UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID DAGGETT, individually, and as a representative of a Class of Participants and Beneficiaries of the Waters Employee Investment Plan, Plaintiff, v. WATERS CORPORATION, et al., Defendants.	Case No. 1:23-cv-11527

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Regulations

INTRODUCTION

Plaintiff David Daggett ("Plaintiff") submits this Memorandum in support of Plaintiff's Motion for Preliminary Approval of his class action settlement with Defendants, Waters Corporation, Waters Technologies Corporation, the Board of Directors of Waters Technologies Corporation, and the Employee Benefits Administrative Committee of Waters Technologies Corporation (collectively, "Defendants"), relating to the management of the Waters Employee Investment Plan ("Waters Plan").[1]

Under the terms of the proposed Settlement, a Gross Settlement Amount of $800,000.00 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 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 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 Plan of Allocation conveniently provides for automatic distribution of the settlement proceeds to the accounts of current participants and by check to former participants;[2]
- The Released Claims are tailored to the claims that were asserted, or could have been asserted, in the action;
- The proposed Settlement Class is consistent with the requirements of Rule 23;
- The proposed Settlement Notice provides substantial information to Class Members about

[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.").

[2] The Settlement Class is defined as "[a]ll participants and beneficiaries of the Waters Employee Investment Plan (excluding the Defendants or any participant/beneficiary who served on the Fiduciary Committees) beginning July 7, 2017, and running through the date of the Preliminary Approval Order." Settlement Agreement, §1.9.

the Settlement; 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, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices and authorizing distribution of the Notices to the Settlement Class; (3) certifying the proposed Settlement Class for settlement purposes; (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 Plaintiff's Motion for Preliminary Approval of Settlement for settlement purposes only.

BACKGROUND

I. PLEADINGS

Plaintiff David Daggett filed this action on July 7, 2023 (Dkt. 1), and filed an Amended Complaint on October 12, 2023. Dkt. 19. In his Amended Complaint, Plaintiff alleged four ERISA violations against Defendants: a violation of the duty of prudence against the Plan Committee under 29 U.S.C. § 1104(a)(1) for charging excessive total recordkeeping and administrative ("RKA") fees to Fidelity and other non-Fidelity service providers; a violation of the duty of prudence against the Plan Committee under 29 U.S.C. § 1104(a)(1) for maintaining underperforming investments; and two claims against Waters and its Board of Directors for failure to monitor fiduciaries on the Plan Committee with regard to Plan total RKA fees and underperforming investments. *Id.*, ¶5.

Defendants filed a motion to dismiss the amended complaint on November 15, 2023, Dkts. 23-25, and the parties completed briefing that motion on January 12, 2024. Dkts. 37, 40. The parties filed various supplemental authorities, Dkts. 44-45, and the Court held oral argument on that motion on February 7, 2024. Dkt. 43. On April 18, 2024, the Court denied Defendants' motion

to dismiss, Dkt. 46, and Defendants' answered the Amended Complaint on May 10, 2024. Dkt. 53.

II. MEDIATION AND SETTLEMENT

The parties agreed to attempt private mediation before JAMS mediator Robert Meyer[3] on August 21, 2024, Declaration of Paul M. Secunda in Support of Motion for Preliminary Approval of Class Action Settlement ("Secunda Decl."), ¶¶ 10-11, and moved to stay discovery pending mediation on May 14, 2024 and the Court stayed the proceedings until August 30, 2024. Dkt. 54. After extensive arm's length negotiations during a full-day mediation, the Parties reached a settlement in principle, signed a settlement term sheet on August 26, 2024, and then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Id.*, ¶ 2. The parties filed a joint status report on August 28, 2024, alerting the Court of the Settlement and asking for a stay of the case until this Motion could be drafted. Dkt. 63. The Court granted the stay until September 30, 2024, when the motion for preliminary approval of the settlement would be filed. Dkt. 64.

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement applies to the following Settlement Class:

> All participants and beneficiaries of the Waters Employee Investment Plan (excluding the Defendants or any participant/beneficiary who served on the Fiduciary Committees) beginning July 7, 2017, and running through the date of the Preliminary Approval Order.

Settlement Agreement, §1.9. In turn, the Class Period means the period from July 7, 2017 through the date of the Preliminary Approval Order, inclusive. *Id.* § 1.12. There are approximately 12,000

[3] Mr. Meyer is an experienced mediator who has successfully facilitated the resolution of numerous complex class actions, including ERISA class actions. Secunda Decl., ¶ 11 & Ex. 2.

Settlement Class Members, about 4000 current members and 8000 former members. Secunda Decl., ¶ 3.

B. Monetary Relief

Under the Settlement, Waters Technologies Corporation will contribute $800,000 to a Qualified Settlement Fund. Settlement § 1.29. After accounting for (a) Settlement Administrative Expenses; (b) reimbursement of expenses incurred by Class Counsel that are awarded by the Court; (c) attorneys' fees to Class Counsel that are awarded by the Court; and (d) Service Award that is awarded by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id.* § 1.38.

The Plan of Allocation is Article V of the Settlement Agreement, and sets out the methodology for allocating and distributing the Net Settlement Amount. It is submitted to the Court for approval in connection with the Preliminary Approval of the Settlement. Class Counsel will retain the Settlement Administrator to calculate the amounts payable to Settlement Class Members. *Id*. § 1.57.

C. Release of Claims

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

> [S]ubject to the exclusions set forth below, any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action, including both known and Unknown Claims, whether class, derivative, or individual in nature against any of the Released Parties and Defense Counsel with respect to the Plan arising on or before the Settlement Effective Date:
>
> (a) That were asserted in the Action or could have been asserted in the Action based on any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences asserted in the Action, whether or not pleaded in the Complaints, including but not limited to those that arise out of, relate to, are based on, or in

connection with: (1) the structure, management, or monitoring of the Plan's investment options, including without limitation the Waters Stock Fund and any self-directed brokerage option; (2) the selection, monitoring, oversight, retention, fees, expenses, or performance of the investments available under the Plan; (3) the selection, monitoring, oversight, retention, fees, expenses, or performance of the Plan's service providers, including without limitation administrative and/or recordkeeping service providers; (4) fees, costs, or expenses charged to, paid, or reimbursed by, or authorized to be paid or reimbursed by the Plan, including any assertions regarding revenue sharing paid, received, or not recaptured in connection with the Plan; and/or (5) any assertions with respect to any fiduciaries of the Plan (or the selection or monitoring of those fiduciaries) in connection with the foregoing; (6) disclosures, filings or failures to disclose information regarding the Plan's investment options or service providers; (7) disclosures or failures to disclose relationships among fiduciaries, service providers, and investment managers for the Plan; (8) engaging in self-dealing or prohibited transactions in relation to the Plan's investments or service providers; (9) compliance with the Plan's governing documents with respect to the selection and monitoring of the Plan's investments or service providers; (10) any assertions with respect to any fiduciaries of the Plan (or the selection or monitoring of those fiduciaries) in connection with the foregoing; and/or (11) the approval by the Independent Fiduciary of the Settlement Agreement;

(b) that would be barred by res judicata based on the Court's entry of the Final Approval Order;

(c) that arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan of Allocation; or

(d) that arise from the approval by the Independent Fiduciary of the Settlement Agreement.

Id., §1.43.

D. Class Notice and Settlement Administration

Class Members will receive notice of the settlement by email or first class mail. Settlement Agreement., § 3.2 & Exs. 1, 2. To the extent that Class Members would like more information, the Settlement Administrator[4] will establish a Settlement Website on which it will post the Settlement Agreement, Settlement Notice, and relevant case documents, including the Amended Complaint

[4] Analytics Consulting, LLC has been selected as the Settlement Administrator, and has extensive experience administering similar ERISA class action settlements. Secunda Decl. ¶ 29 & Ex. 3.

and a copy of all Court orders related to the Settlement. Settlement § 3.3 & Exs. 1-2. 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.*

E. Attorneys' Fees and Administrative Expenses

The Settlement requires that no later than fourteen (14) calendar days prior to the deadline provided in the Preliminary Approval Order for Class Members to object to the Settlement Agreement, Class Counsel may file an application with the Court for payment of reasonable Attorneys' Fees and Costs, and Settlement Administrative Expenses. Settlement Agreement § 6.1. Under the Settlement, a service award up to $7,500 may awarded to the Named Plaintiff for his contributions in bringing and litigating the action *Id.,* § 6.2.

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.,* § 2.2; 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 (30) calendar days before the Fairness Hearing. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

The approval of a settlement agreement is a two-step process." *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 97 n.1 (D. Mass. 2010). In the first step, "the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Id.* at 106–7 (quoting Manual for Complex Litigation (Fourth), §13.14 (2004)). Therefore, a court first makes a "'preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.'" *Id.* at 107 (quoting Manual for Complex Litigation (Fourth), §21.632 (2004)). In making a preliminary determination, courts

"examine the proposed settlement for obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). A presumption of fairness attaches when "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Hochstadt*, 708 F. Supp. 2d at 107 (citing *In re Lupron Mktg. and Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Each of those factors is satisfied.

II. THE COURT SHOULD GRANT PRELIMINARY APPROVAL TO THE SETTLEMENT

A. The Settlement Is The Product Of Arm's-Length Negotiations

There is an initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *City P'ship. v. Atlantic Acquisition Ltd.*, 100 F.3d 1041, 1043 (1st Cir. 1996). The Settlement is the result of arm's-length negotiations between counsel for all parties in this action, which included a full-day mediation with a neutral mediator with extensive experience resolving similar cases. *See* Secunda Decl., ¶¶ 10-12.

The product of these serious and informed negotiations is a Settlement that provides significant benefits to the class. The negotiated monetary relief represents a significant portion of the losses demanded by Plaintiff during mediation. Based on Plaintiff's estimates, Plaintiff demanded $5.9 million for imprudent investments and excessive RKA fees in the Waters Plan. Secunda Decl., ¶ 4. The $800,000 recovery represents 13.6% of the settlement demand. *Id.* This is on par with numerous other ERISA class action settlements that have been approved across the

country.[5]

Consistent with numerous other ERISA settlements that have received court approval,[6] the parties have set out a Plan of Allocation in Article V of the Settlement Agreement which is fair and equitably and based on both excessive fees paid for RKA and whether the participants had invested in the challenged investments. Settlement Agreement, §§ 5.1-5.4. Former participants will have the additional ability to roll-over their settlement contribution into a different retirement plan account. *Id.*, § 5.5. This method of distribution is both effective and efficient. Under no circumstances will any such payments revert to the Company or any other Defendant. *Id.*, § 5.8.

B. The Settlement Was Reached After Informed Negotiations

At the time the settlement was reached, the parties had commenced discovery, but there appeared to be still a chance for settlement. Based on the parties' understanding of the claims in the case after substantial investigation, the parties, fully informed as to the value of the claims and the cost of further litigation, engaged in settlement discussions through a mediator, Robert Meyer, who also has an expert knowledge of these claims. As a result of these arms-length mediation discussions, the parties were able to reach an agreement to resolve all the claims in this case.

In the absence of a settlement, Plaintiff would have faced potential risks. At the time of

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[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); *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").

[6] *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).

settlement, there was a risk that the Court might have dismissed the claims on a motion for summary judgment. If the case proceeded to trial, the Defendants still might have prevailed.[7] Finally, even if Plaintiff prevailed on liability, issues regarding Plaintiff's claimed 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 Class. ERISA cases such as this can extend up to a decade before final resolution, sometimes going through multiple appeals.[8] The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERISA cases such as this are "particularly complex"); *Koerner v. Copenhaver*, 2014 WL 5544051, at *4 (C.D. Ill. Nov. 3, 2014) ("The facts giving rise to Plaintiffs' claims are complicated, require the elucidation of experts, and are far from certain.").

None of this is to say that Plaintiff lacked confidence in his claims. However, given the risks and costs of litigation, it was reasonable for Plaintiff to reach a settlement on these terms. *See Schulte*, 805 F. Supp. 2d at 582–83; *accord Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case had been litigated to conclusion, all that is certain is that plaintiffs would have spent a large amount of money, time, and effort.").

C. The Proponents of the Settlement are Highly Experienced in Similar ERISA

[7] *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).

[8] *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).

Litigation

The record reflects that the Class is adequately represented. Class Counsel are experienced ERISA litigators with a proven track record. Secunda Decl. ¶¶ 25–27. Walcheske & Luzi, LLC ("Walcheske & Luzi"), lead Class Counsel, is a firm recognized for being "experienced in complex [ERISA] litigation," and having the ability and resources to vigorously prosecute [an] action." *See Soulek v. Costco Wholesale Corp. et al.*, Case No. 20-C-937, Dkt. 52 at 4 (E.D. Wis. Mar. 17, 2022). The named Plaintiff is also an adequate class representative, who has diligently pursued this action on behalf of the Class after acknowledging his duties as class representatives. *See* Declaration of David Daggett in Support of Preliminary Approval of the Settlement ("Daggett Decl."), ¶¶ 2–4.

It is Class Counsel's opinion that the Settlement is fair and reasonable. Secunda Decl. ¶ 8. As set forth above, the Settlement provides monetary relief in the Gross Amount of $800,000, which, after paying fees and expenses, will be paid to current and former participants of the Plan during the Class Period.

D. The Settlement is Fair, Reasonable, and Adequate to Warrant Sending Notice to the Settlement Class

Due process and Rule 23(e) do not require that each Class Member receive notice but do require that class notice be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175 (1974).

The proposed forms and method of notice, which is by email or first-class mail (Settlement, § 3.2), satisfies all due process considerations and meet the requirements of Rule 23(e)(1) because

it is reasonably calculated to affect actual notice to the Settlement Class which consists of current and former Plan participants. The parties' proposed notices are attached as Exhibits 1 and 2 to the Settlement Agreement. The notice will fully apprise class members of the existence of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights, including: (i) the terms and operation of the Settlement; (ii) the nature and extent of the release; (iii) the maximum attorneys' fees and costs that will be sought; (iv) the procedure and timing for objecting to the Settlement; (v) the date and place of the fairness hearing; and (vi) the website on which the full Settlement documents and any modifications thereto will be posted. Settlement Agreement, Exs. 1 and 2.

The notice plan will be implemented in a cost-conscious fashion given the monetary amount of the Settlement via either email or first-class mail to all class members who have a current email address known to the Waters Defendants and/or the Plan's current recordkeeper, Fidelity. This notice will be delivered shortly after entry of the order preliminarily approving the Settlement. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate.

III. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Finally, this Court should certify the Settlement Class for settlement purposes. Under Rule 23 of the Federal Rules of Civil Procedure, Plaintiff moves for certification under Rule 23(b)(1) of the following settlement class and appointment of Walcheske & Luzi, LLC, and Jonathan Feigenbaum, as Class Counsel:

> All participants and beneficiaries of the Waters Employee Investment Plan (excluding the Defendants or any participant/beneficiary who is a fiduciary to the Plan) beginning July 7, 2017, and running through the date of judgment.

Settlement § 1.9. In turn, the Class Period means the period from July 7, 2017 through the date of

the Preliminary Approval Order, inclusive. *Id.* § 1.12. There are approximately 12,000 Settlement Class Members, about 4000 current members and 8000 former members. Secunda Decl., ¶ 3.

To certify the Settlement Class, the Court must find that it satisfies each requirement of Rule 23(a) and at least one subpart of Rule 23(b). *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The standard for certifying a class for settlement purposes is more lenient than that applied in certifying a class for trial, as the Court need not inquire whether the class would be manageable for trial purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

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

Rule 23(a) provides four prerequisites to class certification:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

1) the class is so numerous that joinder of all members is impracticable;

2) there are questions of law or fact common to the class;

3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Plaintiff satisfies each prerequisite for the following reasons.

(1) Numerosity

The proposed class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This is a "low threshold" that is generally met if the number of class members "exceeds 40." *Gordon v. Johnson*, 300 F.R.D. 31, 35 (D. Mass. 2014) ("Although no specific, numerical threshold exists, a class of forty or more is generally sufficient in the First Circuit."); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 388 (D. Mass 2011). A class of almost 2,000 individuals "would obviously satisfy the numerosity threshold." *Payne v.*

Goodyear Tire & Rubber Co., 216 F.R.D. 21, 25 (D. Mass. 2003). Here, the class includes over 12,000 members. Secunda Decl., ¶ 3.

(2) Commonality

The commonality requirement is met when there is at least "a single common question" to the class. *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (quoting *Dukes*, 564 U.S. at 359). It is "not a difficult one to meet." *Hochstadt*, 708 F. Supp. 2d at 102. Due to the nature of ERISA fiduciary breach claims, "commonality is quite likely to be satisfied." *In re Schering Plough ERISA Litigation*, 589 F.3d 585, 599 n.11 (3d Cir. 2009). Plaintiff has identified common questions of law and fact that can or would be resolved as to the Plan, not as to any individual participant. Dkt. 19, ¶ 187. In this instance, common questions exist pertaining to the excessive fees associated with Plan RKA fees and imprudent investments during the Settlement Class Period, with whether Defendants breached their fiduciary duties to the Plan; and with whether the Plan suffered losses from the alleged fiduciary breaches. Accordingly, commonality is satisfied.

(3) Typicality

Rule 23(a)(3) requires the claims of the class representatives to be typical of the claims of the class. "The representative plaintiff satisfies the typicality requirement when its injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiff's claims and those of the class are based on the same legal theory." *In re Credit Suisse-AOL Secs. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008). Typicality does not require "identical claims." *In re Neurontin Mktg. & Sale Practices Litig.*, 244 F.R.D. 89, 106 (D. Mass. 2007).

In this case, the Named Plaintiff asserted an identical legal theory on behalf of the Plan under § 1132(a)(2), which arises from the same course of Plan-level conduct: Defendants' alleged imprudent process for selecting and monitoring the Plan's RKA fees and certain challenged

investments during the Settlement Class Period. If Defendants acted imprudently, they breached their duty to the Plan as a whole, and hence, to all participants. In other word, Plaintiff alleges that all participants during the Class Period were harmed or exposed to harm by the alleged breaches of duty, by being subjected to the same excessive RKA fees and imprudent investments. Each class member, Plaintiff posits, would have to rely on the same evidence to establish Defendants' liability.

(4) Adequacy of Representation

Rule 23(a)(4) requires the Court to determine that the Named Plaintiff and his attorneys will adequately represent the class. Fed. R. Civ. P. 23(a)(4). "The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F. 2d 124, 130 (1st Cir. 1985). Plaintiff David Daggett (the "Named Plaintiff") and his attorneys, Walcheske & Luzi, LLC and Jonathan Feigenbaum, satisfy both elements.

a. Named Plaintiff is an adequate class representative.

The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. "Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement." *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting 1 William B. Rubenstein, Newberg on Class Actions § 3:58 (5th ed. 2012)). The interests of the Named Plaintiff are not antagonistic to any class member. Since the damages and remedies pertaining to the claims in this case all go to the Plan, the Named Plaintiff has the same interest as any of the other proposed settlement-class members: that is, recovering purported

losses for the Plan. Accordingly, no conflict exists between the class representative and the absent class members.

An adequate class representative need only have a basic understanding of the claims and a willingness to participate in the case. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *George v. Kraft Foods Global, Inc.*, 270 F.R.D. 355, 369 (N.D. Ill. 2010). The class representative here more than meet this minimum standard. The Named Plaintiff understands that he is attempting to recover the losses caused by Defendants' alleged unlawful mismanagement of the Plan. Daggett Decl., ¶¶ 2-4. The Named Plaintiff understands his duties as class representative, has provided information necessary for the prosecution of this case, and indicated his intent to vigorously prosecute this action. *Id*.

b. Plaintiff's attorneys are competent and qualified to represent the Class

In assessing counsel's adequacy to represent the class, courts look to the factors for appointing class counsel under Rule 23(g):

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g).

Walcheske & Luzi, LLC, lead Class Counsel, has extensive experience. Courts have found that Walcheske & Luzi is a firm recognized for being "experienced in complex [ERISA] litigation," and having the ability and resources to vigorously prosecute [an] action." *See Soulek*, Case No. 20-C-937, Dkt. 52 at 4. Walcheske & Luzi also has relevant knowledge to act as Class Counsel. The firm has litigated dozens of ERISA class action cases over the last five years and is one of the few firms in the country with the expertise and experience to do so. Secunda Decl., ¶¶

25-27. Local counsel, Mr. Feigenbaum, has similar and extensive experience with successfully navigating ERISA class action litigation.

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

In addition to meeting the requirements of Rule 23(a), the proposed 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). 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 instances, 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 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). Further, due to the "derivative nature" of claims brought under ERISA §502(a)(2) [29 U.S.C. §1132(a)(2)], "breach of fiduciary duty claims brought under §502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class[.]" *Schering*, 589 F.3d at 604 (citing cases).

This district has granted class certification under Rule 23(b)(1) in actions brought under 29 U.S.C. §1132(a)(2). *See, e.g., Hochstadt*, 708 F. Supp.2d at 105–06 (Rule 23(b)(1) was "clearly satisfied" given that the "ERISA §502(a)(2) claim brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class member"); *Tracey v. M.I.T.*, No. 16-11620, Doc. 157 at 17–18 (D. Mass. Oct. 19, 2018) (certifying a class in an ERISA action under Rule 23(b)(1)); *Weeks v. JetDirect Aviation, Inc.*, No. 09-10527, 2010 U.S. Dist. LEXIS 111037, at *16 (D. Mass. Oct. 19, 2010) (certified settlement class under Rule 23(b)(1)).

Plaintiff further contends that the proposed settlement class can be certified under Rule 23(b)(1)(A) or (B) because "inconsistent or varying adjudications with respect to individual class members…would establish incompatible standards of conduct for the party opposing the class," or "adjudications with respect to individual class members…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)(A)–(B). The risk of establishing inconsistent standards 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 Plan.

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 the entire plan because the fiduciaries' actions are taken as to the plan as a whole. 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, Boberg & Assoc., Inc.*, 552 U.S. 248, 251 (2008). Plaintiff contends that 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 the fiduciaries to the Plan. The tremendous number of Plan participants only enhances the likelihood of separate actions producing inconsistent and incompatible results.

In all, the Court should certify the proposed class for settlement purposes under Rule 23(b)(1).

CONCLUSION

Plaintiff respectfully requests that the Court (1) preliminarily approve the Parties' Class Action Settlement Agreement; (2) approve the proposed Settlement Notices and authorize distribution of the Notices to the Settlement Class; (3) preliminarily certify the Settlement Class for settlement purposes; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

Dated this 30th day of September, 2024

WALCHESKE & LUZI, LLC

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Attorneys for Plaintiffs and Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, 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