IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA DIVISION

JENNIFER SWEDA, ET AL., *Plaintiffs*, v. THE UNIVERSITY OF PENNSYLVANIA, ET AL., *Defendants*.	No. 2:16-cv-4329-GEKP

PLAINTIFFS' UNOPPOSED MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND MOTION FOR APPOINTMENT OF CLASS COUNSEL

Under Federal Rule of Civil Procedure 23, Plaintiffs respectfully request that this Court certify a class for settlement purposes only under Rule 23(b)(1). Defendants do not oppose the certification of a Settlement Class.

On August 10, 2016, Plaintiffs Jennifer Sweda, Benjamin A. Wiggins, Robert L. Young, Faith Pickering, Pushkar Sohoni, and Rebecca N. Toner, individually and as representatives of a class of participants and beneficiaries of the University of Pennsylvania Matching Plan, filed their complaint. Doc. 1. On November 21, 2016, Plaintiffs amended their complaint, adding the Investment Committee as a Defendant. Doc. 27. Finally, on October 18, 2019, Plaintiffs amended their complaint again to add two additional Plans—The University of Pennsylvania Supplemental Retirement Annuity Plan and The University of Pennsylvania Basic Plan (all three plans collectively referred to as the "Plans"). Doc. 69. Plaintiffs brought this action under 29 U.S.C. §1132(a)(2) alleging that Defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 by causing the Plan to pay unreasonable recordkeeping and administrative fees and maintaining high-cost and underperforming investment options.

Plaintiffs seek to recover all losses to the Plans resulting from each breach of duty under 29 U.S.C. §1109(a) and for other equitable and remedial relief.

After over four years of litigation and after extensive settlement negotiations, the parties entered into a Settlement Agreement. Plaintiffs have requested that the Court preliminarily approve the settlement. As a term of the Settlement Agreement, the Settlement Class is defined as:

> All persons who participated in the Plans at any time during the Class Period, including any Beneficiary of a deceased person who participated in one or more of the Plans at any time during the Class Period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in one or more of the Plans at any time during the Class Period. Excluded from the Settlement Class are each of the individual members of the Investment Committee during the Class Period.

The Class Period is from August 10, 2010 through January 14, 2021. *See* Settlement Agreement, §§2.12, 2.27, 2.41 (Investment Committee definition).

As set forth in the accompanying memorandum, the proposed Settlement Class meets the requirements of Rules 23(a) and 23(b)(1). The named Plaintiffs and Plaintiffs' counsel also meet the requirements for appointment as class representatives and class counsel. The proposed order granting certification of the settlement class is contained within the Proposed Order Granting Motion for Certification of Settlement Class and Motion for Preliminary Approval of Class Action Settlement.

Plaintiffs respectfully request that the Court certify the proposed Settlement Class for settlement purposes only.[1]

[1] The proposed order for the Motion for Certification of Settlement Class and Motion for Appointment of Class Counsel is incorporated into the [Proposed] Order Granting Motion for Preliminary Approval of Class Action Settlement which will be filed with the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement.

January 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record in this case, hereby certifies that on January 14, 2021, a true and correct copy of the foregoing motion was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Heather Lea

LOCAL RULE 7.1(B) CERTIFICATION

I, Christopher Boran, counsel for Defendants hereby certify that they do not oppose Plaintiffs' Motion for Certification of Settlement Class and Motion for Appointment of Class Counsel, and consent to this filing.

/s/ Christopher Boran
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MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND MOTION FOR APPOINTMENT OF CLASS COUNSEL

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Under Federal Rule of Civil Procedure 23, Plaintiffs, as representatives of a class of similarly situated persons and on behalf of The University of Pennsylvania Matching Plan, The University of Pennsylvania Supplemental Retirement Annuity Plan, and The University of Pennsylvania Basic Plan (all three plans collectively referred to as the "Plans"), respectfully request that this Court certify a class for settlement purposes only. Plaintiffs are acting in a representative capacity on behalf of the Plans to recover losses allegedly caused by breaches of fiduciary duty committed by Defendants University of Pennsylvania, Investment Committee, and Jack Heuer. In light of the inherently representative nature of §502(a)(2) claims, involving plan-wide conduct and remedies, the Third Circuit holds that such cases are "paradigmatic examples" of classes that should be certified under Rule 23(b)(1). *In re Schering Plough Corp. ERISA Litig*., 589 F.3d 585, 604 (3d Cir. 2009). For the reasons set forth below, the Court should certify this action as a class action for settlement purposes only under Rule 23(b)(1), appoint the named plaintiffs as class representatives, and appoint Schlichter Bogard & Denton, LLP as Class Counsel in accordance with Rule 23(g).

BACKGROUND

I. Plaintiffs' claims.

Plaintiffs Jennifer Sweda, Benjamin A. Wiggins, Robert L. Young, Faith Pickering, Pushkar Sohoni, and Rebecca N. Toner are six former employees of University of Pennsylvania and participants in the Plans. Second Am. Compl. ("SAC") ¶¶13–18 (Doc. 69); Answer to Second Am. Compl. ("Answer") ¶¶13–18 (Doc. 74); Plaintiffs' Declarations, ¶1 of each (filed herewith); *see* 29 U.S.C. §1002(7). The Plans are defined contribution employee pension benefit plans under 29 U.S.C. §1002(2)(A) and §1002(34). SAC ¶9; Answer ¶9.

Defendants are the Plans' fiduciaries. SAC ¶¶19–26. The University of Pennsylvania, acting through its Board of Trustees, is the Plans' named fiduciary (*see* 29 U.S.C. §1102(a)), with authority to control the management of the Plan and disposition of its assets. SAC ¶¶19–20; Doc. 33-5 at 13, 15 (§§2.27, 2.45); Doc. 33-6 at 16 (§7.06(a)). The Board appointed the Investment Committee ("Committee") as a named fiduciary responsible for investment matters, including determining the available investment options in the Plans. SAC ¶¶21–22, 75; Answer ¶¶21–22, 75; Doc. 84-10 at 35 (Article 7.06(b)) (2019 Matching Plan document); Doc. 84-11 at 33 (Article 12.06(b)) (2019 Basic Plan document); Doc. 84-12 at 29–30 (§9.06(a), (c)) (2014 Supplemental Plan document); Doc. 84-13 (Investment Committee Charter); Doc. 84-14 at (2015 Investment Policy Statement). Penn's Vice President of Human Resources (Defendant Heuer) is a named fiduciary and the designated Plan Administrator. SAC ¶¶23–25; Answer ¶¶23–25; Doc. 84-10 at 35 (Article 7.06(a)); Doc. 84-11 at 32 (Article 12.06(a)); Doc. 84-12 at 29–30 (§9.06(b)). Because Plaintiffs' claims concern Plan-level decisions made by Defendants collectively and individual defendant liability does not affect class certification, Plaintiffs refer to the defendants collectively as "Penn" or "Defendants."

On August 10, 2016, Plaintiffs brought this action under 29 U.S.C. §1132(a)(2) alleging that Defendants breached their fiduciary duties by causing the Plan to pay unreasonable recordkeeping and administrative expenses and maintaining high-cost and underperforming investment options. Doc. 1. On November 21, 2016, Plaintiffs amended their complaint, adding the Investment Committee as a Defendant. Doc. 27. Finally, on October 18, 2019, Plaintiffs amended their complaint again to add two additional Plans—The University of Pennsylvania Supplemental Retirement Annuity Plan and The University of Pennsylvania Basic Plan (all three plans collectively referred to as the "Plans"). Doc. 69.

Plaintiffs allege that Defendants breached their fiduciary duties by failing to monitor and remove imprudent investment options and failing to monitor and control the fees paid to the Plans' investment providers and recordkeepers. *See id*. at 324, 331–32. In Count I (former Count III), Plaintiffs assert that Penn caused the Plans to overpay for recordkeeping services by up to 600%, which resulted from Penn's alleged failures to negotiate a cap on fees, to renegotiate the fee structure, or to solicit competitive bids. *Id*. at 324, 330–32; SAC ¶¶97–119, 187–95. Count II (former Count V) alleges breaches of fiduciary duties related to the Plans' investments: providing "higher cost retail class shares" of mutual funds instead of identically managed low-cost institutional class shares and retaining investment options allegedly charging "layers of unnecessary fees," costly and duplicative funds, and underperforming options which Penn allegedly failed to remove in favor of better-performing alternatives with lower fees. *Sweda v. University of Pennsylvania*, 923 F.3d 320, 331–32 (3d Cir. 2019); SAC ¶¶120–181, 196–209. Plaintiffs seek recovery of all losses to the Plans as well as equitable relief. SAC pp. 112–13 (Prayer of Relief).

Defendants deny the breach of fiduciary duty claims asserted in the SAC. Further, Defendants deny engaging in any breach of fiduciary duty or misconduct of any kind with respect to the management and administration of the Plans.

II. Proposed Settlement Class.

ERISA authorizes any plan participant to bring an action to enforce ERISA's fiduciary duties and to recover all losses to a plan caused by a breach of fiduciary duty. 29 U.S.C. §1132(a)(2), §1109(a). Here, Plaintiffs are acting "in a representative capacity on behalf of the plan as a whole" to recover losses to their Plan resulting from Defendants' alleged breaches of duty, and to obtain equitable remedies. *Mass. Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).

On January 13, 2021, the parties reached a settlement concerning the claims asserted in this litigation. As defined under Section 2.41 of the Settlement Agreement, Plaintiffs seek to certify the following settlement class:

> All persons who participated in the Plans at any time during the Class Period, including any Beneficiary of a deceased person who participated in one or more of the Plans at any time during the Class Period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in one or more of the Plans at any time during the Class Period. Excluded from the Settlement Class are each of the individual members of the Investment Committee during the Class Period.

As defined under Section 2.12 of the Settlement Agreement, the Class Period is defined as August 11, 2010 through January 14, 2021.

ARGUMENT

To obtain class certification, Plaintiffs must show that the class meets the four prerequisites of Federal Rule of Civil Procedure 23(a)—referred to as "numerosity," "commonality," "typicality," and "adequacy"—and that the class falls within "one of three types" specified in Rule 23(b). *Schering*, 589 F.3d at 596. Although the Rule 23 analysis must be "rigorous," *id*., a court may not "engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*.

District courts consistently certify ERISA fiduciary breach actions under Rule 23(b)(1) brought by Plaintiffs' undersigned counsel. *E.g., Sims v. BB&T Corp*., No. 15-732, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017); *Clark v. Duke Univ.*, No. 16-1044, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Cunningham v. Cornell Univ*., No. 16-6525, 2019 WL 275827 (S.D.N.Y. Jan. 22, 2019); *Cassell v. Vanderbilt Univ*., No. 16-2086, 2018 WL 5264640 (M.D.Tenn. Oct. 23, 2018); *Tracey v. MIT*, No. 16-11620, 2018 WL 5114167 (D.Mass. Oct. 19,

2018); *Henderson v. Emory Univ*., No. 16-2920, 2018 WL 6332343 (N.D.Ga. Sept. 13, 2018); *Sacerdote v. New York Univ.,* No. 16-6284, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Marshall v. Northrop Grumman Corp*., No. 16-6794, 2017 WL 6888281 (C.D.Cal. Nov. 2, 2017); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 55 (D.Minn. 2014); *Martin v. Caterpillar*, No. 07-1009, 2010 WL 3210448 (C.D.Ill. Aug. 12, 2010); *Will v. General Dynamics Corp*., No. 06-00698, Doc. 243 (S.D.Ill. Aug. 9, 2010); *Taylor v. United Tech. Corp.*, No. 06-1494, 2008 WL 2333120 (D.Conn. June 3, 2008); *Kanawi v. Bechtel Corp*., 254 F.R.D. 102 (N.D.Cal. 2008); *Tussey v. ABB Inc*., 06-4305, 2007 WL 428964 (W.D.Mo. Dec. 3, 2007); *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2011 WL 3505264 (C.D.Cal. Mar. 29, 2011).

I. Rule 23(a) is satisfied.

Before an action may be certified as a class action, the following requirements of Rule 23(a) must be satisfied:

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the class;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (d) the representative parties will fairly and adequately protect the interests of the class.

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

A. Numerosity

Plaintiffs' proposed Settlement Class satisfies the numerosity requirement under Rule 23(a)(1) because joinder of all class members is impracticable. The Plans have maintained over 20,000 participants or more during the proposed class period. Answer ¶12; Docs. 84-17 through 84-25, *see* p.2, Line 6g of each (listing number of participants with account balances). The numerosity requirement is easily satisfied. *See Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d

Cir. 2001) (finding that requirement is generally satisfied if the number of class members exceeds 40). *See also Schering*, 589 F.3d at 596 .

B. Commonality

There are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement concerns "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Schering*, 589 F.3d 585, 596–97 (quoting *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994)). Because "even a single common question will do," "th[e] bar is not a high one" and "is easily met." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015) (citations omitted). Due to the nature of ERISA fiduciary breach claims, "commonality is quite likely to be satisfied." *Schering*, 589 F.3d at 599 n.11.

Defendants allegedly owed their duties to the Plans and made decisions at the Plan level that affected the Plans as a whole and, hence, all participants. The same menu of options, the same "uniform" fee structures, and the same fiduciary conduct allegedly applied to *all* participants. Therefore, each element of Plaintiffs' claims—(1) fiduciary status, (2) breach of an ERISA-imposed duty, and (3) loss to the Plans—involves common questions rather than individualized questions. *Sweda*, 923 F.3d at 328. Accordingly, just as in *Schering*, there are numerous common questions upon which all class members' claims depend, including: (1) whether Defendants are fiduciaries; (2) whether Defendants breached their fiduciary duties in each respect alleged by Plaintiffs; (3) whether the Plans suffered resulting losses; (4) how to calculate the Plans' losses; and (5) what equitable relief should be imposed to remedy such breaches and to prevent future ERISA violations. SAC ¶184(b). The evidence needed to answer

these contentions are Plan-level facts, and thus the same for all of the Plans' participants. If the evidence shows that Defendants failed to prudently monitor the Plans' investments or fees, that would resolve the validity of all participants' claims "in one stroke." *Dukes*, 564 U.S. at 350. Courts in similar ERISA cases routinely find that issues of fiduciary status, breach, and plan losses are common questions. *Schering*, 589 F.3d at 596–97 (commonality "clearly satisfied" based on questions of whether defendants were fiduciaries, whether they breached their duties by failing to monitor and remove imprudent fund, and whether breaches caused plan losses); *Moore v. Comcast Corp.*, 268 F.R.D. 530, 535 (E.D. Pa. 2010) ("[A] number of common issues pervade this case, including whether defendants were fiduciaries of the Plan and whether defendants breached their fiduciary duties by allowing the Plan to invest" in allegedly imprudent investment); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 05-1151, 2009 WL 331426, *7 (D.N.J. Feb. 10, 2009) (common questions included issues of fiduciary status, breach, and losses); *Cryer v. Franklin Templeton Res., Inc.*, No. 16-4265, 2017 WL 4023149, *5 (N.D. Cal. July 26, 2017) (commonality satisfied because all participants "were provided the same investment options" and recovery would benefit "the Plan as a whole."); *Krueger*, 304 F.R.D. at 559, 572 ("[T]he questions of whether Defendants breached their fiduciary duties by causing the Plan to select imprudent investment options or pay excessive record-keeping fees, and whether the Plan suffered losses from those breaches, are common to all Plan participants' claims and, therefore, will generate answers common to all of the putative class members."); *Kanawi*, 254 F.R.D. at 102, 109 ("[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 "made imprudent investment decisions").

The answers to those questions do not depend on the particular circumstances of any one

participant, because Defendants' centralized administration of the Plans is common to all class members. Because "Defendants owed identical fiduciary duties to all members of the proposed class" and made decisions at the Plan level as to the Plans as a whole, commonality is satisfied. *Kanawi*, 254 F.R.D. at 110.

C. Typicality

The "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R .Civ. P. 23(a)(3). The typicality inquiry involves "three distinct, though related, concerns:"

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

Schering, 589 F.3d at 599.

A representative's legal claims need not be perfectly identical to those of the class, but merely "typical, in common-sense terms," so as to "suggest[] that the incentives of the plaintiffs are aligned with those of the class." *Id*. at 598 (citation omitted). A representative's individual circumstances are sufficiently similar to those of the class when they have a similar "factual basis and support." *Id*. "Complete factual similarity is not required"; factual differences "do not render the representative atypical 'if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members.'" *Id*. (quoting *Hoxworth v. Blinder, Robinson & Co.,* 980 F.2d 912, 923 (3d Cir. 1992)).

Given that the commonality and typicality requirements "are closely related and often tend to merge," *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012), the extensive commonality of issues in this case regarding who are the fiduciaries, whether they breached their

duties, and what are the Plans' losses establishes that any participant's claim will be legally and factually typical of all participants' claims. Because Defendants' actions were directed to and affected the Plans as a whole, the claims of Plaintiffs and class members all arise from the same events and course of conduct—Defendants' alleged failures to prudently monitor and control the Plans' recordkeeping fees, and to monitor the Plans' investment options on an ongoing basis and remove imprudent ones. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 336–37 (8th Cir. 2014); *Tibble v. Edison Int'l,*135 S.Ct. 1823, 1828–29 (2015). All participants allegedly paid a portion of the Plans' recordkeeping fees, which were allegedly charged in a "uniform" manner to all participants. Defendants determined the Plans' investment options at the plan level. *Id*. Thus, all participants were allegedly harmed by Defendants' alleged failure to monitor and remove imprudent investments, either by suffering losses from investing in imprudent funds, or by being deprived of prudent alternatives that would have been in the Plans if Defendants had fulfilled their duties. Each class member will have to rely on the same evidence to prove Defendants breached their duties and harmed the Plans. The Plaintiffs and all class members are bringing the same claims under the same legal and remedial theory: enforcement through ERISA §502(a)(2) of Defendants' fiduciary obligations and liability to make good to the Plans the losses caused by Defendants' alleged breaches of duty and to obtain appropriate equitable and other relief.

Because a §1132(a)(2) claim is inherently a representative claim, any participant's claim is necessarily typical of the claims of the class because any participant is asserting the Plan's claim. For these reasons, courts routinely find any participant's ERISA fiduciary breach claim to be typical of the claims of all participants in the plan. *See, e.g., Boyd v. Coventry Healthcare Inc.,* 299 F.R.D. 451 at 459 (D. Md. 2014); *Sims,* 2017 WL 3730552, at *4; *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59 at 64–66 (M.D.N.C. 2008); *Kanawi*, 254 F.R.D. at 110; *Krueger*,

304 F.R.D. at 573; *see also Schering,* 589 F.3d at 604 (fiduciary breach actions under §1132(a)(2) are "paradigmatic examples of claims appropriate for certification.").

D. Adequacy of Representation

Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The "adequacy inquiry 'has two components designed to ensure that absentees' interests are fully pursued.'" *Schering*, 589 F.3d at 602 (quoting *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 630 (3d Cir. 1996)). First, counsel must be qualified to represent the class. *Id.* Second, the Court considers whether there are "conflicts of interest between named parties and the class they seek to represent." *Id.* Plaintiffs satisfy both components.

The named plaintiffs' interests are aligned with the absent class members' interests. All class members—including the named plaintiffs—are acting on behalf of their Plans, enforcing the fiduciary duties Defendants owed to the Plans, and seeking to recover alleged damages and obtain equitable relief due to the Plans. *See* 29 U.S.C. §1109(a); *Mass. Mut. Life Ins. Co.*, 473 U.S. at 142 n.9; *see also* Docs. 84-3 through 84-8 (Plaintiffs' Declarations), ¶5 of each. They also are committed to vigorously prosecuting this action on behalf of their fellow participants. *Id.* at ¶3. Because Plaintiffs are pursuing claims on behalf of the Plan (not individual claims), there is no conflict between Plaintiffs' individual interests and the interests of the class. *Krueger*, 304 F.R.D. at 574–75. To the contrary, the interests of all Plan participants are aligned because "all class members 'share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants.'" *Ward v. Dixie Nat'l Life Ins. Co.,* 595 F.3d 164, 180 (4th Cir. 2010) (editing marks omitted, *quoting Gunnells v. Healthcare Services, Inc.*, 348 F.3d 417 at 434, 431 (4th Cir. 2003)).

Additionally, Plaintiffs' counsel, Schlichter Bogard & Denton LLP, has extensive experience

in prosecuting ERISA fiduciary breach class actions and will fairly and adequately represent the interests of the class in this case. Decl. of Jerome J. Schlichter ¶¶4–28. The firm conducted an extensive investigation of the claims in this action and is committed to devoting all necessary resources to representing the class and vigorously prosecuting this action, as it has done in numerous prior ERISA fiduciary breach actions. *Id*. ¶¶6–7, 15, 19. The firm's experience also is shown by its appointment as class counsel in 30 ERISA fiduciary breach class actions. *Id.* ¶10 (listing cases). In addition, the firm has obtained substantial settlements and judgments in numerous cases. *Id.*¶13. The firm also has successfully handled other class actions outside of the ERISA context. *Id.* ¶¶29–31.

In excessive fee litigation, Schlichter Bogard & Denton is regarded as the "preeminent firm" having "achieved unparalleled results on behalf of its clients" in the face of "enormous risks". *Nolte v. Cigna Corp.,* No. 07-2046, 2013 WL 12242015, at *3–4 (C.D.Ill Oct. 15, 2013). Prior to bringing excessive fee cases involving 401(k) and 403(b) plans, no such cases had been pursued by other private attorneys or the Department of Labor. Schlichter Decl. ¶5. No other law firm has committed more resources than Plaintiffs' counsel to successfully pursuing ERISA class actions on behalf of employees and retirees. *Id.* ¶¶8, 19. Plaintiffs' counsel are "experts in ERISA litigation". *Krueger v. Ameriprise Fin., Inc*., No. 11-2781, 2015 WL 4246879, at *2 (D.Minn. July 13, 2015) (citation omitted); *In re Northrop Grumman Corp. ERISA Litig*., No. 06-6213, 2017 WL 9614818, at *4 (C.D.Cal. Oct. 24, 2017) (Schlichter Bogard & Denton "is highly experienced" in ERISA class actions). The firm also obtained the only victory of an ERISA 401(k) excessive fee Supreme Court case, which unanimously held that an ERISA fiduciary has a continuing duty to monitor plan investments and remove imprudent ones. *Tibble,*135 S.Ct. 1823, 1828–29.

Schlichter Bogard & Denton's work has attributed to substantial fee reductions in the industry that "approach[ed] $2.8 billion in annual savings for American workers and retirees." *Nolte,* 2013 WL 12242015, at *3. Plaintiffs' counsel's efforts have "significantly improved 401(k) plans across the country[.]" *Spano v. Boeing Co*., No. 06-743, 2016 WL 3791123, at *3 (S.D.Ill. Mar. 31, 2016). District courts have consistently commended Schlichter Bogard & Denton for displaying "extraordinary skill and determination" in obtaining substantial recoveries on behalf of participants and beneficiaries in ERISA retirement plans. *E.g., Beesley v. Int'l Paper Co*., No. 06-703, 2014 WL 375432, at *2 (S.D.Ill. Jan. 31, 2014).

Recently, on June 24, 2019, Judge Eagles from the Middle District of North Carolina "recognized the experience, reputation, and ability" of Schlichter Bogard & Denton and found that the firm "demonstrated diligence, skill, and determination in this matter and, more generally, in an area of law in which few attorneys and law firms are willing or capable of practicing." *Clark v. Duke Univ.*, No. 16-1044, Doc. 165 at 7 (M.D.N.C. June 24, 2019); *see also Sims v. BB&T Corp.*, No. 15-732, 2019 WL 1993519, at *3 (M.D.N.C. May 6, 2019) (Plaintiffs' counsel "displayed skill and determination" and "diligently advocated on behalf of the class"). Chief Judge Osteen from the same District similarly commended the efforts of Plaintiffs' counsel in obtaining a "significant monetary award", as well as the valuable improvements to the plan obtained through the settlement. *Kruger v. Novant Health, Inc*., No. 14-208, 2016 WL 6769066, at *6 (M.D.N.C. Sept. 29, 2016).

For these reasons, the named plaintiffs should be appointed as class representatives and Schlichter Bogard & Denton should be appointed as Class Counsel.

II. The requirements of Rule 23(b)(1) are met.

Having satisfied the four Rule 23(a) requirements, Plaintiffs need only satisfy one

subsection of Rule 23(b). *Schering*, 589 F.3d at 596. Plaintiffs seek certification under Rule 23(b)(1) because claims for breach of fiduciary duty brought under ERISA §502(a)(2) are "paradigmatic" Rule 23(b)(1) claims. *Id.* at 604.

Certification under Rule 23(b)(1) is appropriate if "prosecuting separate actions by or against 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 a defendant, while 23(b)(1)(B) looks to prejudice to the putative class members." *Kanawi,* 254 F.R.D. at 111.

Here, certification is proper under both Rule 23(b)(1)(A) and (B).

A. The proposed class satisfies Rule 23(b)(1)(A).

Rule 23(b)(1)(A) "takes in cases where the [defendant] is obligated by law to treat the members of the class alike" or "must treat all alike as a matter of practical necessity." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted). "One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct." Fed. R. Civ. P. 23, Adv. Comm. Note, 1966 amend., sub. (b)(1)(A).

Here, Defendants owed fiduciary duties the Plans, and thus to *all* participants, and hence all class members. *See* 29 U.S.C. §1104(a)(1). In discharging their duties to the Plans, Defendants, as fiduciaries, were obligated to treat all participants (and all class members) alike.

See In re Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172, 179 (S.D.N.Y. 2006) (finding Fed. R. Civ. P. 23(b)(1)(A) satisfied "because the defendants have a statutory obligation, as well as a fiduciary responsibility, to 'treat the members of the class alike.'") (citation omitted).

Allowing 20,000 individual class members to pursue §502(a)(2) actions on behalf of the Plans could result in varying adjudications over whether Defendants breached their duties as alleged, how to measure damages to the Plans, and whether equitable relief is warranted. Inconsistent adjudications on those issues in "thousands of separate individual actions" would put Defendants in the "untenable" position of being subject to "differing standards of duty and, thus, differing standards of conduct," thereby leaving Defendants "in limbo" and "making compliance impossible." *Shanehchian v. Macy's, Inc*., No. 07-828, 2011 WL 883659, *9 (S.D. Ohio Mar. 10, 2011).

As to Count I, the fact-finder would determine the Plans' alleged losses by deciding how much the recordkeepers were paid and whether the fees paid for those services were reasonable. *See, e.g., Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 1113291, *11–13 (W.D. Mo. Mar. 31, 2012) (calculating damages based on difference between recordkeeping fees paid by the plan each year and the reasonable market rate for the same services). Regarding Count II, the fact-finder would determine whether Defendants prudently and thoroughly investigated Plan investments on an ongoing basis, whether the options were prudent and reasonably priced, and appropriate basis for measuring any losses to the Plans. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951, 959 (8th Cir. 2017) (where fiduciary breached its duty in replacing a fund, the district court must measure the plans' resulting losses). Injunctive relief may also be appropriate to require removal of certain investment options, a bidding process regarding recordkeeping fees, or other reformation of the Plans. *See, e.g.*, *Tussey*, 2012 WL 1113291, *39 (ordering breaching fiduciary

to "utilize[] a competitive bidding process … to select a new recordkeeper"); *see also Clark v. Duke University*, No. 16-1044, 2019 WL 2588029, *3 (M.D.N.C. June 24, 2019)(approving settlement which "obligates Duke to provide considerable non-monetary relief," including the use of an independent consultant and specified investment criteria); *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 147-1 at 22–23 (Article 10) (M.D. Tenn. Apr. 23, 2019) (settlement terms require fiduciary to obtain competitive recordkeeping bids).

Separate individual adjudications to resolve any one of those issues could create incompatible standards for Defendants as to the amount in losses they must restore to the Plans and how to reform the Plans and otherwise remedy Defendants' alleged breaches. As numerous courts have recognized, these claims are properly certified under Rule 23(b)(1)(A). *Piazza v. EBSCO Indus.*, 273 F.3d 1341, 1352–53 (11th Cir. 2001); *Stanford v. Foamex L.P.*, 263 F.R.D. 156 at 173 (E.D. Pa. 2009); *Vellali v. Yale University*, 333 F.R.D. 10 at 18 (D. Conn. 2019); *Henderson*, 2018 WL 6332343, *9; *Clark*, 2018 WL 1801946, *9; *Krueger*, 304 F.R.D. at 576–77 (citing cases); *Shanehchian*, 2011 WL 883659, *9; *Harris v. Koenig*, 271 F.R.D. 383, 394–95 (D.D.C. 2010); *Kanawi,* 254 F.R.D. at 111.

B. The proposed class satisfies Rule 23(b)(1)(B).

For similar reasons, one participant's action over these claims effectively "would be dispositive of the interests" of the other participants' actions over the same claims because they concern the same actions, damages, and fiduciary duties owed to the Plans. Fed. R. Civ. P. 23(b)(1)(B). "Classic examples" of Rule 23(b)(1)(B) claims include "actions charging 'a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or beneficiaries, and which require an accounting or like measures to restore the subject of the trust.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–34 (1999) (quoting Fed.

R. Civ. P. 23, Adv. Comm. Notes, 1966 Amends., subd. (b)(1)(B). In such cases, the "shared character of rights claimed or relief awarded entails the risk that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Id*. at 834.

Because of the trust-like nature of a defined contribution plan, with fiduciary duties owed to the plan and not to particular individuals, courts have routinely certified similar claims as Rule 23(b)(1)(B) class actions. *Schering*, 589 F.3d at 604; *Moore*, 268 F.R.D. at 538; *Stanford*, 263 F.R.D. at 173–74; *Vellali*, 333 F.R.D. at 18; *Henderson*, 2018 WL 6332343, *9–10; *Clark*, 2018 WL 1801946, *9; *Leber v. Citigroup 401(k) Plan Investment Committee*, 323 F.R.D. 145 at 165 & n.17 (S.D.N.Y. 2017) ("Most courts that have certified ERISA class actions alleging breaches of fiduciary duties have done so under Rule 23(b)(1)(B)."); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-9936, 2017 WL 3868803, *9 (S.D.N.Y Sept. 5, 2017) ("[C]ourts regularly certify 23(b)(1)(B) class actions ... in ERISA cases alleging breach of a fiduciary duty[.]") (quoting Rubenstein, 3 *Newberg on Class Actions* §4:20 (5th ed. 2017)); *Krueger*, 304 F.R.D. at 577–78; *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-2593, 2011 WL 1303367, *9 (D. Kan. Apr. 6, 2011); *Harris*, 271 F.R.D. at 394 ("Historically, [§1132(a)(2)] actions brought on behalf of the entire plan have been considered especially appropriate for Rule 23(b)(1)(B) certification.").

Even if absent participants were not barred by res judicata from litigating the same claims, as a "practical matter" a prior adjudication of whether Defendants breached their duties to the Plans would influence a subsequent court's adjudication of the same claims. *Eliasen v. Green Bay & W. R. Co.*, 93 F.R.D. 408, 413 (E.D. Wis. 1982) (finding Rule 23(b)(1)(B) satisfied because "[o]ther courts could, as a matter of comity, give deference" to fiduciary breach and

damages findings "as a determination of the identical factual questions presented in a subsequent suit."). Thus, Plaintiffs satisfy both Rule 23(b)(1)(A) and (b)(1)(B).

CONCLUSION

Plaintiffs respectfully request that the Court certify the Settlement Class for settlement purposes only, appoint the named plaintiffs as class representatives, and appoint Schlichter Bogard & Denton, LLP as Class Counsel.

January 14, 2021

Respectfully submitted,

/s/ Heather Lea

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 14, 2021.

/s/ Heather Lea