UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Yvonne Becker, Christopher Nobles, Rosa Ramirez, Valerie Seyler, and Jannien Weiner, Plaintiffs, vs. Wells Fargo & Co.; Employee Benefit Review Committee; Wells Fargo Bank, National Association; and John and Jane Does, 1-20, Defendants.	Case No. 0:20-cv-2016 (KMM/BRT) **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND PROVISIONAL CLASS CERTIFICATION** **CLASS ACTION**

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I. INTRODUCTION

Plaintiffs Yvonne Becker, Christopher Nobles, Rosa Ramirez, Valerie Seyler, and Jannien Weiner, on behalf of themselves and the proposed Settlement Class,[1] submit this Memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Provisional Class Certification. A copy of the Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit 1[2] to the accompanying Declaration of Michelle C. Yau ("Yau Decl."). This Settlement, if approved, resolves Plaintiffs' class action claims against Wells Fargo & Company, the Employee Benefit Review Committee, Wells Fargo Bank, National Association, and John and Jane Does 1-20 ("Defendants") under the Employee Retirement Income Security Act ("ERISA").

Under the terms of the proposed Settlement, Defendants will pay a gross settlement amount of $32.5 million into a common fund for the benefit of the proposed Settlement Class. This is a significant monetary recovery for the Class and falls well within the range of court-approved settlements in similar ERISA cases. The proposed Settlement amount is also fair and reasonable compared to the estimated value of Plaintiffs' claims, and the attendant risks of litigation. The following facts support preliminary approval:

[1] Capitalized terms have the meaning assigned to them in the Settlement Agreement unless otherwise specified.

[2] The Settlement Agreement attached to the Yau Declaration does not include Exhibits 1 and 2 thereto because they are outdated versions of the draft Proposed Order. Instead, an updated Proposed Order is submitted with this Motion and an updated Proposed Order for Final Approval will be submitted to the Court with Plaintiffs' Motion for Final Approval.

- The $32.5 million recovery is an excellent outcome compared to other settlement recoveries for similar ERISA cases and was negotiated after the Parties had completed all document discovery and the depositions of several witnesses.

- The proposed Settlement of $32.5 million is substantial not only in the aggregate, but also as a percentage of the value of claims – as it recovers 40% of all fee damages estimated by Plaintiffs' damages expert.

- The Settlement was negotiated at arm's length by experienced and capable counsel, after extensive mediation sessions with a well-respected mediator with ERISA class action experience.

- Under the proposed Settlement, payments will be automatically deposited in the Wells Fargo & Company 401(k) Plan accounts of all Current Participants, while Former Participants will receive their distribution via check, or, if they elect, they may receive their payments as a roll-over into a qualified retirement account.[3]

- The Released Claims are tailored to the claims that were asserted in the Action.

- The proposed notice program provides fulsome information to the Class about the Settlement. The Class Notice (long-form) will be distributed via email and U.S. mail (if no email address is available) and will be posted on a dedicated settlement website. The short-form notice will be published in *USA Today* and distributed to thousands of additional news outlets via a *PR Newswire* Press Release.

- The Settlement Agreement provides Settlement Class members the opportunity to raise any objections to the Settlement or to the requested Attorneys' Fees, Expenses and Case Contribution Awards in writing or at the Fairness Hearing.

For the reasons set forth below, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Class Notice and notice program; (3) scheduling a Fairness Hearing; and (4) granting such other relief as set forth in the Proposed Order Preliminarily Approving Class Action Settlement ("Proposed Order") submitted herewith. This motion is not opposed by Defendants.

[3] Exhibit D to the Proposed Order is the Rollover Form discussed in the Class Notice and will be available on the Settlement website.

II. BACKGROUND

A. Procedural History

On March 13, 2020, Plaintiff Yvonne Becker, a participant in the Wells Fargo & Company 401(k) Plan (the "Plan"), filed a complaint in the Northern District of California on behalf of the Plan and similarly-situated Plan participants, alleging a series of claims against Defendants under ERISA. (ECF 1.) On September 21, 2020, Judge Tigar granted Defendants' motion to transfer venue (ECF 59), and on September 22, 2020, transferred the Action to this District (ECF 60).

Plaintiff Becker alleged that Defendants—fiduciaries of the Plan—breached their ERISA fiduciary duties of prudence and loyalty and violated ERISA's prohibited transactions law by, *inter alia*, failing to prudently and loyally select and monitor the Plan's investment options. Specifically, Plaintiff Becker alleged that the Employee Benefit Review Committee ("EBRC") selected and retained several Wells Fargo affiliated funds in violation of ERISA. Plaintiff further alleged that Defendants' fiduciary violations of ERISA caused losses to the Class in the form of unnecessarily high fees or underperformance.

Defendants moved to dismiss the original complaint on February 4, 2021. (ECF 97). On May 12, 2021, the Court issued an opinion denying Defendants' Motion to Dismiss. (ECF 134). On June 2, 2021, Plaintiff Becker, joined by Plaintiffs Christopher Nobles and Rosa Ramirez, also participants in the Plan, filed an Amended Class Action Complaint. (ECF 143). On September 28, 2021, Plaintiffs Becker, Nobles and Ramirez, joined by

Valerie Seyler and Jannien Weiner, also participants in the Plan, filed the Second Amended Class Action Complaint (the "Complaint"). (ECF 178).

During the last 15 months, the Parties have conducted extensive discovery, including the production of over one hundred thousand documents (spanning 1.5 million pages) from Parties and third parties. They completed several depositions of defense fact witnesses and all five of the Named Plaintiffs. The Court has held numerous conferences or motion arguments with the Parties and, independently, the Parties have met and conferred over sixty times in an attempt to resolve disputes without motion practice (which was indeed achieved for the vast majority of issues). Yau Decl. ¶ 4.

In November of 2021, the Parties held their first mediation session with Robert A. Meyer, an experienced and well-respected mediator, who has successfully resolved numerous ERISA cases and other class actions. Yau Decl. ¶ 6. The Parties were unable to resolve the case during the mediation in November of 2021. *Id*. Thereafter, discovery continued apace. Document discovery was completed in mid-December of 2021 and the Parties completed several additional depositions in November and December of 2021. Yau Decl. ¶ 7.

On January 5, 2022, after the second full-day of mediation Parties reached an arm's-length, class-wide resolution of this matter, subject to the Court's approval. The principle terms of the Settlement were memorialized in a term sheet executed late in the evening of January 5, 2022. Yau Decl. ¶ 8 Thereafter, the Parties negotiated the comprehensive Settlement Agreement that is the subject of the present motion. *Id*. The terms of the Settlement are memorialized in the Settlement Agreement. *Id*.

B. Overview of the Settlement Terms

1. Settlement Class

The Settlement Agreement calls for certification of the following Settlement Class:

> All Persons who were Participants of the Plan at any time from March 13, 2014 through the date on which the Settlement becomes Final. Excluded from the Settlement Class are members of the Employee Benefits Review Committee from March 13, 2014 through the date on which the Settlement becomes Final.

Settlement Agreement § 1.38.

2. Monetary Relief

Under the Settlement, Defendants will contribute a gross settlement amount of $32,500,000 to a common settlement fund (the "Qualified Settlement Fund" or "QSF"). Settlement Agreement § 3.7. After the deduction for any Court-approved attorneys' fees and expenses, and/or Case Contribution Awards, Settlement Administration Expenses, taxes and tax-related expenses, the Net Settlement Fund will be distributed to Settlement Class members who invested in at least one of the Challenged Funds in accordance with a Plan of Allocation.[4] *Id.* § 1.24.

3. Review by Independent Fiduciary

The Parties will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. Settlement Agreement §§ 1.21 & 3.4; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary's fees and expenses, up to $25,000, shall be paid from the Qualified Settlement Fund. *Id.* § 3.4.1. Wells Fargo has agreed to pay for any

[4] The Plan of Allocation is attached as Exhibit 2 to the Yau Declaration.

fees or expenses associated with the Independent Fiduciary's review and approval of the Settlement that exceed $25,000. *Id.*

4. Release of Claims

In exchange for the relief provided by the Settlement, the Class will release the Releasees from any claims (a) that were asserted in the Complaint, or that arise out of the conduct alleged in the Complaint whether or not pleaded in the Complaint; (b) that arise out of, relate to, are based on, or have any connection with (1) the selection, oversight, retention, or performance of the Challenged Funds; and (2) fees, costs, or expenses charged to, paid by, or reimbursed by the Plan, or the Plan's Participant, directly or indirectly; (c) that would be barred by *res judicata* based on entry of the Final Approval Order; (d) that relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Net Settlement Fund to the Plan or any member of the Settlement Class in accordance with the Plan of Allocation; and/or (e) that related to the approval by the Independent Fiduciary of the Settlement Agreement. Settlement Agreement § 1.32.

5. Class Notice and Settlement Administration

Settlement Class members will be sent a direct notice of the settlement ("Class Notice")[5] via email so long as the Settlement Class member has an email on file with the Plan's recordkeeper.[6] If a Settlement Class member does not have an email address, or if the Settlement Administrator receives a notification that the emailed Class Notice was

[5] The Class Notice is attached as Exhibit A to the Proposed Order.

[6] Settlement Class members' email and mailing addresseses will be provided by the Plan's current or former recordkeeper. Settlement Agreement § 3.2.3.

undeliverable, then Settlement Class members will be sent the Class Notice via U.S. Mail to their best available address. The Class Notice will inform Former Participants that they can go to the Settlement website to complete the Former Participant Rollover Form and thereafter receive their payment as a roll-over into a qualified retirement account (if adequate information is supplied by the deadline), in which case no taxes will be withheld from their settlement payment.

The Class Notice will provide information to the Settlement Class regarding, among other things: (1) the nature of the claims; (2) the definition of the Settlement Class; (3) the terms and effect of the Settlement Agreement; (4) the process and deadline for electing a rollover into a qualified retirement account (Former Participants only); (5) Settlement Class members' right to object to the Settlement, requested attorneys' fees and expenses and Case Contribution Awards (and the deadline for sending any objections); (6) the Class release; (7) the identity of Class Counsel and the amount of attorneys' fees they will seek in connection with the Settlement; (8) the amount requested for Case Contribution Awards; (9) the date, time and location of the Fairness Hearing; and (10) Settlement Class members' right to appear at the Fairness Hearing. *See* Class Notice, Ex. A to Proposed Order.

Additionally, a summary of the Class Notice (i.e., a short-form notice[7]) will be published in *USA Today* and distributed to thousands of additional news outlets via a *PR Newswire* Press Release. The Settlement Administrator will also establish a Settlement website on which it will post the Class Notice, Settlement Agreement, Plan of Allocation,

[7] The short-form notice is attached as Exhibit C to the Proposed Order.

Former Participant Rollover Form, and relevant case documents, including but not limited to copies of all documents filed with the Court in connection with the Settlement. For any Settlement Class members who would like more information about the Settlement, the Class Notice will provide a telephone number that connects Settlement Class members with a live agent.

6. Attorneys' Fees and Expenses and Case Contribution Awards

The Settlement Agreement requires that Class Counsel must file their Motion for attorneys' fees, reimbursement of expenses, and Case Contribution Awards at least twenty-one (21) days before the deadline for objections are due. Settlement Agreement § 11.1. Under the Settlement, all requested attorneys' fees, reimbursed expenses and Case Contribution must be reasonable and approved by the Court. *Id*.

C. Plan of Allocation

The Plan of Allocation[8] provides that the Net Settlement Amount will be allocated to Settlement Class members who invested in the Challenged Funds in proportion to (i) the Challenged Fund's percentage of the alleged Total Losses[9] during the Class Period[10] and

[8] As mentioned above, the Plan of Allocation is Exhibit 2 to the Yau Declaration.

[9] The alleged Total Losses reflect the aggregate value of the alleged fee losses at the Plan level for all Challenged Funds (i.e., total fees paid to Wells Fargo from a Challenged Fund, plus reinvestment income on those fees during the Class Period). However, for the Stable Value Fund, no fees were paid to Wells Fargo from such fund during the Class Period, and thus the Plan-level fee losses are assumed to be $100,000 to ensure a Net Settlement Fund allocation to the Stable Value Fund.

[10] The Class Period is defined as March 13, 2014 through the date on which the Settlement becomes Final. However, for calculation purposes, the quarterly data used in the Plan of Allocation includes all full quarters from March 13, 2014 until January 31, 2022 (or earlier for Challenged Funds that were removed from the Plan during the Class Period).

(ii) each Settlement Class member's investment balances in each of the Challenged Funds compared to the total of all Settlement Class members' investment balances in such Challenged Funds. Plan of Allocation ("POA") ¶ 7. In other words, each Challenged Fund receives a percentage of the Net Settlement Fund based on its proportion of alleged Total Losses among all Challenged Funds, and then each Settlement Class member who invested in that particular Challenged Fund receives a pro rata share of that Fund's allocated amount, based on the respective Settlement Class member's aggregated investment balances in each of the Challenged Funds compared to all Settlement Class members' aggregated investment balances in such Challenged Funds during the Class Period. *Id.*

Each Current Participant's Settlement recovery will be automatically deposited in their existing Plan account. POA ¶ 18. If, however, the amount of a Former Participant's Settlement recovery (from all Challenged Funds in which they invested) is less than $5.00, it will be considered a de minimis Settlement recovery and will not be distributed; instead, such amount will be reallocated to all other Current and Former Participants (who have recoveries of $5.00 or more) on a per capita basis. *Id.* ¶ 8(h). Each Settlement Class member shall then receive their settlement recovery, which is the "Final Individual Dollar Recovery." *Id.*

Former Participants will have the opportunity to electronically submit a Rollover Form, which allows their Settlement recovery to be rolled over into an individual retirement account or other eligible employer plan, in which case no taxes will be withheld from the Settlement recovery. POA ¶ 21. Former Participants who do not timely submit a Rollover Form, or who do not submit sufficient information to effectuate the Rollover, will

be sent their Settlement recovery via check with any applicable 1099 taxes withheld. *Id*. ¶ 22(ii). In order help ensure that any checks sent to Former Participants are indeed received and cashed by the Participant, the following additional steps will occur: (1) the Plan's recordkeeper will provide mailing addresses for each Former Participant in its possession; (2) before checks are sent, the Settlement Administrator will update all mailing addresses using the National Change of Address Database; (3) for any checks that are returned as undeliverable, the Settlement Administrator shall attempt to find updated address information and resend the check to the updated address; and (4) for all Former Participant whose checks have *not* been returned as undeliverable but were *not* cashed within approximately 60 days of the issue date of the check, the Settlement Administrator will send an email reminder to the Former Participant (if email is available) that all uncashed checks will be voided 120 days after their issue date, and perform a skip-trace to identify an updated mailing address and resend the check to the updated address if possible.

Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to the Plan and distributed by the Plan's Recordkeeper across Current Participants on a per capita basis. In no event shall any part of the Net Settlement Fund be used to reimburse any Defendants or otherwise offset settlement-related costs incurred by any Defendant. POA ¶ 26.

III. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement

Parties seeking to settle a class action must seek approval from the court in a two-stage process. Fed. R. Civ. P. 23(e). Rule 23(e) requires that the court first consider whether

to preliminarily approve a settlement, whether the class should be certified for settlement purposes, and whether the proposed notice appropriately notifies class members. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1399 (D. Minn. 1993); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (*en banc*). After preliminary approval, the court must decide whether to grant final approval after class members have had sufficient notice and opportunity to review the settlement. Fed. R. Civ. P. 23(e); *see also, e.g.*, *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120-122 (8th Cir. 1975).

The purpose of preliminary approval is for the court to determine whether the settlement is within the range of possible approval such that class members should be notified of the terms of the proposed settlement. *White*, 822 F. Supp. at 1399. At this stage, courts attach "[a]n initial presumption of fairness . . . to a class settlement reached in arm[']s-length negotiations between experienced and capable counsel after meaningful discovery." *Grier v. Chase Manhattan Auto Fin. Co.*, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000); *see also White*, 822 F. Supp. at 1421. Indeed, the law strongly favors resolving litigation through settlement, particularly in the class action context. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (holding that "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." (citation omitted)); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2013 WL 716088, at *6 (D. Minn. Feb. 27, 2013) ("The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." (quoting *White*, 822 F. Supp. at 1416)); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (citing cases holding same).

In addition to the "initial presumption of fairness," courts in the Eighth Circuit also consider four factors in evaluating whether a proposed settlement is fair, reasonable, and adequate: (1) the merits of plaintiffs' case weighed against the settlement terms; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005) (citing *Grunin*, 513 F.2d at 124); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *Dryer v. Nat'l Football League*, 2013 WL 5888231, at *2 (D. Minn. Nov. 1, 2013). At the preliminary approval stage, "the fair, reasonable and adequate standard is lowered, with emphasis only on whether the settlement is within the *range* of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Martin v. Cargill, Inc.* 295 F.R.D. 380, 383 (D. Minn. 2013) (citation omitted).

This court has broad discretion in assessing the weight and applicability of these factors. *Pro. Firefighters Ass'n of Omaha, Loc. 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). Additionally, the "[c]ourt is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." *In re Emp. Benefit Plans Sec. Litig.*, 1993 WL 330595, at *5 (D. Minn. June 2, 1993); *see also Welsch v. Gardebring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987) (affording "great weight" to opinions of experienced counsel).

Under relevant precedent, the Settlement here is presumed valid. Nonetheless and regardless of such presumption, the relevant factors weigh in favor of preliminary approval of this proposed Settlement.

1. The Proposed Settlement Agreement is Presumptively Valid

The Settlement is afforded an initial presumption of fairness because the Parties, represented by experienced counsel, have engaged in extensive negotiations with an experienced mediator at an appropriate stage in the litigation where the Parties understand the strengths and weaknesses of the case. *See, e.g.*, *In re Emp. Benefit Plans Sec. Litig.*, 1993 WL 330595, at *5 (noting that "intensive and contentious negotiations likely result in meritorious settlements . . . ."); *Zurn Pex*, 2013 WL 716088, at *6 (observing that "[s]ettlement agreements are presumptively valid, particularly where a settlement has been negotiated at arm's length, discovery is sufficient, [and] the settlement proponents are experienced in similar matters . . . ." (citations omitted)).

Here, the Settlement was reached only after document discovery was complete and after several fact witnesses (a total of 9) had been deposed. Accordingly, the Parties have had sufficient opportunity to test and refine their legal theories through extensive analysis of the documentary record and vigorous motion practice. This discovery and these efforts allowed Plaintiffs to glean important insight into the merits of their claims and class allegations.

The means by which the Parties arrived at this Settlement is also reflective of the contested nature of the litigation and Plaintiffs' efforts to test Defendants' arguments. The Parties negotiated extensively in consultation with the mediator before entering into an agreement. *See Khoday v. Symantec Corp.*, 2016 WL 1637039, at *5 (D. Minn. Apr. 5, 2016) (noting a "settlement . . . is presumptively valid" when "supervised by an independent mediator"); *Zurn Pex*, 2013 WL 716088, at *6. The rigorous negotiations,

arm's length agreement, near the end of extensive discovery, support the presumptive fairness of the Settlement.

2. The Settlement is Fair and Reasonable when Weighed Against the Strengths and Weaknesses of the Claims

The first and "most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Van Horn*, 840 F.2d at 607 (citation omitted); *see also Dryer*, 2013 WL 5888231, at *4; *Petrovic*, 200 F.3d at 1150. In considering this factor, courts are "not to reach any conclusions as to the merits . . . nor . . . substitute [their] opinion for that of plaintiffs' counsel and members of the class." *In re Emp. Benefit Plans Sec. Litig.*, 1993 WL 330595, at *4; *see also Alexander v. Nat'l Football League*, 1977 WL 1497, at *12-13 (D. Minn. Aug. 1, 1997) (stating that "the [c]ourt does not have the responsibility of trying the case or ruling on the merits of the matters resolved by agreement . . . [because] '[t]he very purpose of compromise is to avoid the delay and expense of such a trial.'" (quoting *Grunin*, 513 F.2d at 124)).

Analyzing the strength of the plaintiff's case "is not a simple mathematical exercise with definite outcomes; a 'high degree of precision cannot be expected in valuing a litigation.'" *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 943 (D. Minn. 2016) (*quoting Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Given the inability to value the strength of a case with precision, courts perform a "ballpark valuation." *Synfuel Techs.*, 463 F.3d at 653 (citation omitted).

Here, Plaintiffs hired a damages expert to estimate and quantify the alleged damages associated with their claims. Yau Decl. ¶ 24. To calculate alleged fee damages, the damages expert calculated the amount of fees paid by the Plan on a quarterly basis for each Challenged Fund and then assumed that fee was reinvested in the Challenged Funds (meaning if the fees were not charged, those Plan assets would grow based on the historical returns of each Challenged Fund). *Id.* This methodology resulted in total alleged fee damages of approximately $81 million. *Id.* Plaintiffs' damages expert also measured damages for each Challenged Fund by comparing the Fund's performance (i.e., investment returns) to the performance of the benchmark reported to Plan participants. Under this methodology, some Funds outperformed their benchmark and other Funds underperformed. Depending on whether excess performance of some Challenged Funds are netted against underperformance of others, the total damages ranged between $11 million and $136 million. The midpoint between $11 and $136 million is $74 million and thus comparable to the $81 million of damages using the fee methodology. *Id.*

Here, the proposed Settlement recovery of $32.5 million is substantial not only in absolute dollars, but also as a percentage of the value of claims – as it recovers 40% of all fee damages estimated by Plaintiffs' damages expert. Yau Decl. ¶ 27. This percentage recovery is reasonable and warrants preliminary approval. *See, e.g., Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) (finding that a 27% recovery of maximum possible full verdict at trial to be reasonable). Indeed, both under both metrics, this Settlement compares very favorably to other class action settlements. *See, e.g., Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *5-6 (N.D. Cal. May 11, 2018) (approving a $14 million

ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages.").[11]

Moreover, Defendants' view is that, even if Plaintiffs prevailed on their claims, Plaintiffs are not entitled to the $81 million in fee damages because Plaintiffs may not seek the entire fee amounts the Plan paid; rather the only plausible damages are the fees retained by Wells Fargo. Defendants argue that, for the following Funds, all fees were paid to third parties and not kept by Wells Fargo (or were paid by Wells Fargo and not paid by the Plan at all): Wells Fargo State Street Target CITs[12], Wells Fargo Causeway CIT, Wells Fargo Federated CIT, and Wells Fargo Stable Value Fund. As such, in Defendants' view, there are zero fee damages for those CITs. With respect to the Wells Fargo Emerging Growth and Wells Fargo Money Market Fund fees, Defendants argue that, even if Plaintiffs prevailed on their claims, Plaintiffs are only entitled to the profits Wells Fargo obtained from these fees, not the entire fee. If both these arguments were credited, then Plaintiffs' damages expert estimated that the value of the fee damages would be just $15 million.

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[11] See also *Toomey v. Demoulas Super Markets, Inc*., No. 1:19-cv-11633, ECF 95 at 10 (D. Mass, Mar. 24, 2021), approved at ECF 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 1:17-cv-00563, ECF 211 (S.D.N.Y. May 22, 2020), approved 2020 WL 6114545, at *1 (S.D.N.Y. Oct. 7, 2020) (16% of alleged losses); *Price v. Eaton Vance Corp*., No. 1:18-cv-12098, ECF 32 at 12 (D. Mass. May 6, 2019), approved ECF 57 (D. Mass. Sept. 24, 2019) (23% alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P*., 2018 WL 8334858, at *7 (C.D. Cal. July 30, 2018) (25% of estimated losses). *See also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses") (citation omitted).

[12] "CIT(s)" refers to Collective Investment Trust(s).

While Plaintiffs believe in their damages experts' analysis that the fee damages were indeed $81 million, there are substantial risks that Defendants damages theories prevail which would result in damages of as low as $15 million.

3. The Defendant's Financial Condition

The second fairness factor considers the defendant's ability to pay. *See Petrovic*, 200 F.3d at 1152 (citing *Grunin*, 513 F.2d at 124). Wells Fargo has the financial ability to whatever judgement were entered against it (or against the EBRC members who are indemnified by Wells Fargo). However, as the Eighth Circuit held in *Petrovic v. Amoco Oil Co.*, while Wells Fargo could "pay more than it is paying in this settlement, this fact, standing alone, does not render the settlement inadequate." *Petrovic*, 200 F.3d at 1152. Accordingly, Plaintiffs did not discount the amount of the Settlement based on Defendants' ability to pay. Yau Decl. ¶ 28.

4. The Complexity and Expense of Further Litigation

The third fairness factor requires the Court to evaluate whether the expense and complexity of further litigation weighs in favor of approving the Settlement. *In re Wireless Tel.*, 396 F.3d at 932-33. In applying this factor, courts have approved settlements where "[t]here is no doubt that further litigation in this matter would be both complex and extraordinarily expensive"; "[t]he class certification process would undoubtedly be hard-fought and would also require a detailed analysis of the claims of the class members"; "Plaintiffs' claims themselves are complex"; and damages determinations would be "exceedingly time-consuming and complex." *Dryer*, 2013 WL 5888231, at *3.

Courts have repeatedly recognized that ERISA 401(k) cases "often lead[ ] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) ("*Krueger II*"). Cases involving the fiduciary breach claims concerning several 401(k) investment options, can extend for a decade or longer before final resolution, and sometimes go through multiple appellate proceedings. *See Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding for district court to address the issue of loss a second time); *see also Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed a decade earlier). The potential for protracted litigation supports the Settlement's approval. *Cullan and Cullan LLC v. M-Qube, Inc.*, 2016 WL 5394684, at *7 (D. Neb. Sept. 27, 2016) (approving settlement because it provided "a real and substantial remedy without the risk and delay inherent in prosecuting this matter through trial and appeal[.]").

As previously noted, the Parties have already completed significant discovery and motion practice. While nine depositions of fact witnesses and a 30(b)(6) deposition on certain noticed topics had already been completed by the second mediation session, another five depositions were on the horizon had the parties not reached a settlement on January 5, 2022. The parties were also preparing to file motions on several issues before the Honorable Magistrate Judge Becky R. Thorson. Thereafter, expert discovery would proceed and would involve four to six expert witnesses offering expert and rebuttal reports, the production of substantial work papers, the depositions of all expert witnesses and likely Daubert motions.

In addition, without the proposed Settlement, the Parties would brief (and the Court would decide) a contested motion for class certification and cross-motions for summary judgment. The parties would ultimately prepare for and conduct a bench trial, if the case were to make it that far. Continuing the litigation would have resulted in complex, costly, and lengthy proceedings before this Court, and potentially the Eighth Circuit, which would have significantly delayed any relief to Settlement Class members (and might have resulted in no relief at all). By contrast, the proposed Settlement provides $32.5 million to the Settlement Class now, as opposed to the chance of a recovery after trial and appeals.

5. The Amount of Opposition to the Settlement

The final fairness factor considers the amount of opposition to the Settlement. *In re Wireless Tel.*, 396 F.3d at 932-33. This factor is best addressed at the Final Approval Hearing when the Settlement Class has had an opportunity to object or raise concerns to the Settlement.

B. Certification of the Settlement Class Is Warranted Under Rule 23

Finally, this Court should certify the Settlement Class for settlement purposes. The ERISA claims that Plaintiffs assert here have been recognized by "numerous courts" in and outside the Eighth Circuit as "paradigmatic examples of claims appropriate for certification" and are certified routinely even on contested motions for class certification. *Rozo v. Principal Life Ins. Co.*, 2017 WL 2292834, at *4 (S.D. Iowa May 12, 2017) (citation omitted).

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

Rule 23(a) sets forth four requirements applicable to all class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Each of these requirements is met here.

Numerosity. Based on data from the Plan's recordkeepers, there are over 500,000 Settlement Class members, though not all Plan participants invested in the Challenged Funds. Based on documents produced in discovery, Plaintiffs estimate that at least 400,000 Settlement Class members invested at least one Challenged Funds and this far exceeds the threshold for numerosity. *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 569 (D. Minn. 2014) ("*Krueger I*") (finding numerosity exists where a plan had 10,000 participants); *Figas v. Wells Fargo & Co.*, 2010 WL 2943155, at *4 (D. Minn. Apr. 6, 2010) (finding numerosity exists for claims involving the exact same Plan at issue here); *see also Ark. Educ. Assoc. v. Bd. of Educ.*, 446 F.2d 763, 765–66 (8th Cir. 1971) (approving class of twenty members).

Commonality. A common issue of law or fact that is sufficient to satisfy Rule 23(a)(2) is one that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Krueger I*, 304 F.R.D. at 569 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Plaintiffs' fiduciary claims meet the commonality requirement because "the appropriate focus" for a breach of fiduciary duty claim is "the conduct of the defendants,

not the plaintiffs." *Tussey v. ABB, Inc.*, 2007 WL 4289694, at *4 (W.D. Mo. Dec. 3, 2007) (quoting *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 209 (W.D. Mo. 2006)).

Here, as in other ERISA cases, there are numerous common questions of fact and law that turn on Defendants' uniform conduct with respect to all Settlement Class memberss, including: (a) whether the EBRC Defendants are ERISA fiduciaries; (b) whether the fiduciary process employed by the EBRC Defendants when they selected and maintained the Challenged Funds was consistent with ERISA's fiduciary duties of prudence and loyalty; and (c) whether the EBRC's selection and retention of the Challenged Funds caused the Plan to suffer losses. Accordingly, commonality is satisfied.

Typicality. Rule 23(a)(3) requires that "the claims . . . of the representative parties [be] typical of the claims . . . of the class." The typicality requirement "is generally considered to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal procedure or remedial theory." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982) (citation omitted).

Because a "suit under [29 U.S.C.] § 1132(a)(2) is 'brought in a representative capacity on behalf of the plan as a whole,'" each Plan participant who could bring suit would be asserting the same claim on behalf of the Plan. *Braden v. Wal-Mart Stores*, 588 F.3d 585, 593 (8th Cir. 2009) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985)). Thus, one participant's 29 U.S.C. § 1132(a)(2) claim is not just typical of other participants' claims; they are identical, because all participants are authorized to assert § 1132(a)(2) claims on behalf of the Plan. Alba Conte & Herbert B. Newberg, *2*

Newberg on Class Actions § 4:21 (5th ed.) (due to the "derivative nature of ERISA § 502(a)(2) claims . . . courts regularly certify ERISA cases under Rule 23. . . .") (citation omitted). For these reasons, typicality has been found satisfied in cases asserting similar ERISA claims. *Krueger I*, 304 F.R.D. at 573; *Figas v. Wells Fargo & Co.*, 2010 WL 2943155, at *4 (D. Minn. Apr. 6, 2010) ("Figas's claims are undoubtedly typical."); *Pizarro v. Home Depot, Inc*, 2020 WL 6939810, at *10 (N.D. Ga. Sept. 21, 2020) (1132(a)(2) claims typical of the class); *Moreno v. Deutsche Bank Ams. Holding Corp.*,, 2017 WL 3868803, at *7 (S.D.N.Y. Sept. 5, 2017) (typicality satisfied because ERISA fiduciary "claims arise from the same course of events—their participation in the Plan").

Adequacy. Rule 23(a)(4) focuses on "whether the class representatives will vigorously prosecute the interests of the class through qualified counsel" and whether "the class representatives have common interests with the members of the class." *Paxton*, 688 F.2d at 562–63 (citations omitted). Thus, this inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citation omitted).

Plaintiffs have no interests that are antagonistic with each other, the proposed Settlement Class members, or any segment thereof. Rather, their interests are entirely aligned. Plaintiffs, like all Settlement Class members, are participants in the Plan and seek plan-wide relief for Defendants' alleged breaches of fiduciary duty. Moreover, each Plaintiff has demonstrated their willingness and ability to vigorously prosecute this action by having already responded to Defendants' written discovery and testifying at deposition, and they understand their responsibilities in serving as class representatives. Yau Decl.

¶ 30. *Rozo*, 2017 WL 2292834, at *4 (holding ERISA participant adequate class representative based upon commitment to the litigation as shown by "producing documents, cooperating with counsel, attending depositions, and responding to interrogatories") citing *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 613 (8th Cir. 2017).

Class Counsel are experienced ERISA litigators. These lawyers and their respective firms have decades of experience in successfully handling ERISA class actions and class actions generally. They have litigated several ERISA class actions involving improper and imprudent 401(k) Plan investments and have served as lead counsel or co-lead counsel for numerous ERISA classes alleging breaches of defendants' fiduciary obligations. Further details about the lawyers and their firms are provided in the firm resumes attached to the Yau Declaration as Exhibits 3 – 5.

Because the Settlement satisfies Rule 23's requirements, the Court should conditionally certify the Settlement Class.

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

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

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

> individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re IKON Office Sols., Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). The claims here satisfy Rule 23(b)(1)(A) and (B) based on ERISA's distinctive "representative capacity" for claims seeking plan-wide relief under 29 U.S.C. § 1132(a)(2), and because the remedy will necessarily affect the participants in the Plans and the Plans' fiduciaries. Because an ERISA fiduciary in this type of case must treat plan participants uniformly, courts have certified classes under Rule 23(b)(1)(A) given that "allowing individual actions to proceed could subject the fiduciaries to differing standards of duty." *Sweda v. Univ. of Penn.*, 2021 WL 2665722, at *4 (E.D. Pa. June 29, 2021) (citation omitted). Additionally, "[b]ecause [D]efendants' alleged mismanagement of the Plan is the same as to all Plan participants, resolution of one action against one Plan participant would necessarily affect the resolution of any concurrent or future actions by other Plan participants"; most courts that have certified ERISA class actions have done so under Rule 23(b)(1)(B). *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 165 & n.17 (S.D.N.Y. 2017) (listing commonly cited cases) (citation omitted).

For this reason, courts in and out of the Eighth Circuit have found certification of 29 U.S.C. § 1132(a)(2) claims under Rule 23(b)(1) particularly appropriate. *Krueger I*, 304 F.R.D. at 576 ; *Leber*, 323 F.R.D. at 165 (S.D.N.Y. Nov. 27, 2017) (listing commonly cited cases). Indeed, ERISA claims against plan fiduciaries are recognized as "paradigmatic

examples of claims appropriate for certification as a Rule 23(b)(1) class." Alba Conte & Herbert B. Newberg, *2 Newberg on Class Actions* § 4:21 (5th ed.) (citation omitted). See also *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. at 453 ("ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class," and citing cases holding same) (citation omitted).

Moreover, because Plaintiffs' claims are brought under 29 U.S.C. § 1132(a)(2) for relief to the Plan as a whole, the claims should be certified under Rule 23(b)(1) as a non-opt out class. For this reason, Plaintiffs are not seeking to certify the Settlement Class under Rule 23(b)(3), which would allow opt-outs. As noted in *Leber*, if a class is eligible for certification under both (b)(1) and (b)(3), courts find that Rule 23(b)(1) controls. 323 F.R.D. at 165. The court noted that to hold otherwise would "directly contravene the stated purposed of Rule 23(b)(1)(B) and could open the door to separate litigation by individual members of the class." *Id*. (citation omitted). ERISA class actions settlements are routinely certified under Rule 23(b)(1) as non-opt out classes. *See, e.g.*, *Krueger II*, 2015 WL 7596926; *Figas v. Wells Fargo*, 0:08-cv-4546, ECF 262 (D. Minn. March 31, 2011).

3. In the Alternative, the Proposed Settlement Class Satisfies Rule 23(b)(2)

In the alternative, to the extent that the proposed Settlement Class does not satisfy either Rule 23(b)(1)(A) or (B), the proposed class satisfies Rule 23(b)(2). Rule 23(b)(2) authorizes class action treatment if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Here, Plaintiffs alleged that Defendants' breaches applied to the Settlement Class as a whole. Additionally, since the

calculation of relief will be mechanical and formulaic, and done by a computer, this case is appropriate for certification pursuant to Rule 23(b)(2). *See, e.g.*, *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (certifying ERISA class action under 23(b)(2), noting that where "calculation of monetary relief [is] mechanical, formulaic . . . not for a trier of fact but for a computer program," class can be certified under Rule 23(b)(2)).

C. The Court Should Approve the Class Notification Procedures and Schedule a Fairness Hearing

1. The Proposed Notice Program Meets the Requirements of Due Process.

Upon preliminary approval and certification of a settlement class, Rule 23 requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified with reasonable effort." Rule 23(c)(2)(B). *See also* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11:53 at 167 (4th ed. 2002) (notice is "adequate if it may be understood by the average class member"). However, it is important to note that a class notice "need only satisfy the 'broad reasonableness standards imposed by due process.'" *Petrovic*, 200 F.3d at 1153 (quoting *Grunin*, 513 F.2d at 121). A proposed notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. (*quoting Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950)); *see also Cullan and Cullan LLC*, 2016 WL 5394684, at *7 (approving notice when it was "written in plain English and [was] designed to be read and understood.").

Rule 23(c)(2)(B) also requires individual notice to Settlement Class members who can be identified through reasonable effort. *See Manual For Complex Litig.* (Fourth), § 21.311, at 292 (2004) (individual notice generally is preferable); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978). However, this standard is flexible depending on the circumstances, the size of the class, and the cost of providing notice as compared to the overall settlement fund. *See McKinney v. U.S. Postal Serv.*, 292 F.R.D. 62, 66-68 (D. D.C. 2013) (discussing the flexible notice requirements under Rule 23); *Lee v. Enter. Leasing Co.-W.*, 2014 WL 4801828, at *2 (D. Nev. Sept. 22, 2014) ("Under this 'best notice practicable' standard, courts retain considerable discretion to tailor notice to the relevant circumstances . . . ."); *see also* Alba Conte & Herbert B. Newberg, *2 Newberg on Class Actions* § 4:35, at 309 ("When identification of class members for notice purposes poses a complex problem from a manageability perspective, then such members cannot be reasonably identified within the meaning of Rule 23(c)(2) and are not entitled to individual notice.").

The Eighth Circuit and courts within it have found notice programs using email notice to constitute the best notice practicable under the circumstances and thus consistent with under Rule 23. *Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 905 (8th Cir. 2018) (holding that a notice plan that included social media campaign, radio advertising, email notices, direct mailings, and posters was reasonable and affirming district court holding that notice plan satisfied Rule 23 and was as the best practical notice under the circumstances). *See also Khoday v. Symantec Corp.*, 0:11-cv-00180, ECF 400 (D. Minn. Oct. 8, 2015) (preliminary approval order approving notice program where email notice

was sent to all Settlement Class members except those without emails on file or whose email bounced).

Here, the multi-faceted notice program satisfies the requirements imposed by Rule 23 and the due process requirements of the United States Constitution based on prior court precedent approving similar notice programs.[13] "Courts across the country are adapting with the times, taking steps to maximize the effectiveness of class notice through the use of social media" and other electronic means. *Wade v. Furmanite Am., Inc.*, 2018 WL 2088011, at *7 (S.D. Tex. May 4, 2018) (authorizing email notice and holding "[e]mail is universally hailed as an effective communication tool"). Further support for the proposition that email notice as the primary method of direct notice may be found in the Department of Labor's ERISA regulations entitled "Alternative method for disclosure through electronic media - Notice-and-access" which allows ERISA governed plans to send statutorily mandated plan disclosures to participants by email. 29 CFR § 2520.104b-31(k)(2).

Accordingly, Plaintiffs propose direct email notice to those Settlement Class members for whom the Plan's recordkeeper has an email address. If a Settlement Class

[13] Courts commonly approve notice programs that rely heavily on email notice. *See, e.g.*, *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 13 (D. D.C. 2015) (approving email notice to class members); *In re LivingSocial Mktg. & Sales Prac. Litig.*, 298 F.R.D. 1, 8 (D.D.C. 2013) (approving email notice to 10.9 million class members); *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 132 F. Supp. 3d 707, 711 (D.S.C. 2015) (approving class notice by email and text message); *Vega v. Point Sec., LLC.*, 2017 WL 4023289, at *4 (W.D. Tex. Sept. 13, 2017) ("[I]n the world of 2017, email and cell phone numbers are a stable, if not primary, point of contact for the majority of the U.S. population, and thus that using email and texts to notify potential class members is entirely appropriate.").

member does not have an email address, or if the Settlement Administrator receives a notification that a Class Notice sent via email was undeliverable, then the Settlement Administrator will re-send the Class Notice via U.S. Mail after running the Settlement Class member's address on file through the National Change of Address Database. Additionally, if a Class Notice is returned with a corrected address provided by USPS, then the Class Notice will be re-mailed to the corrected address.

The proposed notice program also includes publication of a short-form notice in *USA Today* and distribution to thousands of other news and media outlets via a *PR Newswire* Press Release, which distributes to 5,400 traditional media outlets (TV, radio, newspaper, and magazine) and 4,000 national websites. A list of the media outlets to whom the short-form notice will be distributed is attached as Exhibit 4 to the Declaration of Richard Simmons. Publication notices are routinely found by courts to be a proper means to supplement a direct notice program and satisfy Rule 23 and due process. *See e.g.*, *Manual For Complex Litig.*, (Fourth) § 21.311, at 288 (2004) ("Publication in magazines, newspapers, or trade journals may [be used] . . . as a supplement to other notice efforts."). The short-form notice is attached as Exhibit C to the Proposed Order.

Finally, under the notice program the Settlement Administrator will create a dedicated settlement website that provides the Class Notice, the Settlement Agreement, the Plan of Allocation and all Settlement pleadings and documents filed in this Action. Courts have found that establishing a website is an appropriate component of providing notice to the class. *See, e.g.*, *Krueger II*, 2015 WL 7596926, at *5 (order approving website notice as one feature of the notice plan); *Figas v. Wells Fargo & Co.*, No. 0:08-cv-4546, ECF 294

(D. Minn. Aug. 9, 2011) (order approving settlement, noting website included as feature of notice plan). *See also Schwarm v. Craighead*, No. 2:05-cv-01304, ECF 260 (E.D. Cal. July 8, 2011) (order approving website notice as one feature of the notice plan); *Adoma v. Univ. of Phoenix, Inc.*, 2010 WL 4054109, at *3 (E.D. Cal. Oct. 15, 2010) (website sufficient for providing case documents and contact information and consistent with Federal Judicial Center's model class notice).

Thus, the notice program proposed by Plaintiffs satisfies the requirements imposed by Rule 23 and the due process clause of the United States Constitution. In fact, based on the experience of Analytics, LLC (the proposed Settlement Administrator), this notice program is expected to reach most Settlement Class members, and is expected to fall well within the targeted range for "reach," which is 70% to 95% of the Class. Declaration of Richard Simmons ¶¶ 41-42 citing *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* at 3, Fed. Jud. Ctr. (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

2. The Class Notice Provides All Appropriate Information to the Settlement Class

The Class Notice provides appropriate information about the Settlement and Settlement Class members' rights as required by Rule 23. The Class Notice will provide information to the Class regarding, among other things: (1) the nature of the claims; (2) the definition of the Class; (3) the terms of the Settlement; (4) the process for completing Rollover Forms (Former Participants only); (5) Settlement Class members' right to object to the Settlement and the deadline for doing so; (6) the Class release; (7) the identity of

Class Counsel and the amount of attorneys' fees they will seek in connection with the Settlement; (8) the requested Class Representatives' compensation; (9) the date, time and location of the Fairness Hearing; and (10) Settlement Class members' right to appear at the Fairness Hearing. *See* Class Notice, Ex. A to Proposed Order.

Additionally, the Class Notice will direct Settlement Class members to the Settlement website for more information and provide as telephone them with a telephone line where individuals can learn more about their rights and responsibilities in the litigation and to talk to a live agent. Together, the Class notification procedures provide the Settlement Class with the essential information about the Settlement and all information required by Rule 23 to inform the Settlement Class members of their rights and deadlines to act. Yau Decl. ¶ 14-16.

3. The Court Should Set Settlement Deadlines and Schedule a Fairness Hearing

Plaintiffs also request that the Court set a final approval hearing date, dates for emailing or mailing the Class Notice, and deadline for objecting to the Settlement Agreement and filing papers in support of the Settlement. The Named Plaintiffs propose the following schedule:

Action	Timing	Citation
Deadline for Defendants to deposit $32.5 million in Qualified Settlement Fund with Escrow Agent	21 days after entry of this Order	SA § 3.7
Last day for Settlement Administrator to provide initial distribution of email and U.S. Mail Notices	30 days after entry of this Order	Prelim App. Order

Settlement Administrator to establish Settlement website	approximately 30 days after entry of this Order	
Independent Fiduciary Report to Parties	21 days prior to Class Counsel filing Final Approval Motion (i.e., 62 days prior to Fairness Hearing)	SA § 3.4
Last day for Class Counsel to file motion in support of fees, costs, and Expense Award	21 days prior to Deadline for Objections (i.e., 41 days prior to Fairness Hearing)	SA § 11.1
Last day for Class Counsel to file Final Approval Memo	21 days prior to Deadline for Objections (i.e., 41 days prior to Fairness Hearing)	SA § 3.2.6
Deadline for Objections and deadline for notice to be filed to speak at Fairness Hearing	20 days prior to the Fairness Hearing	SA § 3.2.1(d)
Deadline for Former Participants to submit Former Participant Rollover Forms	20 days prior to the Fairness Hearing	Prelim. App. Order
Deadline for the Parties to file a response to Objections	10 days prior to Fairness Hearing	SA § 3.2.1(e)
Fairness Hearing[14]	Entry of Preliminary Approval + 100 days	suggested time frame

[14] Under the Class Action Fairness Act ("CAFA"), the Fairness Hearing may not occur sooner than 90 days after the CAFA notices are sent. Here because the CAFA notices will be sent by latest April 11, 2022, the Fairness Hearing can occur any time after July 10, 2022. The proposed CAFA Notice is attached as Exhibit B to the Proposed Order Preliminarily Approving Class Action Settlement. Please note that the exhibit numbers in the proposed CAFA Notice do not match the exhibit numbers in Plaintiffs' filings for preliminary approval of Class Settlement.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the proposed Settlement; (2) provisionally certify the proposed Settlement Class; (3) appoint the Named Plaintiffs as Settlement Class Representatives and the undersigned attorneys as Settlement Class Counsel; (4) approve the proposed notice program and form of Class Notice and the short-form notice; and (5) schedule the final Fairness Hearing and related deadlines.

Dated: April 1, 2022

By: */s/ Michelle C. Yau*

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, a copy of the foregoing was filed electronically via the Court's ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to the following attorneys of record:

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