrogatories on the University and issued subpoenas to two third parties. The University made several productions totaling several thousand pages of documents to Plaintiffs, including critical documents about the nature of the processes followed by the plans' fiduciaries, which Plaintiffs reviewed. Defendants also served discovery requests, including requests for production, interrogatories, and requests for admission on each of the Plaintiffs. Plaintiffs also retained and worked with expert economic witnesses to develop estimates of the damages sustained by the Plaintiffs and the Plans. The parties were on the verge of beginning fact depositions and commencing the process of producing ESI when, encouraged by the Court, they agreed to mediation.

C. Settlement Negotiations

Following the denial of Defendant's second motion to dismiss, at the direction of the Court, the parties began meaningful settlement discussions. The parties jointly retained retired Magistrate

Judge Morton Denlow as mediator. As part of that process, the parties prepared and submitted detailed damage analyses and settlement proposals. Judge Denlow's mediation procedures required the parties to exchange settlement offers in advance and complete a class action checklist that addressed in detail terms and conditions of the various provisions that would likely be included in a potential class settlement.

The mediation procedures were extensive. Prior to submission of the mediation briefs, Class Counsel provided the University with an extensive list of additional documents they wanted to review based on review of the initial document production. The University produced all of the documents that were requested, and Class Counsel had ample time to review them. In addition, the parties agreed to hold a pre-mediation meeting. In that pre-mediation meeting, the University explained its position with respect to certain of the key documents (in particular, the mapping of monies from the TIAA annuities) and agreed to answer any questions from Class Counsel.

After this extensive pre-mediation process, the parties participated in an all-day, in-person mediation with Judge Denlow on April 14, 2018. After lengthy negotiations, the parties reached the principal terms of the Settlement. Judge Denlow's requirement of exchanging class action checklists allowed the parties to execute a term sheet based on an agreed checklist at the conclusion of the mediation. Thereafter, the parties negotiated the detailed terms of the Settlement Agreement and exhibits thereto presented to the Court on this motion, memorializing the terms of the class action Settlement for which Plaintiffs now seek preliminary approval, and developed the Notice plan and the Plan of Allocation on the basis of detailed Class Member and investment data.

During this litigation, the parties were able to fully develop the legal and factual record as a result of briefing two sets of dispositive motions, reviewing the relevant proprietary and public documents, the University's production of information in connection with the mediation, and the

retention of knowledgeable industry experts. The proposed Settlement was agreed upon after extensive arm's-length negotiations among experienced counsel, including an in-person mediation conducted by a seasoned and well-respected mediator. If approved, the Settlement will provide a substantial monetary benefit to Class Members, totaling $6,500,000.

D. The Settlement Agreement

1. Benefits to Class Members

The Settlement Agreement provides for a cash payment of $6.5 million (the "Settlement Amount") as compensation to the Settlement Classes. *See* Settlement Agreement § 3.1(a). The Settlement Amount will also cover the administrative costs associated with implementing the Settlement; any applicable taxes or tax-related costs; independent fiduciary fees in excess of $25,000; any Case Contribution Awards for Plaintiffs approved by the Court; and any attorneys' fees and costs approved by the Court. *Id.* § 3.1(j). The remaining amount (the "Net Settlement Amount") will be distributed to members of the Settlement Classes pursuant to the terms of the Settlement Agreement and the proposed Plan of Allocation, which is attached as Exhibit C to the Settlement Agreement, or such other allocation plan as may be ordered by the Court. *Id.* § 3.2

Under the terms of the Settlement Agreement, $100,000 of the Settlement Amount will be deposited into the Escrow Account within five days of entry of the Preliminary Approval Order to fund any Administrative Costs that arise before the Effective Date. The balance of $6.4 million will be deposited into the Escrow Account within 15 days of the Effective Date. *Id.* § 3.1(b). The Settlement Fund will be administered by the Court-approved Settlement Administrator. *Id.* § 3.1(d).The Settlement Amount, less administration costs, and Court-approved fees, expenses, and Case Contribution Awards, shall be distributed to Monetary Relief Class Members in accordance with the Plan of Allocation, or such other allocation plan approved by the Court. *Id.* § 3.2. No

payment less than $25 shall be distributed to any Class Member who is a Former Participant of the Plans, as defined in § 1.24 of the Agreement. Any undistributed funds shall be delivered to the Plans and used for participant education, provided that the amount is not sufficient to warrant a second distribution. *Id.* § 3.4. There will be no *cy pres* payment. *Id.*

All distributions of the Net Settlement Amount will be made according to the Plan of Allocation, based upon records concerning the year end account balances in the Plans for every Monetary Relief Class Member for each year the Member participated in the Plans. Class Members will not be required to submit claim forms to obtain a share of the Net Settlement Amount.

In addition, the University has agreed to retain certain structural changes to the Plans that will further benefit the Plans and their participants who are members of the proposed Settlement Classes. *Id.* § IV. The University agreed not to increase per-participant recordkeeping fees for three years from the date of Final Approval of the Settlement, and to use commercially reasonable best efforts to continue to attempt to reduce recordkeeping fees. *Id.* § 4.2. Moreover, effective April 2, 2018, the University implemented a new investment lineup for the Plans that reduced the total number of investment options, and removed the CREF Stock account as an investment option.[4] *Id.* § 4.3.

2. Retention of an Independent Fiduciary

As required by Prohibited Transaction Class Exemption 2003-39, 68 FR 75632 (Dec. 31, 2003), as amended 75 FR 33830 (June 15, 2010), the Settlement Agreement provides that the University will select an Independent Fiduciary to provide the authorization required by that Exemption to approve the Settlement on behalf of the Plans and approve the release for the

[4] The TIAA Real Estate Account will continue to be available as an investment option in the new investment lineup, and participants will not be required to liquidate their holdings in CREF Stock. (They cannot contribute any additional money to the CREF Stock account.)

University and the Plan fiduciaries *Id.* § 2.9(a). The University has agreed to pay the costs associated with the retention of the independent fiduciary, up to $25,000. *Id.* The Settlement Agreement provides that the Independent Fiduciary must provide a report authorizing the Settlement at least 15 days prior to the final approval hearing. *Id.* § 2.9(b).

Accordingly, in addition to this Court's review and approval, the Settlement will be evaluated by an experienced fiduciary whose sole loyalty is to the Settlement Class Members, and that fiduciary will evaluate the Settlement as to whether it is (1) reasonable in the light of the litigation risk and the value of the claims, (2) consistent with an arm's length agreement, and (3) not part of an agreement or arrangement to benefit a party in interest.

3. Attorneys' Fees, Costs and Service Award for Plaintiffs

Class Counsels' fees, costs and expenses and Plaintiffs' Case Contribution Awards will be paid from the Settlement Fund as the Court may so order. *See generally Id.* § 8. Class Counsel will petition the Court for Case Contribution Awards not to exceed $10,000 per named Plaintiff in recognition of their service. *Id.* § 8.1(a). Class Counsel will also petition the Court for an award of attorneys' fees not to exceed 30% of the Settlement Amount plus reasonable expenses. All requests will be subject to Court approval. *Id.* §§ 8.1-8.2.

4. Release of Claims

Under the terms of the Settlement Agreement, Plaintiffs and the Settlement Class Members, on their own behalf and on behalf of their current and former beneficiaries, their representatives, and their successors-in-interest, and the Plans absolutely and unconditionally release and forever discharge the Chicago Releasees from the claims at issue in this case. *Id.* § 6.1. Additionally, Plaintiffs, the Classes and the Plans agree not to sue the University for any of the Structural Changes that have been made pursuant to the Settlement Agreement for a period of 3

years from the date of Final Approval. *Id.* § 6.2. The full scope of the releases and covenant not to sue is set forth in the Settlement Agreement at Section VI.

5. Notice and Objections

Pursuant to Federal Rule of Civil Procedure 23(e)(1) and (e)(5), the Settlement Agreement provides for notice to the Class and an opportunity for Class members to object to approval of the Settlement. *Id.* § 2.10. The Parties have agreed, subject to Court approval, to a notice plan that will provide the Class Members with sufficient information to make an informed decision about whether to object to the proposed Settlement. *Id.* The proposed Settlement Notice procedure includes first-class mail to the Monetary Relief Class Members of the Settlement Notice to the Class Members' last known mailing address, which will be supplied by TIAA and Vanguard and supplemented using the National Change of Address database.

The Notice will inform Class Members of the nature of the action, the litigation background and the terms of the Settlement Agreement, including the definition of the Settlement Classes, the relief provided by the Settlement Agreement, the intent of Class Counsel to seek fees and costs, the proposed Case Contribution Awards payable to Plaintiffs, and the scope of the release and binding nature of the Settlement on Class Members. It also describes the procedure for objecting to the Settlement and states the date, time and place of the final approval hearing. *Id.* The Settlement Agreement also provides that the Settlement Administrator shall establish a Settlement Website that will contain the Notice, the Settlement Agreement and its exhibits, and a Settlement Information Line. *Id.* §§2.12-2.13.

III. ARGUMENT

A. The Settlement Classes Meet All Requirements of 23(a) and (b)(1) and Should Be Certified.

In connection with preliminary approval of the Settlement, Plaintiffs seek class certification for settlement purposes. Defendant takes no position on this motion. As part of the Settlement, Plaintiffs propose, and Defendants do not object to, for settlement purposes only, certification of the Settlement Classes defined as follows:

(a) **The Monetary Relief Class**

> The "Monetary Relief Class" will consist of all participants and beneficiaries of The University of Chicago Contributory Retirement Plan and The University of Chicago Retirement Income Plan for Employees from May 18, 2011 through the date of preliminary approval, excluding the Defendant and any participant who is a fiduciary to the Plans.

(b) **The Structural Changes Class**

> The "Structural Changes Class" will consist of all participants and beneficiaries of The University of Chicago Contributory Retirement Plan and The University of Chicago Retirement Income Plan for Employees from the date of final approval until the date that is three years after the date of final approval.

Before assessing whether the Settlement is within the range of reasonableness for the purposes of preliminary approval, the Court must conduct an independent class certification analysis. The Settlement Classes meet all of the requirements for certification under Federal Rule of Civil Procedure 23(a) and Rule 23(b)(1).

A class may be certified under Rule 23(a) when "(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." *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 923 (7th Cir. 2016) (quoting Fed. R. Civ. P. 23(a)).

1. The Class is so numerous that joinder is impracticable.

Rule 23(a)(1) requires that a class be so numerous that joinder of all class members is "impracticable." "Generally, where class members number at least 40, joinder is considered impracticable and numerosity is satisfied." *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, No. 12-CV-05105, 2016 WL 5390952, at *6 (N.D. Ill. Sept. 27, 2016) (quoting *Oplchenski v. Parfums Givenchy, Inc.*, 254 F.R.D. 489, 495 (N.D. Ill. 2009)); *see also Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 (7th Cir 1969) (concluding that 151 class members met the numerosity requirement). Here, the proposed Settlement Classes potentially include roughly 40,000 people, making joinder impracticable.

2. There are questions of law and fact common to the Class.

Class certification is "'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and … 'turn on questions of law applicable in the same manner to each [class] member.'" *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). Rule 23(a)(2) does not require that every question of law or fact be common to each member of the class, rather "[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Keele v. Wexler*, 149 F.3d. 589, 595 (7th Cir. 1998); *see also George v. Kraft Foods Global, Inc.*, 270 F.R.D. 355 (N.D. Ill. 2010) (citations omitted).

In this case, the commonality requirement is readily satisfied because Plaintiffs' allegations arise from the same common nucleus of operative facts, and all members of the proposed Settlement Classes will cite the same common evidence to prove their identical claims. Thus, in

this case, a "classwide proceeding [will] generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (U.S. 2011).

Under these circumstances, commonality is easily satisfied. The legal and factual questions linking Class Members are related to the resolution of the litigation of every Class Member's claims. Common questions of law and fact are presented about whether Defendant breached its fiduciary duties concerning the Plans' investment options and recordkeeping and administrative fees charged. The many questions of law and fact common to the Class (and the nature of the common evidence used to prove these elements of the claims) include:

a. Whether Defendant is a fiduciary under ERISA (answerable based on form documents);

b. How Defendant selected, retained and oversaw the Plans' investment options, including the TIAA Real Estate Fund and the CREF Stock Account (focused exclusively on Defendant's conduct);

c. How Defendant selected, retained and oversaw the Plans' recordkeepers (focused exclusively on Defendant's conduct);

d. Whether Defendant, in arranging for, selecting, and retaining the investment options and Plan service providers discharged its fiduciary duties with respect to the Plans in a prudent manner (focused exclusively on Defendant's conduct); and

e. Whether Defendant's actions proximately caused losses to the Plans and, if so, the appropriate relief to which the Plans are entitled (focused exclusively on Defendant's conduct).

These are the core issues in this case and the alleged bases for the harms that unify all Class Members. The evidence necessary to resolve these issues is the same way. Classes consisting of ERISA plan participants are routinely certified in this and other courts. Thus, the commonality requirement is readily satisfied for the Class. *See, e.g.*, *Nistra v. Reliance Trust Co.*, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018); *Abbott v. Lockheed Martin Corp.*, 2014 WL 12570094 (S. D. Aug. 1, 2014); *Beesley v. International Paper Co.*, 2013 WL 12171727.

3. Plaintiffs' claims are typical of the claims of the Class.

Rule 23(a)(3)'s typicality requirement is similar to the commonality requirement, *Keele* 149 F.3d at 595, but examines whether the proposed class representatives have the same interests and seeks a remedy for the same injuries as other class members. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). "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 his or her claims are based on the same legal theory." *Keele*, 149 F.3d at 595. "[T]here must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011).

In this context, the typicality requirement is satisfied if the class representative is "invested in the same funds as the class members" or were participants in the same plans. *Id.* There is no dispute that this is so. For the same reasons that Plaintiffs' claims are common to all Class Members, they are also typical. Plaintiffs, like other members of the Class, (1) seek relief for the same losses, (2) caused by the same alleged breaches of fiduciary duties, (3) affecting the same Plans and funds. *Cf. Spano*, 633 F.3d at 586-87, 589-90. "Nothing more is required to satisfy Rule 23." *Kraft*, 270 F.R.D. at 367; *see also Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 350-55 (N.D. Ill. 2007) (holding that "plaintiffs' claims are typical of those of the putative class, principally because they seek relief on behalf of the Plan . . . for alleged fiduciary violations as to the Plan").

4. Plaintiffs will fairly and adequately represent the Settlement Classes.

Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In order to satisfy the requirements of Rule 23(a)(4), the class representative must "possess the same interest and suffer the same injury as the class members." *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002) (quoting *E.*

Tex. Motor Freight, 431 U.S. at 403). The adequacy determination is two-pronged. Both the adequacy of the named plaintiff's counsel, and the adequacy of "'representation provided in protecting the different, separate, and distinct interest' of the class members." *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (quoting *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986) (*en banc*)).

Here, the three named Plaintiffs who are the proposed Class Representatives are participants in the CRP and ERIP and allegedly suffered a *pro rata* loss as a result of Defendant's alleged fiduciary breaches with regard to excessive administrative and recordkeeping fees and deficient investment fund performance. Like other members of the Class, the proposed Class Representatives seek to maximize the recovery to the Class through this litigation. *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008). None of the proposed Class Representatives has any interest that is antagonistic to the claims of any Class Member. *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 338, 348 (N.D. Ill. 2008). The proposed Class Representatives' interests are thus fully aligned with the interests of Class Members.

Furthermore, the proposed Class Representatives have been and remain willing and able to take the required role in the litigation to protect the interests of those they seek to represent. As one district court has noted, it is sufficient for purposes of an ERISA case if a proposed class representative "understands that she had a retirement plan and believes that defendants failed to protect the money in the Plan" and, further, that she "understands her obligation to assist her attorneys and testify." *Rankin v. Rots*, 220 F.R.D. 511, 521 (E.D. Mich. 2004). All three proposed Class Representatives have that required understanding and have demonstrated their commitment to this case by providing materials in discovery and they were consulted about key terms of the Settlement. In addition, as discussed below, the proposed Class Representatives have retained

counsel with significant experience in ERISA class actions. In sum, the named Plaintiffs are adequate representatives of the proposed Settlement Classes.

5. The Class satisfies the requirements of Rule 23(b)(1).

Fed. R. Civ. P. 23(b)(1)(B) provides that a class may be certified where "prosecuting separate actions by . . . individual class members would create a risk of . . . 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)(B). As the Supreme Court has explained, Rule 23(b)(1)(B) applies where "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). "Classic examples" of suits appropriate for class resolution under Rule 23(b)(1)(B) classes include "actions charging a breach of trust by a . . . fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust." *Id.*

This is the type of case that Rule 23(b)(1) envisioned. Plaintiffs allege that the University breached its fiduciary duties to the Plans and that the breach similarly affected all Plan beneficiaries. The proposed class therefore satisfies Rule 23(b)(1)(A). *See Nistra v. Reliance Trust Co.*, 16-C-4773, 2018 WL 83541 (N.D. Ill. Feb. 13, 2018).

B. The Settlement Should Be Preliminarily Approved

It is well-established that there is an overriding public interest in settling and quieting litigation, and this is true particularly in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *Williams v.*

Quinn, 748 F. Supp. 2d 892, 897 (N.D. Ill. 2010) ("Federal courts favor the settlement of class actions"); *Goldsmith v. Tech. Solutions Co.*, No. 92-4374, 1995 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 10, 1995) at *6 ("the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement.")

Preliminary approval is warranted when a proposed class-action settlement is "within the range of possible approval" so as to provide a "reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (citing *Manual for Complex Litigation* § 1.46). "[T]he court's task is . . . not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards." *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 WL 3290302, at *6 (N.D. Ill. July 26, 2011) (citing *Armstrong*, 616 F.2d at 314). In determining whether to approve a settlement preliminarily, "the court must consider 'the strength of plaintiffs' case compared to the amount of defendant's settlement offer, an assessment of the likely complexity, length and expense of the litigation, and evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 227 (N.D. Ill. 2016) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). All of these factors warrant preliminary approval of the proposed Settlement.

1. This Settlement Provides Substantial Monetary Relief to Class Members And Preserves Beneficial Changes to the Plans that the University Recently Implemented.

The Settlement provides substantial monetary relief. It provides for a multi-million dollar payment to the Plans for distribution to members of the Monetary Relief Class. It also preserves the beneficial changes to the Plans that the University recently implemented. Specifically, the University agrees not to increase recordkeeping fees for at least three years and will use its best efforts to reduce those fees further. The University also removed the CREF Stock Account as an investment option in the Plans.

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

The Settlement was achieved only after arm's-length negotiations between well-informed and experienced counsel after hard-fought motion practice and a substantial exchange of discovery. It is the opinion of the counsel who achieved the Settlement that it is fair and reasonable to the members of the Classes. Each of these factors strongly supports preliminary approval of the Settlement.

First, courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. *See, e.g.*, *Armstrong,* 616 F.2d at 325 (in determining the fairness of a class settlement, "the court is entitled to rely heavily on the opinion of competent counsel"); *Hispanics United*, 988 F. Supp. at 1170 (same); *Alliance to End Repression v. City of Chi.*, 561 F. Supp. 537, 548 (N.D. Ill. 1982) ("Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."). Here, proposed Co-Lead Counsel – two law firms that are nationwide leaders in ERISA class-action litigation– have made a considered judgment based on adequate information derived from substantial discovery that the Settlement is not only fair and reasonable, but a favorable result for the Classes. Co-Lead

Counsel's beliefs are based on their deep familiarity with the factual and legal issues in this case and the risks associated with continued litigation.

The arm's-length nature of the settlement negotiations creates a presumption that the Settlement is fair. *See Nat'l Rural Telecomm Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair."); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (a settlement proposal arrived at after arm's length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate) (*citing Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 320 (N.D. Ill. 1979)).

2. The Substantial Benefits for the Class, Weighed Against Litigation Risks, Support Preliminary Approval.

Absent this Settlement, continued litigation of this action would be complex and lengthy, requiring the investment of considerable resources by both parties and the Court. Liability in this case is heavily contested, and both sides would face considerable risks should the litigation proceed. In contrast to the complexity, delay, risk, and expense of continued litigation, the proposed Settlement will produce certain, and substantial recovery for Settlement Class Members.

The $6.5 million cash payment represents a substantial recovery, and the result here is enhanced by the fact that the Settlement guarantees the preservation of beneficial Plan changes the University has implemented. These results are particularly beneficial to the Classes in light of the risks posed by continued litigation, including the possibility of the Court ultimately finding no liability or the inability to prove damages.

While Plaintiffs believe that the claims asserted against Defendant are meritorious, they recognize that their claims present a number of substantial risks to establishing both liability and damages and there was no certainty that Plaintiffs would have prevailed at trial. The University

mounted a vigorous defense to Plaintiffs' claims in this Action and have set forth multiple defenses in their pleadings. Their defenses include the defenses: of statute of limitation/laches, waiver, estoppel, standing, lack of proximate causation, failure to mitigate loss, release, comparative fault, and their contention that Plaintiffs exercised independent control over their investment elections in the Plan.

With respect to the primary question of Defendant's liability, the University claims that it properly managed its retirement plans and had prudent processes in place to evaluate both its recordkeeping fees and investment options. They claim that their choices were within the range of choices made by other similarly-situated plan fiduciaries at the time they were made. As to the record-keeping claim, in particular, the University claims that it repeatedly negotiated reductions in fees throughout the Class Period, including ones that were retroactive to the start of the class period. The University also contended in the mediation that Plaintiffs overstated the potential damages they could recover at trial, even assuming Plaintiffs could establish liability with regard to all claims.

Thus, Plaintiffs faced a risk that they would be unable to establish the University's liability, and if they were able to do so, they faced the further risk that a trier of fact would find no damages or damages that were less than the $6.5 million Settlement the University offered. One factor that the parties weighed during the mediation was the fact that one of the 19 roughly similar retirement plan lawsuits against private universities was scheduled to go to trial less than a month after the date of the mediation. Both parties negotiated at the mediation knowing that the future outcome of that trial as well as the outcomes of the other lawsuits were risk factors for both sides. As of the date of this motion, the outcome of that trial remains unknown.

In light of all of these risks, Plaintiffs and their counsel believe the Settlement represents a favorable outcome for Class members. The Settlement will avoid the cost and expense of continued litigation and will achieve immediate relief for Class members.

C. The Court should appoint Plaintiffs' Counsel as Co-Lead Class Counsel.

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

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- counsel's knowledge of the applicable law; and
- 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).

Proposed Co-Lead Class Counsel, the law firms of Berger & Montague P.C., and Schneider Wallace Cottrell Konecky Wotkyns LLP, satisfy these criteria. This team of law firms, together with Wexler Wallace LLP, expended a great deal of time, effort and expense investigating the University's documents, practices, and actions prior to and since filing this action. Further, as set forth in the firm resumes submitted herewith, each firm is highly experienced in ERISA litigation. *See* Exs. F, G, and H. It is clear from each firm's track-record of success that Class Counsel are highly skilled and knowledgeable concerning ERISA law and class-action practice.

Berger & Montague, P.C., one of the oldest and most successful plaintiffs' class action firms in the nation, has for decades represented plaintiffs and plaintiffs' classes not only in ERISA actions, but also in the areas of antitrust, securities, mass tort, and consumer protection. The firm

has represented plaintiffs in many ERISA class actions, including as lead counsel in a recent case in this district that settled for $36 million. *See Diebold v. Northern Trust Investments, N.A.,* No. 09-cv-1934. A fuller description of Berger Montague's experience litigating complex class actions, including a firm resume, is included herewith. *See* Ex. F.

Schneider Wallace has extensive experience in class action matters, including ERISA matters. Of note, Schneider Wallace (with co-counsel) was appointed co-lead counsel in a class action challenging the management of a leading collection of stable value funds managed by JP Morgan and affiliates, *In re J.P. Morgan Stable Value Fund ERISA Litigation*, Master File No. 12-cv-2548-VSB (S.D.N.Y.). That class was certified on March 31, 2017 and approval of the parties' $75 million settlement is pending. Schneider Wallace also served as class counsel (with co-counsel) in *Glass Dimensions, Inc. v. State Street Corp. et al*., Civ. No. 10-10588-FDS, an ERISA fiduciary breach class action that settled for $10 million as well as substantial injunctive relief. Schneider Wallace has been appointed class counsel in many other similarly complex class actions, and attached as Exhibit G, included herewith, is a true and correct copy of a list of representative actions in which Schneider Wallace has been appointed lead counsel as well as a set of biographies for the attorneys principally working on this matter.

Wexler Wallace is a nationally-recognized leading firm in complex class-action and multidistrict litigation, and attorneys at the firm have been appointed to numerous leadership positions in class action cases across the country. The firm's resume, attached hereto as Exhibit H, describes many of the firm's successes, including in ERISA class-action cases. For example, just last year, Wexler Wallace served as co-lead class counsel—and trial counsel—for an ERISA class action which resulted in the district court affirming a unanimous advisory jury verdict for the class. *See Jammal, et al. v. American Family Insurance*, No. 13-cv-00437 (N.D. Ohio). As can be seen

by their commitment to prosecuting this case thus far as well as their track record, Class Counsel have made the investment and have the experience to represent the Class vigorously. Accordingly, the appointment of the proposed Co-Lead Class Counsel under Rule 23(g) is warranted.

D. The Proposed Class Notice Is Appropriate and Should be Approved

As set forth in the proposed Preliminary Approval Order, Class Counsel will cause Class Members to be notified of the pendency of the Action and the proposed Settlement by causing the Settlement Notice to be mailed to all Class Members. The Settlement Administrator will also establish a website related to the Settlement, with the Notice featured on it, as well as a Settlement Information Line. This procedure is designed to reach as many Class Members as reasonably practicable. The Settlement Notice informs Class Members of the nature of the Action, the definition of the Classes, the binding nature of the Settlement on Class Members, and the intent of Class Counsel to seek a Case Contribution Awards for Plaintiffs and an award of attorneys' fees and reimbursement for litigation expenses. It contains a detailed but easily-understandable summary of the terms of the Settlement (including the relief provided and the scope of the Release) and a copy of the proposed Plan of Allocation. It also informs Settlement Class Members how and when to file objections,[5] and states the date, time and place of the Settlement hearing.

The form and manner of providing notice to the Class satisfies all the requirements of Rule 23 and due process. A settlement must provide adequate notice to class members so that each can make an informed choice about whether to object. Rule 23(e) (1) provides that, in the event of a class settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" the proposed settlement. Fed. R. Civ. P. 23(e)(1). To satisfy due process, the notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the

[5] As this is a Rule 23(b)(1) class action, there is no provision for opting out of the proposed Classes.

pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Courts have considerable discretion in approving an appropriate notice plan. *Eirhart v. Libbey-Owens-Ford Co.*, 921 F.2d 278, at *1 (7th Cir. 1990) (table op.) (observing that a district court "has 'virtually complete discretion' as to the manner in which notice of a proposed settlement be given."); *Manual for Complex Litig.* § 21.311 ("Determination of whether a given notification is reasonable under the circumstances of the case is discretionary.").

The notice program set forth in the proposed Preliminary Approval Order meets these standards: it provides the best practicable notice under the circumstances and is reasonably calculated to reach substantially all members of the Class. Settlement Notices will be directly mailed to all Class Members, and that mailing will be supplemented by publication on the Settlement website. The Proposed Class Notice is clear, accurate, easy-to-understand, and satisfies due process.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of the Settlement and for certification of the proposed Classes for settlement purposes only, and enter the proposed Preliminary Approval Order.

Dated: May 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2018, I caused to be served, via electronic mail a true and correct copy of PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT AND RELATED MATTERS to the following:

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