UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Judy Larson, Janelle Mausolf, and Karen Reese, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Allina Health System; the Allina Health System Board of Directors; the Allina Health System Retirement Committee; the Allina Health System Chief Administrative Officer; the Allina Health System Chief Human Resources Officer; Clay Ahrens; John I. Allen; Jennifer Alstad; Gary Bhojwani; Barbara Butts-Williams; John R. Church; Laura Gillund; Joseph Goswitz; Greg Heinemann; David Kuplic; Hugh T. Nierengarten; Sahra Noor; Brian Rosenberg; Debbra L. Schoneman; Thomas S. Schreier, Jr.; Abir Sen, Sally J. Smith; Darrell Tukua; Penny Wheeler; Duncan Gallagher; Christine Webster Moore; Kristyn Mullin; Steve Wallner; John T. Knight; and John Does 1–20,

Defendants.

Civil Action No.: 17-3835-SRN-SER

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; CERTIFICATION OF SETTLEMENT CLASS; APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL; APPROVAL OF NOTICE TO SETTLEMENT CLASS; AND APPROVAL OF PLAN OF ALLOCATION

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Named Plaintiffs Judy Larson, Janelle Mausolf, and Karen Reese (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby submit this Memorandum of Law in support of their Motion for Final Approval of Class Action Settlement. Plaintiffs' accompanying motion seeks an Order: 1) approving the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") under FED. R. CIV. P. 23(e); (2) certifying a Settlement Class; (3) appointing Named Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding that the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and adequately informed Settlement Class members of the terms of the Settlement, how to lodge an objection and obtain additional information; and (5) approving the Plan of Allocation.

I. INTRODUCTION

On November 21, 2019, the Court preliminarily approved the Settlement in this Action, which provides for the creation of a $2.425 million Settlement Fund.[1] The Court's Preliminary Approval Order also, *inter alia*, conditionally certified a Settlement Class and appointed the Named Plaintiffs as class representatives and Kessler Topaz Meltzer & Check LLP, Bailey & Glasser LLP, Izard Kindall & Raabe LLP, and Nichols Kaster, PLLP as Class Counsel. *See* ECF 99. Plaintiffs and Class Counsel believe each of these findings in the Preliminary Approval Order should be made final because the proposed Settlement

[1] The Settlement Agreement was previously submitted as Exhibit 1 to the Declaration of Mark K. Gyandoh in support of Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement Agreement [ECF 96-1]. Undefined capitalized terms herein have the same meaning as in the Settlement Agreement.

represents an outstanding recovery.

In particular, the Settlement represents more than 30% of the Settlement Class's potential damages, as determined by Class Counsel. Importantly, it eliminates the numerous, substantial risks, expenses and potential delays that would lay ahead if the Parties continued to prosecute this case. Class Counsel achieved this Settlement only after extended negotiations involving multiple telephonic and written communications over several months between counsel for both Parties. Without doubt, the Settlement was negotiated at arm's-length by experienced counsel on both sides.

The Settlement Class has received full and fair notice of the terms of the Settlement through individualized direct mail and a dedicated internet Settlement website, in accordance with the Class Notice Plan.[2] After mailing the approved form of Notice to 69,558 Class Members, Class Counsel have thus far received only four (4) objections. These objections do not challenge the fairness or reasonableness of the Settlement, only the request for attorneys' fees.[3] As set forth in detail below, all prerequisites for approval of the Settlement have been met, and it is the opinion of proposed Class Counsel that this Settlement merits final approval.

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[2] Additionally, Defendants mailed the CAFA notice on December 6, 2019, and have received no objections to date.

[3] The four objections disapprove of, without legal or factual support, the amount of attorneys' fees being sought. Plaintiffs address these objections briefly below and in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Case Contribution Awards to the Named Plaintiffs ("Fee Memo" or "Fee Memorandum"). These objections, as well as any others that are filed before the objection deadline of March 16, 2020, will be addressed fully by Class Counsel by the deadline of March 30, 2020, which is set forth in the Preliminary Approval Order. *Id*. at ¶ 10.

Accordingly, Plaintiffs respectfully request that this Court enter the proposed Judgment Approving Class Action Settlement.

II. SUMMARY OF CLAIMS

This case was filed pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") on behalf of the Allina 401(k) Plan and the Allina 403(b) Plan (collectively, the "Plans"). In particular, Plaintiffs allege that Defendants violated ERISA §§ 404 and 406, 29 U.S.C. §§ 1104, 1106 by *inter alia*, entering into an agreement with Fidelity Management Trust Company ("FMTC") by which FMTC could select the investments available to participants in the Plans without assuming fiduciary responsibility for those selections. As a result, Plaintiffs allege FMTC larded the Plans with hundreds of options, either provided by a Fidelity affiliate or which provided FMTC with a kickback on the management fees, instead of making selections based on whether the fund was a prudent investment option. Plaintiffs further alleged that Defendants did not adequately monitor investment management, recordkeeping and other fees charged to participants in the Plans, such that participants paid excessive fees. Defendants deny any liability or wrongdoing.

III. LITIGATION HISTORY AND SETTLEMENT NEGOTIATIONS

A. <u>The Action</u>

Following eight months of investigation, Plaintiffs filed the Complaint on August 18, 2017, bringing claims against Defendants for breaches of their fiduciary duties to manage the Plans' assets prudently and loyally (Count I), failure to adequately monitor other fiduciaries (Count II), and failure to provide disclosures to participants regarding fees charged to them (Count III). ECF No. 1.

Following an unsuccessful meet and confer held pursuant to Local Rule 7.1(a), Defendants filed a motion to dismiss the Complaint on December 15, 2017. ECF Nos. 28, 32. Defendants moved to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and (6), claiming that Plaintiffs did not have standing to challenge the mutual fund window used by the Plans and that they failed to state a claim for breach of fiduciary duties under ERISA for all other funds. ECF No. 30. On January 29, 2018, Plaintiffs filed their opposition to the motion to dismiss. ECF No. 43. On February 28, 2018, Defendants filed a reply in support of their motion to dismiss. ECF No. 45. Subsequently, both Parties filed notices of supplemental authority in support of their respective positions. ECF Nos. 48, 58, 61, 64, 69.

The Court heard oral argument on Defendants' motion to dismiss on May 3, 2018. On October 1, 2018, this Court issued an opinion and order granting in part and denying in part Defendants' motion. This Court held that Plaintiffs had failed to state a claim as to the breaches of fiduciary duty except with regard to Plaintiffs' claims that Defendants may have breached their fiduciary duties by: 1) allegedly allowing FTMC to select higher cost affiliated funds over identical, but lower-cost K-asset class funds; 2) allegedly failing to obtain less expensive recordkeeping fees, including failing to attempt to renegotiate the fees for a number of years; and 3) allegedly allowing "revenue sharing" with non-FTMC mutual funds in the Plans' core options and mutual fund window. This Court did not summarily dismiss Plaintiffs' claim for failure to monitor other fiduciaries to the extent Plaintiffs had plausibly alleged that Defendants breached their fiduciary duties. This Court also did not summarily dismiss the disclosure claim to the extent Plaintiffs had plausibly alleged that Defendants simply described charges to participants' account as "fees." ECF No. 71.

Defendants answered the Complaint on November 29, 2018. ECF No. 76. On December 12, 2018, the Parties held a Rule 26(f) meeting and filed a Joint Report of that meeting on January 2, 2019. ECF No. 77. The Parties then attended a Rule 16(f) conference on January 8, 2019 before Judge Leung. The following day, Judge Leung issued a pretrial scheduling order that included dates for filing initial disclosures pursuant to FED. R. CIV. P. 26(a)(1), filing a stipulated protective order, and a schedule for submitting confidential letters with the Court detailing the status of the case, including any settlement prospects. Pursuant to the scheduling order, the Parties filed a Stipulation for Protective Order on January 25, 2019, which was entered by the Court on February 4, 2019, and exchanged initial disclosures on February 1, 2019. Additionally, Plaintiffs submitted three confidential status letters to Judge Leung in February, April and July.

B. <u>Settlement Negotiations</u>

Settlement discussions began in earnest on November 1, 2018, when Plaintiffs' counsel submitted a written settlement demand to counsel for Defendants. *See* Gyandoh Decl.[4] at ¶ 7. Thereafter, over the next five months counsel for Plaintiffs and Defendants

[4] Declaration of Mark K. Gyandoh on Behalf of Class Counsel in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement; Certification of Settlement Class; Appointment of Class Representatives and Class Counsel; Approval of Notice to Settlement Class; and Approval of Plan of Allocation, and in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards for the Class Representatives.

engaged in extensive telephonic and e-mail discussions concerning settlement. *Id.* In connection with their settlement negotiations, the Parties exchanged information regarding their views on the merits, strengths, and weaknesses of the Action, risks of litigation, and available insurance. *Id.* On April 5, 2019, the Parties agreed to the Settlement in principle. *Id*. at ¶ 10. Several weeks of negotiations followed to finalize the terms of the Settlement Agreement. The Settlement Agreement was finally executed in October 2019.

IV. THE SETTLEMENT AGREEMENT

A. <u>The Settlement Fund</u>

The Settlement resolves all claims of current and former participants in the Plans since August 17, 2011. *See* Settlement Agreement, §§ 1.10 and 1.40. To effectuate the Settlement, Defendants agreed not to oppose the certification of the "Settlement Class," defined as "all participants and beneficiaries of the Plans during the Class Period, excluding Defendants and their Immediate Family Members to the Action." *See id.* at § 1.40.

Under the Settlement, Defendants will contribute $2.425 million to the Settlement Fund. *Id*. at § 7.2. The Settlement Fund will be used to pay the costs to administer the Settlement, to provide notice to Settlement Class members and to pay any attorneys' fees, expenses and Case Contribution Awards that the Court may order. *Id.* at §§ 8.1.1, 8.1.4, 8.2.1, 8.2.2, and 8.2.3. The Settlement Fund, up to the amount of $25,000, will also be used to pay the costs of an Independent Fiduciary who, upon review of the Settlement, will approve and authorize the Settlement in a writing to be submitted to the Court by March 27, 2020. *Id.* at §§ 2.6, 8.1.3. Defendants will be responsible for any fees of the Independent Fiduciary in excess of $25,000. *Id*. at § 8.1.3.

After the payment of costs, expenses and fees described above, the Settlement Fund will be distributed to Settlement Class members. *Id*. at § 8.2.3. Settlement Class members will not have to make a claim to receive their share of the Settlement Fund. The amount distributed to each Settlement Class member will be *pro rata*, based on account balances, a proxy for the alleged losses, as fully described in the Plan of Allocation attached to the Settlement Agreement. *Id*. at Exhibit C. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section C is less than ten dollars ($10.00) shall receive a payment of ten dollars ($10.00). Plan of Allocation at Section D.

Current participants will receive their share of the Settlement Fund through an electronic distribution to their Plan account. *Id*. at Section E. Former participants whose Final Dollar Recovery is determined to be over two hundred dollars ($200.00) will have the option to elect a rollover to a designated retirement account. Otherwise, they and those former participants whose Final Dollar Recovery is determined to be less than two hundred dollars ($200.00) will receive a check mailed to their last known address that expires in one hundred and eighty (180) days. *Id*. at Section F. If any checks to former Plan participants are uncashed, the money shall be forwarded to the Plans' Trust for purposes of defraying administrative fees and expenses of the Plans that would otherwise have been charged to the Plans' participants. *Id.* at Section I.

B. <u>Released Claims</u>

Plaintiffs and Settlement Class members will provide a release and covenant-not-to-sue to Defendants and the other Released Parties covering the claims that were or could have been asserted in the Action based on the facts alleged in the Complaint filed in this case or Defendants' defenses to the Plaintiffs' claims. *Id*. at §§ 3 and 4.5. The release and covenant-not-to-sue in the Settlement does not encompass individual claims for vested benefits that are otherwise due under the terms of the Plans.

C. Case Contribution Awards, Attorneys' Fees and Costs

The Settlement provides that Class Counsel may apply to the Court for an award to Class Counsel, of attorneys' fees and reimbursement of expenses, to be paid solely from the Settlement Fund. *Id*. at § 10.1. Class Counsel also may apply to the Court for Case Contribution Awards for the Class Representatives for their contributions to the Action, and the Class Representatives shall be entitled to receive such compensation from the Settlement Fund to the extent awarded by the Court. *Id.* As noted above, Class Counsel is filing their Fee Memorandum concurrently with this motion. Pursuant to the common fund doctrine, as explained therein, and as the Class Notice advised Settlement Class members Class Counsel would do, Class Counsel is seeking Court approval of one-third of the Settlement Amount (33¹/₃%), which is $808,252.50. The Class Notice also stated that Class Counsel would seek up to $50,000 for reimbursement of expenses. However, Class Counsel is seeking $12,413.78 in expenses.

V. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

Pursuant to the Preliminary Approval Order, Class Counsel has overseen the issuance of the Court-approved Class Notice. The March 6, 2020 Declaration of Jennifer M. Keough Regarding Notice Administration ("JND Declaration"), filed contemporaneously herewith on behalf of the Settlement/Notice Administrator, JND Legal

Administration LLC ("JND"), demonstrates compliance with this Court's Order for dissemination of Class Notice. Among other things, the JND Declaration attests to the mailing of 69,558 individual Class Notices to Settlement Class members, wherein March 16, 2020, was established as the deadline for objecting to the proposed Settlement and Plaintiffs' motion for attorneys' fees and other relief. Of the 69,558 Class Notices sent, only 2,876 remain undeliverable meaning the Class Notice has been successfully delivered to approximately 95.87% of the Settlement Class. JND Declaration, ¶ 8. Of note, the instant filing (as well as the Fee Memorandum) is being made in advance of the deadline to object.

The Class Notice was also posted on a dedicated website – www.AllinaERISASettlement.com – through which the Plans' current and former participants could (i) view a summary description of the Action and the status of the Action, and (ii) access the Settlement Agreement and related Settlement documents. *See* JND Declaration at ¶ 9. As of the date of this submission, the Settlement website has tracked 2,765 unique users who registered 6,023 page views. *Id.* at ¶ 10.

Where, as here, a notice program includes direct mail notice to absent class members and is supplemented by a settlement website and a toll-free telephone number, this constitutes the "best notice practicable." *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 946 (D. Minn. 2016) (citations omitted). Indeed, the Court previously found the combination of the direct-mail Class Notice and dedicated Settlement website and phone number was adequate to inform Settlement Class members of the terms of the proposed

Settlement and how to lodge an objection, and obtain additional information. *See* Preliminary Approval Order, ¶ 7.

VI. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Legal Standard

To grant final approval of a settlement, a court must determine that a settlement is "fair, reasonable and adequate." *In re Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013). The Eighth Circuit directs courts to consider the following factors in evaluating if it should approve a class action settlement:

> (1) the merits of the plaintiff's case weighed against the terms of the settlement; (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 (8th Cir. 2005). A district court has broad discretion in assessing the weight and applicability of these factors. *Prof. Firefighters Ass'n of Omaha Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). As set forth below, the Settlement is fair, reasonable and adequate and should be granted final approval.

B. The Settlement is Fair, Reasonable, and Adequate

1. The Merits of the Case Weigh In Favor of the Terms of the Settlement

The merits of Plaintiffs' case are the most important consideration in deciding whether a settlement is fair, reasonable, and adequate. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999). The first step in determining if a settlement is fair is analyzing the strength of the plaintiff's case to establish the value of class members' claims. "This is not a simple mathematical exercise with definite outcomes; a 'high degree of precision cannot be expected in valuing a litigation.'" *Hashw*, 182 F. Supp. 3d at 943 (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Courts perform a "ballpark valuation." *Synfuel Techs.*, 463 F.3d at 653.

Here, following dismissal of several of the Complaint's claims, Class Counsel determined maximum potential damages to the Plans of $8 million. Gyandoh Decl. at ¶ 8. Accordingly, the Settlement Amount of $2.425 million is approximately 30.3% of what Class Counsel determined to be the Settlement Class's maximum potential damages. This percentage, in and of itself, is reasonable and warrants final 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).

The $8 million figure is based in large part in alleged kickbacks on investment fees that FTMC received from non-affiliated investment managers. Gyandoh Decl. at ¶ 8. It should be noted, however, that Defendants produced documents that suggest that these monies actually offset recordkeeping and other charges to the Plans, which would reduce the potential full damages figure by at least $4 million. If Defendants' argument in this regard prevailed at trial, the damages would be substantially less. Indeed, the Settlement represents over ***60%*** of the Class's remaining damages (as determined by Class Counsel) in that scenario—a percentage that compares favorably to comparable cases where settlements were approved. *See*, *e.g.*, *Urakchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 3000490, *4 (C.D. Cal. Feb. 6, 2018) (granting preliminary approval to settlement that represented 25.5% of plaintiffs' losses) and Docket Entries 185 and 186 (final approval order and judgment of that settlement).

In considering the Settlement's fairness, a court must consider the challenges that plaintiffs would face in prevailing on their claims. *See, e.g.*, *Ramsey v. Sprint Comm. Co., L.P.*, 2012 WL 6018154, at *3 (D. Neb. Dec. 3, 2012). In doing so, a court "does not try the case," but instead identifies the disputed factual and legal issues that make it less likely for the plaintiffs to receive a full recovery. *Id*. (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). "If the plaintiff class faced a strong unlikelihood of success, or an initial defeat followed by another round at the appellate level, virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation." *Ramsey*, 2012 WL 6108154, at *3 (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995)).

Here, Plaintiffs faced significant hurdles to recovering their maximum damages, no matter what the figure. As an initial matter, their maximum damages figure is contingent on the Court certifying a class. While courts have certified classes in similar ERISA cases (*see*, *e.g.*, *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017)), class certification is not guaranteed. *See, e.g.*, *Powers v. Credit Mgmt. Servs.*, 776 F.3d 567, 570 (8th Cir. 2015) ("'Rigorous analysis is necessary" for a class to be certified). Defendants would be expected to oppose class certification on a number of grounds.

Plaintiffs would also face challenges in proving their claims. Breach of fiduciary duty claims under ERISA depend on the process by which decisions were made rather than the results of those decisions. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir.

2009). The Plans' investment decisions were made by the Allina Health System Retirement Committee ("Committee"). Defendants maintain that the process by which the Committee approved FTMC's investment selection meets the requirements of ERISA. Further, Defendants maintain that discovery would have shown that recordkeeping fees were renegotiated several times over the past decade. While Plaintiffs disagree with Defendants positions, these disputed issues support the Settlement's approval. *See, e.g.*, *Cooper v. Integrity Home Care, Inc.*, 2018 WL 3468372, at *2 (W.D. Mo. July 18, 2018) ("A settlement is bona fide if it reflects a reasonable compromise over issues actually in dispute.").

If Plaintiffs established that Defendants breached their fiduciary duty, proving damages would not be a given. As set forth above, the $8 million damages amount was a "best case" scenario, as determined by Class Counsel, a number that Defendants would try to minimize if not eliminate at the summary judgment stage or at trial. For example, in addition to claiming that the revenue sharing of non-affiliated investment options offset fees that otherwise would have been charged to the Plans, Defendants would also claim that that any damages from failing to properly identify the fees charged to participants in the Plans on their quarterly statements are minimal.

The proposed Settlement here is the result of lengthy, contentious and complex arm's-length negotiations between the Parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. In light of the uncertain and high-stakes backdrop, the proposed Settlement is an exceptional result for the Settlement Class. Indeed, plaintiffs in two recent analogous breach of fiduciary actions have survived a motion to dismiss only to lose at trial. *See Wildman, et al.*, *v. Am. Century Servs.*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. NYU*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

2. Defendants' Financial Condition

Allina Health System is a large company with enough assets to pay the Settlement. Accordingly, Plaintiffs did not discount the amount of the Settlement based on Defendants' ability to pay. Gyandoh Decl. at ¶ 10. This factor supports the Court's final approval of the Settlement. *See, e.g.*, *Cooper*, 2018 WL 3468372, at *4; *In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d at 933 (affirming approval of settlement because "there is no indication that (defendant's) financial condition would prevent it from raising the settlement amount.").

3. Complexity and Expense of Further Litigation

"The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement should be approved." *In re Charter Commc'ns, Inc. Sec. Litig.*, 2005 WL 4045741, at *8 (E.D. Mo. June 30, 2005). This factor supports the Settlement's approval.

Without settlement, the Action would proceed with additional motions relating to class certification and then into merits discovery, and summary judgment, as well as a trial and a possible appeal. Each stage will take time and, importantly, present additional risks that the Plaintiffs and Settlement Class members will receive less than the $2.425 million that they are now being offered.

The Settlement provides money to the Settlement Class ***now***, instead of years in the future ***if*** the Plaintiffs prevail on their claims. 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). It is not unusual for ERISA "fee" cases to last for a decade or longer. *See, e.g.*, *Tussey v. ABB, Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings on amount of damages more than 10 years after the suit was filed); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed in 2007). The potential for protracted litigation supports the Settlement's approval. *See also Cullan and Cullan LLC v. M-Qube, Inc.*, 2016 WL 5394684, *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…").

Plaintiffs would also incur considerable expenses if this case continued. To prove their claims, Plaintiffs would need to depose several Committee members and FTMC employees. These depositions, including the costs of transcripts and travel, would be expensive and reduce the net amount of Class's recovery. *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (granting final approval, noting that "early settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways.").

In addition, Plaintiffs would incur expenses related to expert testimony, as they would need to retain experts on: (a) what is a prudent process for an ERISA fiduciary; (b) whether a prudent fiduciary would have allowed for revenue sharing of the type in the

Plans; (c) what are reasonable recordkeeping charges for similarly sized retirement plans; and (d) the amount of damages because of Defendants' fiduciary breaches. If this case continued to trial, Plaintiffs would incur continued expert costs that would reduce the Class's recovery.

4. The Four Objections Received Thus Far Do Not Challenge The Adequacy of the Settlement

The four (4) objections filed so far fall in the same general category and are unrelated to the merits of the Settlement. Each of the objectors ask the Court to award Class Counsel less than the requested attorneys' fees and expenses. *See generally* ECF 101 (objection of Patricia P. Hines); 102 (objection of Randall K. Johnson); 112 (unidentified objector); and 113 (objection of Sharon Atchley). Given the bases for the objections, which do not go to the merits of Settlement terms, Plaintiffs respond to the objections in the Fee Memorandum. Nonetheless, it is plain that the objections lack merit: "In the Eighth Circuit, courts have routinely awarded attorney fees ranging from 25% to 36% of a common fund under the percentage-of-the-fund method." *See Yarrington v. Solvay Pharm.*, *Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (approving attorneys' fees of 33% of the common fund). Class Counsel inarguably achieved a substantial benefit for the Settlement Class (a fact the objectors do not challenge), and the attorneys' fees requested are in line with Eighth Circuit precedent.

C. The Settlement Does Not Have Any Substantive or Procedural Deficiencies

A class action settlement is a private contract negotiated between the parties that is "presumptively valid." *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (internal quotations omitted). "Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion…" *In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d at 934. In doing so, courts look for "glaring substantive or procedural deficiencies" and consider whether the "settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys." *Adams*, 2016 WL 7664135, * 3 (citing *Schoenbaum v. E.I. Dupont De Nemours and Co.*, 2009 WL 4782082, *3 (E.D. Mo. Dec. 8, 2009)).

The Settlement does not contain any deficiencies, glaring or otherwise. Substantively, in simplest terms, the Settlement provides Settlement Class members with money in exchange for a release and a covenant-not-to-sue. Settlement Agreement at §§ 3.2, 3.3, 3.4, and 4.5. As discussed in Section IV above, the monetary amount of the Settlement is fair given the strength and risks associated with Plaintiffs' claims. And, the Settlement's release and covenant-not-to-sue clauses are limited to the claims that arise out of the allegations in the Complaint. Settlement at § 3.3. Settlement Class members are not releasing their rights to vested benefits under the Plans. *Id*.

The Settlement also does not unduly favor the Plaintiffs over other Settlement Class members. Like all Settlement Class members, Plaintiffs' shares of the Settlement will be based on the Plan of Allocation, a formula based on the losses to their Plan account(s). While Class Counsel does request that this Court award Case Contribution Awards of $5,000 to each Plaintiff, the Settlement is not contingent on Plaintiffs receiving such awards (*see* Settlement Agreement at § 8.1.6) and the amount that Class Counsel request is in line with the awards in other cases. *See, e.g.*, *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (affirming decision to give case contribution awards of $10,000 to each of the plaintiffs); *see also Kruger*, 2016 WL 6769066, at *6 (awarding class representatives $25,000 each for their contributions). *See also* Fee Memorandum (listing cases). Likewise, as discussed further in the Fee Memorandum, the Settlement does not excessively compensate Class Counsel. The Settlement is not contingent on Class Counsel receiving a specific amount of fees and any fees they receive will be determined by the Court. Settlement at § 8.1.6.

The Parties reached the Settlement in a procedurally fair manner. For this factor, courts consider the stage of proceedings and amount of discovery completed, the opinion of experienced counsel, and whether the settlement was negotiated at arm's length. *In re Wireless Tel. Fed. Cost Rec. Litig.*, 396 F.3d at 934; *see also Adams*, 2016 WL 7664135, at *3 ("[C]ourts should consider issues such as whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making…"). Class Counsel was fully aware of this case's strengths and weaknesses when negotiating the Settlement, which supports the Settlement's final approval. *See, e.g.*, *King v. Ranieri Constr., LLC et al.*, 2015 WL 631253, at *3 (E.D. Mo. Feb. 12, 2015) (approving settlement when the "parties engaged in settlement negotiations and exchanged a large amount of documents and information for a month before submitting the proposed settlement.").

Class Counsel also has in-depth knowledge of the legal framework applicable to this case. Class Counsel have decades of experience prosecuting, settling, and trying ERISA cases on behalf of retirement plan participants, which they used to evaluate and negotiate the Settlement. Gyandoh Decl. at ¶ 18 and Exhibit 6; *see also* KTMC, Bailey Glasser, Izard Kindall, and Nichols Kaster Declarations. It is Class Counsel's opinion that the proposed Settlement is fair and reasonable, a factor which supports the Settlement's approval. *See, e.g.*, *Netzel v. West Shore Grp.*, 2017 WL 1906955, at *6 (D. Minn. May 8, 2017) (approving settlement when class counsel had "sufficient and extensive experience…").

Because the Settlement was negotiated by experienced counsel, there is a presumption that it was "the product of arm's length negotiations." *Netzel*, 2017 WL 1906955, at *6; *see also Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) ("If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable."). The Settlement was also reached after many rounds of negotiation, which allowed Plaintiffs to increase the Settlement's monetary benefits. Gyandoh Decl. at ¶ 7; *Cullan and Cullan LLC,* 2016 WL 5394684, *7 (approving settlement when it was negotiated "in several rounds of settlement negotiations").

VI. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

"A court must also look beyond the settlement documents and review the plan of allocation to assure it is "'fair and reasonable.'" *Zilhaver v. UnitedHealth Group, Inc.,* 645 F. Supp. 2d 1075, 1080 (D. Minn. 2009) (citation omitted). The proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit C, is premised on calculating a Settlement Class member's distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section C of the Plan of Allocation is less than ten dollars ($10.00) shall receive a payment of ten dollars ($10.00). *See* Plan of Allocation at Section D.

Further, current participants will receive their share of the Settlement Fund through an electronic distribution to their Plan account. *Id*. at Section E. Former participants whose Final Dollar Recovery is determined to be over two hundred dollars ($200.00) will have the option to elect a rollover to a designated retirement account. Otherwise, they and those former participants whose Final Dollar Recovery is determined to be less than two hundred dollars ($200.00) will receive a check mailed to their last known address that expires in one hundred and eighty (180) days. *Id*. at Section F. If any checks to former Plan participants are uncashed, the money shall be forwarded to the Plans' Trust for purposes of defraying administrative fees and expenses of the *Plans* that would otherwise have been charged to the *Plans'* participants. *Id.* at Section I.

The Plan of Allocation treats all Settlement Class members equally such that no Settlement Class member is singled out for either disproportionately favorable or unfavorable treatment. Such plans of allocation have been previously approved in numerous analogous ERISA breach of fiduciary duty actions around the country. *See McDonald v. Edward Jones*, 791 F.App'x 638, 640 (8th Cir. 2020) (affirming judgment that granted final approval to settlement in ERISA action with analogous plan of allocation). Where the Settlement Fund "proceeds will be distributed among class members in proportion to their calculated losses," courts have found this distribution plan to be "fair and reasonable." *Zilhaver,* 645 F. Supp. 2d at 1080.

VII. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

Certification of the Settlement Class in this Action is warranted for numerous reasons. As an initial matter, before entering the Preliminary Approval Order, this Court examined the record and conditionally certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1). *See* Preliminary Approval Order at ¶¶ 1-3. Nothing has changed in the record that would compel the Court to now reach a different conclusion with respect to the final approval of the Settlement Class. Indeed, courts across the country have determined that breach of fiduciary duty claims under ERISA analogous to those at issue in this action are uniquely appropriate for class treatment.[5] Accordingly, Plaintiffs request that the Court make appropriate findings and certify the following Class for settlement purposes only:

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[5] *See, e.g., Henderson, et al. v. Emory Univ*., et al., No. 1:16-cv-02920 (N.D. Ga. Sept. 13, 2018) (certifying class under 23(b)(1)(A) and (B)); *Fuller et al. v. SunTrust Banks, Inc. et al.*, 2018 U.S. Dist. LEXIS 113108 (N.D. Ga. June 27, 2018) (same); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. April 13, 2018) (same); *Sacerdote v. New York Univ.,* 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018) (same); *Troudt v. Oracle Corp., et al.*, 325 F.R.D. 373 (D. Colo. 2018) (certifying class and subclasses pursuant to Rule 23(b)(1)(A)); *Wildman v. Am. Century Servs., LLC,* 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017) (certifying class and subclasses pursuant to Rule 23(b)(1)); *Marshall, et al. v. Northrop Grumman Corp.*, 2017 WL 6888281 (C.D. Cal. Nov. 2, 2017) (certifying class and subclasses pursuant to Rules 23(a) and 23(b)(1)); *Sims v. BB & T Corp*., 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017) (certifying class and subclasses pursuant to Rules 23(a) and Rule 23(b)(1)(A)); *Cryer v. Franklin Templeton Res., Inc.*, 2017 WL 4023149 (N.D. Cal. July 26, 2017) (certifying class and subclasses pursuant to Rule 23(b)(1)); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678 (C.D. Cal. June 15, 2017) (certifying class and subclass pursuant to Rule 23(b)(1)); *Rozo v. Principal Life Ins. Co*., 2017 WL 2292834 (S.D. Iowa May 12, 2017) (certifying class and subclasses pursuant to Rules 23(a) and Rule 23(b)(1)(A)).

> All current and former participants and beneficiaries (excluding Defendants and their Immediate Family Members) of the Allina Health System ("Allina") 403(b) Retirement Savings Plan and the Allina 401(k) Retirement Savings Plan at any time between August 18, 2011 and November 21, 2019.

Moreover, The Supreme Court has acknowledged the propriety of certifying a class solely for settlement purposes. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). As set forth below, Rule 23(a) and (b)(1)'s requirements are easily met and certification of a Settlement Class is thus appropriate.

A. Rule 23(a)'s Requirements are Satisfied

1. Numerosity.

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This threshold is easily met, as the Plans had thousands of participants by the beginning of the Class Period. Indeed, the Class Notice was sent to 69,558 individuals. *See* JND Decl. at ¶ 5; *Speer v. Cerner Corp.*, 2016 WL 5444648, at *5 (W.D. Mo. Sept. 27, 2016) (numerosity met when there were thousands of proposed class members). Accordingly, numerosity is satisfied.

2. Commonality.

In defined contribution plans such as the instant Plans, participants operate against a common background. The fiduciaries make decisions that affect the entire plan and its participants. The allegation that a fiduciary failed to satisfy its fiduciary duties when selecting investment options or defray expenses affects the plan as a whole, not just at the individual level.

Accordingly, "commonality is quite likely to be satisfied" for ERISA breach of fiduciary duty claims, like the ones made here. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 n.11 (3d Cir. 2009). Commonality is typically present in ERISA cases because the "appropriate focus … is the conduct of the defendants, not the plaintiffs." *In re Aquila ERISA Litig.,* 237 F.R.D. 202, 209 (W.D. Mo. 2006) (quoting *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 422 (N.D. Okla. 2005)).

This case is no different than *In re Aquila* and the many others that have found that commonality was met. Plaintiffs' claims center on the Defendants' selection, monitoring and retention of FTMC as administrator and recordkeeper for the Plans, as well as the selection of particular investment funds for the Plans. Defendants' actions affected both Plans in their entirety, not just Plaintiffs' accounts. This satisfies commonality. *Kanawi v. Bechtel*, 254 F.R.D. 102, 109 (N.D. Cal. 2008) ("[T]he common focus is on the conduct of Defendants: whether they breached their fiduciary duties to the Plan as a whole by paying excessive fees, [and] whether they made imprudent investment decisions.").

Plaintiffs must also show that at least one of the questions common to the class can be answered with a common answer, meaning "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." *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2551 (2011) (emphasis added). Here, there are several common questions in this case with respect to each Class member, including: (1) whether Defendants were fiduciaries of the Plans; (2) whether Defendants breached their fiduciary duties to the Plans; (3) whether the Plans and their participants and beneficiaries were injured by Defendants' breaches; (4) whether the Settlement Class is entitled to damages; and (5) if so, the proper measure of damages. Commonality will not be defeated merely because there are some factual variations among the claims of the Settlement Class members. Determining the truth or falsity of those questions "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.

These common questions and issues satisfy the requirement of Rule 23(a). *Krueger v. Ameriprise Fin,, Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014) (certifying class because "the questions of whether Defendants breached their fiduciary duties by causing the Plan to select imprudent investment options …, and whether the Plan suffered losses from those breaches, are common to all Plan participants' claims[.]"); *Tussey*, 2007 WL 4289694, at *5 (certifying class "[b]ecause all members of the class are interested in these excess fees being returned to the Plan, there is clearly a common question …"); *In re Northrup Grumman Corp. ERISA Litig.*, 2011 WL 3505264, at *8 (C.D. Cal. Mar. 29, 2011)(common questions included "whether the Plans' fees and expenses are reasonable; [and] whether the investment options selected by Defendants have been prudent"); *Kanawi*, 254 F.R.D. at 109 (noting common questions regarding whether Defendants' selection of investments "was affected by serious and ongoing conflicts of interest"); *Tibble*, 2009 WL 6764541, at *3-4 (common issues included "[w]hether Defendants chose certain investment options in order to maximize the amount that Defendants could obtain from the mutual funds, rather than to maximize the return to the Plan participants").

3. Typicality

The commonality and typicality requirements are "closely related." *Newman v. CheckRite Cal., Inc.*, 1996 WL 1118092, at *5 (E.D. Cal. Aug. 2, 1996) (citing H. Newberg, *Class Actions,* § 3.13 (1977)). A finding of commonality often fulfills the typicality requirement as well. *See id.* Typicality requires that "the claims or defenses of the representative parties are typical" of those of the class. FED. R. CIV. P. 23(a)(3). This requirement is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer*, 64 F.3d at 1174; *Wildman*, 2017 WL 6045487, at *4. "[I]f the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal theory or remedial theory" individual factual variations will not normally defeat class certification. *Bradford*, 187 F.R.D. at 603 (citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1997)). This is especially true in ERISA cases where plaintiffs raise claims on behalf of the plan. *Tussey*, 2007 WL 4289694, at *3.

Plaintiffs' claims are typical of the class because they arise from Defendants' course of conduct that affected the administration and fees paid by both Plans. Plaintiffs assert their claims on behalf of the Plans as a whole pursuant to 29 U.S.C. §§ 1109(a) and 1132(a). To the extent that Defendants breached their duty, it was breached with respect to both Plans, which were administered and managed in the same way. To the extent that Defendants lacked a prudent process for managing the 401(k) Plan's investments, that same process and its defects also affected the 403(b) Plan's investments. Plaintiffs do not base their claims on any unique facts specific to themselves or their particular investments.

Plaintiffs' "claims are typical of those of the putative class members because all class members are participants in the Plans, and the alleged breaches of fiduciary duties were directed to the Plans rather than to individual participants." *Wildman*, 2017 WL 6045487, at *5; *see also Ameriprise*, 304 F.R.D. at 573. Thus, "typicality is satisfied." *Id.*

The Settlement Class can and should be certified so as to include the participants in the Plans during the Class Period because Plaintiffs allege all participants during the Class Period were harmed and, under the Settlement, all are eligible to benefit. Accordingly, the Plaintiffs' claims with respect to these allegations are typical of the Class, and the requirement of Rule 23(a)(3) is met.[6]

4. <u>Adequacy</u>

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). To meet this requirement, Plaintiffs must demonstrate that (1) they "will vigorously prosecute the interest of the class through qualified counsel" and (2) they "have common interests with the members of the class." *Paxton v. Union Natl' Bank*, 688 F.2d 552, 562-563 (8th Cir. 1982). Both elements are satisfied here.

The Plaintiffs' claims and interests are aligned with those of the Settlement Class, as they are seeking to prove Defendants' liability based on common facts and claims and to maximize monetary recovery to the Plans and protect the Plans from excessive fees in

[6] Although not a requirement for class certification under FED. R. CIV. P. 23, the Settlement Class is clearly ascertainable here as it is defined by objective criteria — participation in the Plans during the defined Class Period. Defendants have lists of such people throughout the Class Period.

the future. The interests of the Plaintiffs are not antagonistic to any Settlement Class member. Since the damages and remedies for ERISA fiduciary breach claims all go to both Plans as a whole, to then be credited later to the accounts of individual participants, the Named Plaintiffs have the same interest as any participant of the Plans: specifically, recovering their share of the Plans' losses.

Moreover, no Settlement Class members benefited from paying improper fees, and none would be harmed by the relief. In any event, "the class representative represents the *legal* interest of the class." *Clark v. Duke Univ*., 2018 WL 1801946, at *8 (M.D.N.C. Apr. 13, 2018) (emphasis in original). A class representative "has no duty to make all class members happy." *Id*. Accordingly, no conflict exists between the named representatives and the unnamed Settlement Class members.

B. <u>The Settlement Class satisfies the requirements of Rule 23(b).</u>

Plaintiffs' claims should be certified under Rule 23(b)(1). That Rule provides for certification where:

> the prosecution of separate actions by … individual members of the class would create a risk of (A) inconsistent or varying adjudications … which would establish incompatible standards for the party opposing the class, or (B) adjudications with respect to the individual members of the class which would be dispositive of the interest of the other members not parties to the adjudications.

FED. R. CIV. P. 23(b)(1)(A), (B). 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 Solutions*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). In both cases, the court is concerned with the problems that would be caused if each potential class member were free to pursue his or her own lawsuit.

The Rule 23 Advisory Committee's note to the 1966 amendment noted that "an action which charges a breach of trust … by [a] … fiduciary similarly affecting the members of a large class of … beneficiaries" calls for certification under this section. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-34 (1999) (citing same). "[S]everal courts have held the type of ERISA claims for breach of fiduciary duty raised here are particularly appropriate for Rule 23(b)(1)(A) and (B) certification because of ERISA's distinctive 'representative capacity' and remedial provisions." *Paschal v. Child Dev., Inc.*, 2014 WL 112214, at *6 (E.D. Ark. Jan. 10, 2014); *see also Wildman*, 2017 WL 6045487, at *5-6; *Tussey*, 2007 WL 4289694, at *8. Indeed, "ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 194 (W.D. Mo. 2009) (citation and quotation marks omitted).

This Action is no exception. Plaintiffs, and the members of the Settlement Class they seek to represent, are the participants of the Plans. They claim that the Defendants breached their ERISA-mandated fiduciary duties and they are bringing suit in a representative capacity to recover the Plans' losses arising out of the breaches. The Settlement Class can be certified under Rule 23(b)(1)(A) because, without question, "inconsistent or varying adjudications with respect to individual class members [] would establish incompatible standards of conduct for the party opposing the class." FED. R. CIV. P. 23(b)(1)(A). The risk of establishing inconsistent standards under ERISA is particularly strong where, as here, the central element of the prudence claims is not individualized: the fiduciary duties are owed to, and carried out for, the Plans.

Thus, a court adjudicating a suit by an individual plaintiff would determine the issues of the existence of the fiduciary duty and its breach not in relation to the individual plaintiff, but in relation to both Plans since the fiduciaries' actions are taken as to both Plans. The language of ERISA § 409 makes clear that the liability of the fiduciary is to the Plans, and that a fiduciary found liable for damages due to a breach must reimburse the Plans. Thus, as the Supreme Court stated: "Section 502(a)(2) provides for suits to enforce the liability-creating provisions of §409, concerning breaches of fiduciary duties that harm *plans.*" *LaRue v. DeWolff, Bogerg & Assoc., Inc.*, 552 U.S. 248, 251 (2008) (emphasis added). This produces not only a significant risk, but a near certainty that separate actions would establish differing standards for the duty under ERISA owed by a fiduciary to the Plans. The tremendous number of Plan participants only enhances the likelihood of separate actions producing inconsistent and incompatible results.

Indeed, the very purpose of ERISA is to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). As part of that regime, ERISA requires that similarly situated plan participants be treated the same. *See, e.g.*, 29 C.F.R. §2560.503-1(b)(5) (claims procedures regulation requiring that plan provisions be "applied consistently with respect to similarly situated claimants[.]"); *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983).

Here, the Defendants have common fiduciary duties to all Plan participants. If Settlement Class members were required to bring (and could practically bring) separate, individual actions against Defendants regarding Defendants' identical actions, there very well could be inconsistent or varying adjudications that would establish incompatible standards of conduct for the Defendants. Indeed, if class certification is denied in this case, adjudication of the Plaintiffs' claims raise the specter of incompatible rulings. The amount of the payment, or the fact of whether an individual should be paid at all, may conflict if different courts calculate damages in different ways or if one court orders that no payment be made while another requires payment to a similarly situated participant.

With respect to equitable relief, the conflict is even clearer. One court might order the removal of plan fiduciaries while another holds they should remain. Thus, "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible standards to govern Defendants' conduct, such as … determinations of differing 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Ameriprise*, 304 F.R.D. at 577. "In light of this risk, Plaintiffs have successfully satisfied the requirements of Rule 23(b)(1)(A)." *Kanawi*, 254 F.R.D. at 111.[7]

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[7] *See also Shanehchian v. Macy's, Inc.*, 2011 WL 883659, at *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible."); *Harris v. Koenig*, 271 F.R.D. 383, 394 (D.D.C. 2010) ("[T]his Court could enter a ruling to restore Plan assets, remove Plan fiduciaries, or reform Plan investigative practices and monitoring practices that would directly contradict another Court's ruling on

Class certification is also appropriate under Rule 23(b)(1)(B). *Jones*, 257 F.R.D. at 193 ("Several courts have certified classes alleging breaches of ERISA Fiduciary duties under Rule 23(b)(1)(B)"). Because this Action is brought on behalf of the Plans, the present action "will influence a subsequent adjudication of the same claims brought by another participant and … could effectively dispose of the other participants' actions on behalf of the Plan." *Ameriprise*, 304 F.R.D. at 577. Moreover, because "plaintiffs' claims seek 'plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief.'" *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1081 (D. Minn. 2009) (quoting *Jones*, 257 F.R.D. at 193).

Accordingly, class certification should be granted under Rule 23(b)(1)(B).

C. **<u>Class Counsel Will Adequately Represent the Settlement Class</u>**

The inquiry into the adequacy of class counsel is now decoupled from the Rule 23(a)(4) inquiry into the adequacy of the class representatives. Rule 23(g)(1)(A) focuses upon the qualifications of plaintiffs' counsel, and instructs the Court to consider, *inter alia*: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A). Each of these considerations demonstrates Class Counsel's adequacy.

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the very same issues. In that event, Defendants would be faced with incompatible standards of conduct with respect to their duties and obligations toward the Plan.").

They have diligently prosecuted this Action, drafting a thorough Complaint after an extensive examination of the documents and legal framework and aggressively pursued Plaintiffs' claims, defeating Defendants' motion to dismiss and securing an excellent recovery relatively early in the litigation. Class Counsel have and will fairly and adequately represent the Settlement Class' interests.

As shown in the accompanying declarations, Class Counsel are experienced in successfully handling ERISA class actions, and have litigated many class actions involving defined contribution retirement plans and investments, and have served or are serving as lead counsel or co-lead counsel for classes in numerous cases alleging breaches of ERISA by defendant fiduciaries. *See generally* Gyandoh, KTMC, Bailey Glasser, Izard Kindall, and Nichols Kaster Declarations. Each of these factors weigh in favor of a finding that Plaintiffs' proposed class counsel is adequate. *Ameriprise*, 304 F.R.D. at 574.

VIII. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for final approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) approving the Class Action Settlement Agreement under FED. R. CIV. P. 23(e); (2) certifying the above-defined Settlement Class; (3) appointing Named Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding that the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and fair and adequate; and (5) approving the Plan of Allocation.

Dated: March 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2020, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which will send a notification to all counsel of record in this Action.

/s/ Mark K. Gyandoh
Mark K. Gyandoh

CERTIFICATE OF COMPLIANCE

I, Mark K. Gyandoh, certify that Plaintiffs' Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement complies with the limits in Local Rule 7.1(f) and type-size limit of Local Rule 7.1(h). I further certify that Microsoft Word version 2013, 13-point font, Times New Roman typeface, and that this word processing program has been applied to include all text, including headings, footnotes, and quotations in the word count, which contains 8,928 words.

/s/ Mark K. Gyandoh
Mark K. Gyandoh