

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

KENNETH DUKES, MARK A. GALE,
CHRISTINE CHAVIS, AND DAVID R. FLY,
individually, and as representatives of a Class of
Participants and Beneficiaries of the
AmerisourceBergen Corporation Employee
Investment Plan,

Plaintiffs,

v.

AMERISOURCEBERGEN CORPORATION, et al.

Defendants

Case No. 3:23-CV-313-DJH-CHL

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

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INTRODUCTION

Plaintiffs Kenneth Dukes, Mark A. Gale, Christine Chavis, and David R. Fly (“Plaintiffs”) submit this Memorandum in support of their Motion for Preliminary Approval of the Class Action Settlement with AmerisourceBergen Corporation (n/k/a Cencora, Inc.), the Board of Directors of AmerisourceBergen Corporation (n/k/a the Board of Directors of Cencora, Inc.), and the AmerisourceBergen Corporation Benefits Committee (together, “Defendants”), relating to the management of the AmerisourceBergen Corporation Employee Investment Plan (n/k/a the Cencora Employee Investment Plan) (the “Plan”).¹

Under the terms of the proposed Settlement, a Gross Settlement Amount of \$625,000 million dollars will be paid to resolve the claims of Settlement Class Members who participated in the Plan during the subject period. This is a significant recovery for the Settlement Class in relation to the claims that were alleged, and falls well within the range of negotiated settlements in similar ERISA cases.

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

- The Settlement was negotiated at arm’s length with the assistance of a respected mediator;
- The Settlement provides for significant monetary relief that is on par with other settlements;
- The Settlement conveniently provides for automatic distribution of the settlement proceeds to the accounts of current participants in the Plan, while former participants will receive their distributions via check;
- The Released Claims are tailored to the claims that were asserted in the Action or could have been asserted based on the same factual predicate;

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

- The proposed Settlement Class is consistent with the requirements of Rule 23;
- The proposed Settlement Notice provides substantial information to Class Members about the Settlement, and will be distributed via email or first-class mail; and
- The Settlement provides Class Members the opportunity to raise any objections they may have to the Settlement and to appear at the final approval hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notice and authorizing distribution of the Notices to the Settlement Class; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the accompanying Preliminary Approval Order. Defendants join in the relief requested by Plaintiffs' Motion for Preliminary Approval of Settlement. However, Defendants do not agree with the averments, statements, allegations, and claims stated by Plaintiffs in this Memorandum of Law in Support of the Motion for Preliminary Approval of Settlement.

BACKGROUND

I. PLEADINGS AND MOTIONS

Plaintiffs Kenneth Dukes, Mark A. Gale, Christine Chavis, and David R. Fly ("Plaintiffs") filed this Action on June 20, 2023, Dkt. 1, and then filed an amended complaint on October 6, 2023, Dkt. 16. In their Amended Complaint, Plaintiffs allege that during the putative Class Period (June 20, 2017, through the date of judgment), Defendants, as fiduciaries of the Plan, as that term is defined under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duty of prudence they owed to the Plan by requiring the Plan to pay excessive recordkeeping and administrative ("RKA") fees, and by failing to remove their high-cost recordkeeper, Fidelity Investments Institutional ("Fidelity"). *Id.*, ¶¶ 6-7. Plaintiffs alleged that Defendants breached their fiduciary duty of prudence also by offering a high-cost stable value fund. *Id.* ¶ 7. On November 20, 2023, Defendants filed a motion to dismiss the Amended Complaint, Dkt. 19, and the Parties briefed that

motion, including through numerous notices of supplemental authorities. Dkts. 20, 23, 25-27, 36. Thereafter, on September 24, 2024, the Court denied in part and granted in part Defendants' motion to dismiss the Amended Complaint, dismissing the stable value claim and allowing the RKA claim to proceed. Dkt. 37.

On October 31, 2024, the Parties jointly moved to stay the case pending private mediation. Dkt. 43. On November 20, 2024, the Court stayed the case and required the Parties to file a joint status report by February 19, 2024. Dkt. 44.

II. MEDIATION AND SETTLEMENT

On February 12, 2025, the Parties held a day-long mediation before JAMS mediator Robert A. Meyer,² and the Parties reached a settlement in principle. *Secunda Decl.* ¶ 10. On February 19, 2025, the Parties filed a joint status report, asking the Court to stay the matter to allow the Parties to draft a Settlement and then file a motion for preliminary approval of the Settlement. Dkt. 45. The Court entered a stay on February 26, 2025. Dkt. 46. The Parties then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Secunda Decl.* ¶ 11.

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement applies to the following Settlement Class:

All persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are the current and former members of the AmerisourceBergen Corporation Benefits Committee during the Class Period.

² Mr. Meyer is an experienced mediator who has successfully facilitated the resolution of numerous complex class actions, including ERISA class actions. *Secunda Decl.* ¶ 10 & *Ex. B.*

Settlement § 1.46. In turn, the Class Period means at any time on or after June 20, 2017, through the date of judgment. *Id.* § 1.13. There are 51,160 participants/beneficiaries with a positive account balance between the start of the class period and March 7, 2025. *Secunda Decl.* ¶ 3.

B. Monetary Relief

Under the Settlement, Defendants will contribute \$625,000 dollars to a common settlement fund. *Settlement* § 1.25. After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Case Contribution Awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id.* § 1.29.

The Plan of Allocation has been prepared by Class Counsel, with the assistance of Defendants' counsel, and submitted to the Court for approval in connection with the Preliminary Approval of the Settlement. (*Settlement, Ex. B*). Class Counsel will retain the Settlement Administrator, Analytics Consulting, LLC, to calculate the amounts payable to Settlement Class Members. *Id.* § 1.43. For those Settlement Class Members who had an account in the Plan during the Class Period, the distribution will be made into his or her account in the Plan. *Settlement, Ex. B*, ¶ 1.6. For those Settlement Class Members who are former participants without an account in the Plan, the distribution will be made by check to the former participants. *Id.*, ¶ 1.7.³

C. Release of Claims

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

"Released Claims" means: any and all actual or potential claims (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement, litigation costs, injunction, declaration, contribution, indemnification, or any other type or nature of legal or equitable relief), actions, demands, rights, obligations, liabilities, expenses, costs, and causes of action, whether arising under federal, state, or local law, whether by statute, contract, or equity, whether brought in an

³ Under no circumstances will any monies revert to Defendants. Any checks that are uncashed will be paid into the Plan for the purpose of defraying administrative expenses. *Settlement*, § 5.6.

individual or representative capacity, whether accrued or not, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, against any of the Released Parties and Defense Counsel based in whole or in part on acts or failures to act through the end of the Class Period:

That were asserted in the Class Action, or that arise out of, relate to, or are based on, or have any connection with any of the allegations, acts, omissions, facts, events, matters, transactions, or occurrences that were alleged, or could have been alleged or asserted in the Class Action or could have been alleged or asserted based on the same factual predicate, whether or not pleaded in the Complaint and/or the Amended Complaint; and/or

That arise out of, relate in any way to, are based on, or have any connection with (a) the selection, monitoring, oversight, retention, fees, expenses, or performance of the Plan's service providers, including without limitation administrative and/or recordkeeping service providers; (b) the services provided to the Plan or the costs of those services; (c) the selection, oversight, retention, monitoring, compensation, fees, or performance of the Plan's investment options; (d) the fees, costs, or expenses charged to, paid, or reimbursed by the Plan or any Class Member; (e) disclosures or failures to disclose information regarding the Plan's fees or service providers; (f) the nomination, selection, monitoring, oversight or retention of Plan fiduciaries; (g) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions under ERISA relating to the Plan's service providers or Plan's administration; and/or (h) engaging in self-dealing or prohibited transactions in relation to the Plan's service providers, or Plan's administration; or

That would be barred by res judicata based on entry of the Final Order; or

That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund to the Plan or any Class Member in accordance with the Plan of Allocation or to any action taken or not taken by the Settlement Administrator in the course of administering the Settlement; or

That relate to the approval by the Independent Fiduciary of the Settlement, unless brought against the Independent Fiduciary alone.

The Class Representative, Class Members, and the Plan expressly waive and relinquish, to the fullest extent permitted by law, any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which provides that a "general release does not extend to claims that the creditor or the releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her,

would have materially affected his or her settlement with the debtor or released party,” and any similar state, federal or other law, rule or regulation or principle of common law of any domestic governmental entity.

“Released Claims” excludes claims for individual denial of benefits under the Plan that the Class Representative or Class Members may have regarding the value of their respective vested account balances under the terms of the Plan.

Id., §§ 1.38.1– 1.38.7.

D. Class Notice and Settlement Administration

Class Members will receive notice of the Settlement via email first, and then if necessary, by first-class U.S. Mail. *Id.* § 2.4 & Ex. A. To the extent that Class Members would like more information, the Settlement Administrator will establish a Settlement Website on which it will post the Settlement Agreement, Notice, and relevant case documents, including the Amended Complaint and a copy of all Court orders related to the Settlement. *Settlement* § 2.3.1 and Ex. A. The Settlement Administrator also will establish a toll-free telephone line that will provide the option of speaking with a live operator if callers have questions. *Id.* 1.43.

E. Attorneys’ Fees and Administrative Expenses

The Settlement requires that Class Counsel file their Motion for Attorneys’ Fees and Costs no later than the deadline set in the Preliminary Approval Order. *Id.* § 6.2. Under the Settlement, the requested fees may not exceed one-third of the Gross Settlement Amount. *Id.* In addition, the Settlement provides for recovery of litigation costs and Administrative Costs related to the Settlement, *id.* §§ 2.3, 6.1, and for a case contribution award up to \$5,000 for each of the Named Plaintiffs. *Id.* § 6.1..

F. Review by Independent Fiduciary

As required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. *Id.* § 2.1; *see also* Prohibited Transaction Exemption

2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830. The Independent Fiduciary will issue its report no later than thirty-five (35) calendar days before the Fairness Hearing, *Settlement*, § 2.1.2, so it may be considered by the Court. Defendants will pay for the costs of the Independent Fiduciary up to and including \$15,000. *Id.*, § 2.1.3.

ARGUMENT

I. Standard of Review

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

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

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

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

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

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

See Macy v. GC Servs. Ltd. P'ship, 2019 WL 6684522, at *2 (W.D. Ky. Dec. 6, 2019) (citing *Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016); *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)).⁴

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

II. The Settlement Meets the Standard for Preliminary Approval

A. The Class Is Adequately Represented

The record reflects that the Settlement Class is adequately represented. Class Counsel are experienced ERISA litigators with a proven track record. *See Secunda Decl.* ¶¶ 25–27. The

⁴ The Sixth Circuit does not appear to have considered the new version of Rule 23(e)(2). “Before the Rule 23(e)(2) factors were added in 2018, courts in the Sixth Circuit evaluated the fairness of class action settlements under factors from *UAW*, 497 F.3d at 631, called “the *UAW* factors.” *See Raymo v. FCA US LLC*, 2025 WL 521834, at *10 (E.D. Mich. Feb. 18, 2025). Sixth Circuit courts still evaluate class action settlements under the *UAW* factors. *See McKnight v. Erico Int'l Corp.*, 655 F. Supp. 3d 645, 661 (N.D. Ohio 2023). Since the amendment, courts within the Sixth Circuit have been applying both sets of factors. *See, e.g., Elliott v. LVNV Funding, LLC*, 2019 WL 4007219 at *9, 2019 (W.D. Ky. Aug. 23, 2019) (citing *Peck v. Air Evac EMS, Inc.*, 2019 WL 3219150 (E.D. Ky. July 17, 2019)).

Named Plaintiffs are also an adequate class representatives, who have diligently pursued this Action on behalf of the Settlement Class after acknowledging their duties as class representatives.

See Dukes Decl. ¶¶ 2–3; *Gale Decl.* ¶¶ 2–3; *Chavis Decl.* ¶¶ 2–3; *Fly Decl.* ¶¶ 2–3.

B. The Proposal Was Negotiated at Arm’s Length

Where experienced counsel have negotiated a settlement at arm’s-length, with the help of an experienced mediator, a strong initial presumption is created that the compromise is fair. *See In re Skelaxin (Metaxalone) Antitrust Litig.*, 2015 WL 13650515, at *2 (E.D. Tenn. Jan. 16, 2015) (“This presumption is appropriate here and, in any event, the undisputed evidence shows that the settlement negotiated in good faith and without collusion. Arms-length settlement negotiations took place under the auspices of a mediator appointed by this Court.”). That is exactly the situation here: settlement negotiations took place in the context of an arm’s length mediation session before an experienced and impartial mediator. *See Secunda Decl.* ¶ 10 & *Ex. B*.

Also, relevant here: (1) Class Counsel undertook an extensive investigation of the factual and legal bases for Plaintiffs’ claims prior to commencing the Action, *Secunda Decl.* ¶ 8; and (2) Class Counsel had the necessary experience and qualifications to evaluate the Parties’ legal positions, *id.* ¶¶ 12–27. These circumstances further favor approval of the Settlement. Courts in this Circuit consistently approve class action settlements reached through arms-length negotiations after meaningful mediation discovery. *See Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021) (citing *See Koenig v. USA Hockey*, 2012 WL 12926023, at *4 (S.D. Ohio Jan. 10, 2012); *see also Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014) (noting that, “although formal discovery had not commenced, [plaintiffs] had access to extensive public documents,” and settlement was reached “after an arm’s-length negotiation where the Parties’ positions on liability and damages were extensively briefed and debated” before an

experienced mediator); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 133, at *5 (N.D. Ill. Sept. 20, 2018) (“The negotiations were supported by a robust investigation before commencement of the Lawsuit; the production and review of confidential documents ... during mediation discovery; and extensive legal and factual research on the issues in the case.”).

C. The Settlement Terms Are Fair and Adequate

1. The Monetary and Prospective Relief Is Significant

The product of these serious and informed negotiations is a Settlement that provides significant benefits to the Settlement Class. The negotiated monetary relief represents a significant portion of the settlement demand of \$3.2 million at the facilitative mediation. *Secunda Decl.* ¶ 4. Based on this demand, the \$625,000 recovery represents 19.5% of the total estimated losses. *Id.* This is on par with numerous other ERISA class action settlements that have been approved across the country.⁵

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

In the absence of a settlement, Plaintiffs would have faced potential risks. At the time of settlement, although Plaintiffs had withstood Defendants’ motion to dismiss with regard to their RKA claims, there was a risk that the Court might have dismissed the claims on a motion for

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

summary judgment. If the case proceeded to trial, Defendants still might have prevailed.⁶ Finally, even if Plaintiffs prevailed on liability, issues regarding loss would have remained. *See* Restatement (Third) of Trusts, § 100 cmt. (b)(1) (determination of investment losses in breach of fiduciary duty cases is “difficult”).

At a minimum, continuing the litigation would have resulted in complex and costly proceedings, and significantly delayed any relief to the Settlement Class. ERISA cases such as this one can extend up to a decade before final resolution, sometimes going through multiple appeals.⁷ The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See Karpik*, 2021 WL 757123, at *4 (“The complexity inherent in class actions is amplified in ERISA class actions. Indeed, it is well-recognized that ‘ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation.’”) (quoting *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015)).

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

⁶ *See, e.g.,* *Rozo v. Principal Life Ins. Co.*, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), *aff’d*, 9 F.4th 95 (2d Cir. 2021); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019).

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

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

Consistent with numerous other ERISA settlements that have received court approval,⁸ Current Participants will have their Plan accounts automatically credited with their share of the Settlement, and Former Participants will receive their pro-rata amount by check. *See supra* at 5. This method of distribution is both effective and efficient.

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

The amount of any fee award is reserved to the Court in its discretion. *See Settlement* § 6.1. However, Class Counsel have agreed to limit their request to one-third of the Gross Settlement Amount. *Id.* This is the amount typically awarded in complex ERISA cases such as this. *See Bell v. Pension Comm. of ATH Holding Co.*, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting cases).

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

There are no side agreements relating to the Settlement. As the Settlement plainly and expressly states: “This Settlement Agreement and the exhibits attached hereto constitute the entire agreement among the Settling Parties and no representations, warranties, or inducements have been made to any party concerning the Settlement other than those contained in this Settlement Agreement and the exhibits thereto. It specifically supersedes any settlement terms or settlement agreements relating to the Defendants that were previously agreed upon orally or in writing by any of the Settling Parties.” *Settlement* § 14.20.

⁸ *See, e.g., Kinder v. Koch Indus., Inc.*, 2021 WL 3360130, at *1–2 (N.D. Ga. July 30, 2021); *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *2 (S.D. Ohio Feb. 18, 2021); *Dolins v. Cont'l Cas. Co.*, No. 1:16-cv-08898, Dkt. 122-1 § 9 (N.D. Ill. Aug. 6, 2018).

6. The Settlement Treats Class Members Equitably

The Settlement treats Class Members equitably. As noted above, the Settlement Amount will be allocated among eligible Class Members on a *pro rata* basis, the same allocation formula is used to calculate settlement payments for all eligible Class Members, and that formula is tailored to the claims asserted in the case. *See supra* at 5; *Secunda Decl.* ¶ 6. This further supports approval of the Settlement.

7. The Class Notice Plan is Reasonable and Should be Approved

The Court also must ensure that notice is sent in a reasonable manner to all Class Members who would be bound by the Settlement. Fed. R. Civ. P. 23(e)(1). The “best notice” practicable under the circumstances includes individual notice to all Class Members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here, as the Settlement Administrator will individually first email and then if necessary, use first-class mail, to send Notice of the Settlement to Class Members. *Settlement* ¶ 2.4. This type of notice is presumptively reasonable. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Snyder v. Ocwen Loan Serv’g*, 2019 WL 2103379, at *8 (N.D. Ill. May 14, 2019). Moreover, the content of the Notice is also reasonable, as it contains information regarding the terms of the Settlement, the claims asserted in the Action, the definition of the Settlement Class, the scope of the Released Claims, the process for making an objection, Class Members’ right to appear at the Fairness Hearing, the proposed Attorneys’ Fees and Costs, and the proposed Case Contribution Award. *See Settlement Ex. A.*

8. The Proposed Class Should Be Certified for Settlement Purposes

Finally, this Court should certify the Settlement Class for settlement purposes.⁹ “ERISA class actions are commonly certified” under Rule 23 because ERISA breach of fiduciary duty claims are brought on behalf the plan as a whole. *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). That is precisely the nature of this Action. *See* Dkt. 16, ¶ 26 (citing 29 U.S.C. §§ 1109, 1132(a)(2)).

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

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

Numerosity. As noted above, there are 51,160 participants/beneficiaries with a positive account balance between the start of the class period and March 7, 2025 Class Members. *See supra* at 4. This far exceeds the threshold for numerosity. *See Neil*, 275 F.R.D. at 260.

Commonality. “[T]he commonality requirement is typically easily satisfied in ERISA cases.” *Shanechian v. Macy’s, Inc.*, 2011 WL 883659, at *3 (S.D. Ohio March 10, 2011); *see also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 452 (S.D.N.Y. 2004) (“In general, the question of defendants’ liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries.”). Here, as in other ERISA cases, there are common questions, such as (1) whether the Plan’s RKA fees were excessive; (2) whether Defendants breached their fiduciary duties to the Plan; and (3) whether the Plan suffered losses from the alleged fiduciary breaches. Accordingly, commonality is satisfied. *See, e.g., Neil*, 275 F.R.D. at 260–61; *Godfrey v. GreatBanc Tr. Co.*, 2021 WL 679068, at *4 (N.D. Ill. Feb. 21,

⁹ In the context of a settlement, class certification is more easily attained because the court need not inquire whether a trial of the action would be manageable on a class-wide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

2021).

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

Adequacy. The adequate representation inquiry considers the adequacy of the named plaintiffs and class counsel. *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), *as modified* (7th Cir. Sept. 22, 2011). Both are adequate here for the reasons noted above. *See supra* at 8-9.

The Named Plaintiffs have no known conflicts of interest with other Class Members, have assisted in pursuing the Action, and have acknowledged their responsibilities as Class Representative. *See Dukes Decl.* ¶¶ 2–3; *Gale Decl.* ¶¶ 2–3; *Chavis Decl.* ¶¶ 2–3; *Fly Decl.* ¶¶ 2–3. This is sufficient to demonstrate adequacy. As participants of the Plan, their interests are aligned with other Class Members. *See Rush v. GreatBanc Tr. Co.*, 2021 WL 2453070, at *7 (N.D. Ill. June 16, 2021); *Godfrey*, 2021 WL 679068, at *5–6.

For their part, Class Counsel are experienced ERISA litigators. *See supra* at 10; *Secunda Decl.* ¶¶ 25–27. Thus, Class Counsel are also adequate to represent the Class.

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

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

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

Fed. R. Civ. P. 23(b)(1). The claims here plainly satisfy this test because they are brought derivatively on behalf of the Plan under ERISA, *see* 29 U.S.C. §§ 1109 and 1132(a)(2), and the outcome will necessarily affect the participants in the Plan and the Plan’s fiduciaries. *See Godfrey*, 2021 WL 679068, at *7. Indeed, courts have held that “breach of fiduciary duty claims brought [section 1132(a)(2)] are ‘paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.’” *Neil*, 275 F.R.D. at 267–68 (collecting cases); *In re Household Int’l, Inc. ERISA Litig.*, 2004 WL 7329911, at *2 (N.D. Ill. Nov. 22, 2004).¹⁰ This case is no exception.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Parties’ Class Action Settlement Agreement; (2) approve the proposed Settlement Notice and authorize distribution of the Notice to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) schedule a final Fairness Hearing; and (5) enter the accompanying Preliminary Approval Order.

¹⁰ The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) in “an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust.” Fed. R. Civ. P. 23, Advisory Committee Note (1966).

Dated this 19th day of March, 2025

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**ATTORNEYS FOR PLAINTIFF AND PROPOSED
SETTLEMENT CLASS**

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2025, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record

s/Paul M. Secunda
Paul M. Secunda