IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re Biogen, Inc. ERISA Litigation	Case No.: 1:20-cv-11325-DJC Judge Denise J. Casper Fairness Hearing: January 24, 2024

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

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Plaintiffs,[1] on behalf of the proposed Settlement Class and the Biogen Inc. 401(k) Savings Plan (the "Plan"), respectfully submit this Memorandum of Law in Support of their Motion for Final Approval of Class Action Settlement and Attorneys' Fees, Expenses, and Case Contribution Awards (the "Motion"), pursuant to the Court's Order Granting Preliminary Approval of the Settlement, Preliminarily Certifying Class for Settlement Purposes, Approving Form and Manner of Settlement Notice, Preliminarily Approving Plan of Allocation, and Scheduling Fairness Hearing entered on August 31, 2023 (ECF No. 117, "Preliminary Approval Order"). Plaintiffs respectfully request that the Court issue an Order that: (1) approves the Settlement with Defendants, as memorialized in the Settlement Agreement dated August 23, 2023 and exhibits thereto (ECF No. 116-1); (2) maintains certification of the Settlement Class; (3) finds the manner in which the Settlement Class was notified of the Settlement was the best notice practicable under the circumstances, and fair, reasonable, and adequate; (4) approves the Plan of Allocation; and (5) awards attorneys' fees of one-third of the Gross Settlement Amount ($3,250,000.00), reasonable expenses incurred and carried during the litigation, and case contribution awards of $15,000.00 each to Plaintiffs. Defendants do not oppose this Motion.

I. INTRODUCTION

The Parties have agreed to the Settlement in this representative action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for total relief of $9,750,000.00, as well as significant non-monetary relief aimed at strengthening the fiduciary process by which the Plan is managed and administered in the future, which will provide a

[1]Plaintiffs are Sarah Gamble, David Covington, Tansy Wilkerson, and Daisy Santiago, (collectively, "Plaintiffs"). Defendants are Biogen, Inc., the Board of Directors of Biogen, Inc., and the Biogen Inc. 401(k) Retirement Committee (collectively, "Defendants," and with Plaintiffs, the "Parties").

substantial recovery to Class Members. The Settlement follows substantial motion practice and discovery, which afforded the Parties a thorough understanding of the claims and defenses and the Plan's alleged losses, and was negotiated at arm's-length by experienced counsel after two mediations. In light of the favorable Settlement relief, Plaintiffs submit that the Settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class, and warrants final approval. In addition, the significant efforts of Plaintiffs and Class Counsel in achieving the Settlement recovery support the requested awards of attorneys' fees, litigation expenses, and case contribution awards, each of which are within the range regularly approved in the First Circuit.

On August 31, 2023, the Court entered the Preliminary Approval Order, which, among other things, conditionally certified the Settlement Class, found that notice to the Settlement Class was warranted, and set a final approval hearing on January 24, 2024 at 3:30 p.m. *See generally* Preliminary Approval Order. The Notice amply describes the terms of the Settlement, nature and history of the litigation, manner in which objections can be lodged, as well as the Plan of Allocation, and anticipated requests for fees, expenses, and compensatory awards. The Settlement Administrator has distributed notice to over 13,000 members of the Settlement Class and Class Counsel are aware of ***no objections*** to the Settlement or related applications to date. Moreover, the Independent Fiduciary engaged by Defendants on behalf of the Plan has approved and authorized the Settlement and found each of the related applications to be reasonable.

Since none of the circumstances warranting preliminary approval have changed, and the reaction of the Settlement Class has been overwhelmingly positive, Plaintiffs now request that the Court enter final approval of the Settlement and grant the related applications.

II. BACKGROUND

A. The Settlement

Plaintiffs allege that Defendants are fiduciaries of the Plan and breached duties they owed

to the Plan and its participants and beneficiaries under ERISA by failing to appropriately monitor the Plan's investments and, consequently, retaining unsuitable investments in the Plan instead of offering prudent, readily available alternative investments. *See* Consolidated Class Action Complaint ("Complaint," ECF No. 22) ¶¶ 25–59. Plaintiffs filed the Complaint on September 25, 2020, and Defendants moved to dismiss the Complaint on November 18, 2020 (ECF Nos. 28, 29). The Court granted in part and denied in part Defendants' motion to dismiss on July 22, 2021 (ECF No. 80), and the Parties engaged in comprehensive discovery, including the exchange and review of thousands of pages of documents and the deposition of multiple witnesses, as well as third-party discovery. *See* Declaration of Alec J. Berin ("Berin Decl.") ¶ 3. The Parties stipulated to class certification on November 4, 2022 ("Class Certification Stipulation," ECF No. 103). The Court entered the Class Certification Stipulation on November 8, 2022, certifying the following class:

> All participants and beneficiaries in the Biogen, Inc. 401(k) Savings Plan at any time on or after July 14, 2014, to the present, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period.

See ECF No. 104. The Class was divided into a "Release Subclass" and "Non-Release Subclass" to provide for a workable framework for certification while preserving ultimate issues around release agreements signed by absent class members.

After the Court issued its order on Defendants' motion to dismiss, the Parties participated in a private mediation with Robert A. Meyer, Esquire of JAMS, a well-respected, neutral mediator with experience mediating complex ERISA claims of the kind at issue in the Class Action. *See* Berin Decl. ¶ 4. This mediation did not result in a resolution of any of the pending claims but enabled the Parties to candidly discuss their positions regarding the strengths and weaknesses of the Class Action and the Plan's losses alleged by Plaintiffs. Following further

discovery, the Parties then agreed to participate in a second mediation with Mr. Meyer in an attempt to resolve the litigation and moved to stay proceedings pending mediation on March 16, 2023 (ECF No. 109). The Court stayed the prior deadlines in the Class Action through June 29, 2023 (ECF No. 110), and the Parties held the second mediation session on June 22, 2023. Prior to and during the mediation sessions, the Parties exchanged briefs and follow-up information concerning the merits of Plaintiffs' claims, Defendants' defenses, and potential damages, and reached an agreement in principle during the second mediation to resolve the Class Action. The Parties reported their agreement to the Court on June 29, 2023 (*see* ECF No. 112) and worked diligently to document the same in the Settlement Agreement.

The Settlement provides that, in exchange for dismissal of the Class Action and a release of claims, Defendants will pay $9,750,000.00 into a Qualified Settlement Fund, to be allocated to Current Participants, Former Participants, Beneficiaries, and Alternate Payees of the Plan pursuant to the Plan of Allocation. *See* Settlement Agreement, §§ 1.38, 4.4–4.5, 5.3, 7.1–7.2. In addition, the Settlement provides that Retirement Committee will: (i) complete the ongoing request for proposal for investment advisory services for the Plan, including negotiating the advisor's attendance at the Committee's quarterly meetings and provisions of quarterly investment reports; (ii) conduct quarterly meetings; (iii) receive annual fiduciary training, and any new members will receive onboarding training, by a third party; (iv) conduct a full review of the suitability of the MFS New Discovery Growth Fund for the Plan; (v) evaluate whether a small cap value fund should be added to the Plan lineup; and (vi) evaluate whether to recommend to the Board or any applicable sub-committee of the Board that the Committee be expanded from three to five members. *See id.*, §§ 14.1–14.6. The Settlement Agreement and the Preliminary Approval Order set forth the Notice Plan and describe Plaintiffs' anticipated requests

for payment of Attorneys' Fees and Costs to Class Counsel and for Case Contribution Awards, all of which are subject to the Court's approval. *See id.*, §§ 1.4, 1.9, 2.2.7, 6.1.

B. Class Notice

In accordance with the Preliminary Approval Order, Strategic Claims Services ("SCS") disseminated the Settlement Notice by electronic and/or first-class mail to more than 13,500 members of the Settlement Class and the Former Participant Claim Form to each Class Member without an Active Account by October 2, 2023. *See* Declaration of Cornelia Vieira Concerning the Mailing of the CAFA Notice, Settlement Notice, and Former Participant Claim Form ("Vieira Decl."), at ¶ 5. The original list was run through the United States Postal Service national change of address service to obtain new address information prior to the initial mailing. *See id.* SCS re-mailed any Notices and Former Participant Claim Forms returned as undeliverable for which forwarding addresses were available. *See id.*, at ¶¶ 6–7. For those returned as undeliverable for which no forwarding addresses were available, SCS utilized Experian "skip tracing" to obtain a new address and re-mailed Notices and Former Participant Claim Forms to each individual for whom an updated address was discovered. *See id.*, at ¶¶ 6–9. SCS re-mailed approximately 450 Notices and Former Participant Claim Forms that were initially returned as undeliverable. *See id.*, at ¶ 7. Pursuant to the terms of the Settlement, SCS also established a website for the Settlement, which provides information about the case and relevant deadlines and also makes available a number of pertinent documents, including the following: (i) Notice; (ii) Former Participant Claim Form; (iii) the Preliminary Approval Order; (iv) the Settlement Agreement and exhibits; and (v) the Complaint. *See id.*, at ¶ 9. Further, in accordance with the Settlement Agreement and the Preliminary Approval Order, SCS established a toll-free telephone number and email address to which members of the Settlement Class could direct questions about the Settlement. *See id.*, at ¶ 10. On November 27, 2023, SCS sent

reminder post card by first-class mail and e-mail (when available) to each Former Participant, Beneficiary, and Alternate Payee who did not return the Former Participant Claim Form prior to the deadline for submission of the same. *See id.*, at ¶ 11.

C. Distribution of the Settlement Fund and Reaction of the Settlement Class

More than 8,000 members of the Settlement Class will automatically receive the benefit of the Settlement. *See* Vieira Decl., at ¶¶ 4, 14. In addition, SCS has received more than 1,250 Former Participant Claim Forms to date. *See id.* The deadline for submitting the Former Participant Claim Form is December 29, 2023. *See id.* After payments have been issued to Class Members, any amount remaining in the Settlement Fund from uncashed checks will be distributed back to the Settlement Fund to be utilized as set forth in the Plan of Allocation.

To date, no objections to the Settlement or any of the related applications have been lodged by members of the Settlement Class after effectuation of the Notice Plan. *See* Berin Decl., at ¶ 8; *see also* Vieira Decl., at ¶ 13. To further ensure the Settlement Agreement is fair, reasonable, and adequate, and complies with ERISA's prohibited transaction provisions, the Independent Fiduciary has reviewed the Settlement and related applications on behalf of the Plan and issued its report approving and authorizing the Settlement on behalf of the Plan.[2]

D. Efforts of Plaintiffs and Class Counsel

Plaintiffs devoted significant time and effort with Class Counsel to research the facts of the case, reviewed filings, collected documents for anticipated discovery, and regularly conferred with Counsel about litigation strategy and the progress of settlement negotiations, culminating with Plaintiffs' authorization of the Settlement. *See* Berin Decl., at ¶¶ 3–5.

Counsel and their professionals have spent, in the aggregate, over 4,030 hours in the

[2]The Independent Fiduciary's report will be filed on the date of this Motion's filing.

prosecution of this case against Defendants, resulting in a lodestar of $2,357,741.50, with additional anticipated lodestar of at least $100,000 necessary to complete the representation in this matter. *See* Berin Decl., at ¶ 18. Accordingly, the requested fees would represent a lodestar multiplier of ***less than 1.4***, even before additional time in connection with settlement administration is considered and without accounting for the value of non-monetary relief obtained on behalf of the Settlement Class. Counsel undertook to represent Plaintiffs and the Class on a contingent basis and advanced necessary litigation expenses without any guaranty of recovery. *See id.*, at ¶¶ 15–16.

E. Independent Fiduciary Review

To further ensure that the Settlement Agreement is fair, reasonable, and adequate, Defendants retained an Independent Fiduciary, Fiduciary Counselors Inc., to approve and authorize the Settlement on behalf of the Plan and provide the Court another touchstone to assess the fairness of the Settlement. The Parties have cooperated to provide the Independent Fiduciary with sufficient information to enable it to evaluate the Settlement, including all requested public and confidential documents (including confidential expert materials), separate interviews of the Parties' counsel by the Independent Fiduciary, and information concerning the applications for attorneys' fees, litigation expenses, and case contribution awards. *See* Berin Decl., at ¶ 2. Further, the Independent Fiduciary complied with all relevant conditions set forth in Prohibited Transaction Class Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003 by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended ("PTE 2003-39"), in making its determination, for the purpose of Defendants' reliance on PTE 2003-30. As reflected in the report that will be filed on the docket on the date of this Motion's filing, the Independent Fiduciary concluded that the Settlement and related applications are fair, reasonable, and adequate. *See id.*

III. ARGUMENT

A. Certification of the Settlement Class Should be Maintained

When the Court is presented with a proposed settlement in a class action, it must determine whether the proposed settlement class satisfies the Federal Rule of Civil Procedure 23 requirements for class certification. *See Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990); *see also Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 102 (D. Mass. 2010) (finding despite "cautionary approach" to class certification, "the law favors class action settlements"). Specifically, a proposed class must meet the four requirements of Rule 23(a) and the requirements of at least one subsection of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997); Fed. R. Civ. P. 23.

The Court entered the Class Certification Stipulation upon findings that the elements of Rule 23(a) and 23(b)(1) were satisfied. *See* ECF No. 104. Moreover, the Court provisionally maintained class certification in the Preliminary Approval Order based upon further review and findings that Rules 23(a) and 23(b)(1) remain satisfied. *See* Preliminary Approval Order, ECF No. 117, at 2–3. None of the circumstances that warranted certification based upon the Parties' Class Certification Stipulation or the Court's findings in the Preliminary Approval Order have changed. Thus, under the same analysis, the Settlement Class should be maintained through entry of a final judgment.

B. The Settlement Warrants Final Approval

The Court must determine whether the Settlement warrants final approval on the substance. Although the First Circuit has not adopted any single list of factors in approving a settlement, courts in this District often look to the factors articulated by the Second Circuit in *Detroit v. Grinell Corp.*, 495 F.2d 488, 463 (2d Cir. 1974): "(1) the complexity, expense, and likely duration of litigation, (2) reaction of class to settlement, (3) stage of proceedings and

amount of discovery completed, (4) risks of establishing liability, (5) risks of establishing damages, (6) risks of maintaining class action through trial, (7) ability of defendants to withstand greater judgment, (8) range of reasonableness of settlement fund in light of best possible recovery, and (9) range of reasonableness of settlement fund to a possible recovery in light of all the attendant risks of litigation." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 343–44 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015). Other formulations of the final approval inquiry by courts in the First Circuit generally represent variations or abbreviations of the *Grinell* analysis. *See Bezdek*, 79 F. Supp. 3d at 344 (citing *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 259 (D.N.H. 2007); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003)). At bottom, these elements "speak to the core question of the reasonableness of the settlement in light of the uncertainties of litigation." *Id.* at 343; *see also United States v. Massachusetts,* 869 F. Supp. 2d 189 (D. Mass. 2012) (citing *Voss v. Rolland*, 592 F.3d 342, 251 (1st Cir. 2010)) (finding the Court must determine if the settlement is "fair, reasonable, and adequate; and not illegal, a product of collusion, or against the public interest."). Courts in the First Circuit approach that analysis with the understanding that "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996).

The analysis begins with a presumption in favor of the settlement if the parties negotiated at arm's-length and were sufficiently informed about the strengths of the claims and defenses, as well as risks of continued litigation. *See Hochstadt*, 708 F. Supp. 2d at 107 (citing *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32–33 (1st Cir. 2009)); *see also City P'ship Co.*, 100 F.3d at 1043 (noting that "the law favors class action settlements").

1. The Settlement Should be Approved

The First Circuit has enumerated various factors for courts to consider when determining whether to approve of a settlement: "Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005) (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003)). The most important factor is the "likelihood of success," or "the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement." *Schlusselberg v. Colonial Mgmt. Assoc., Inc.*, 389 F. Supp. 733, 735 (D. Mass. 1974). When evaluating this factor, courts are mindful that settlement are born out of compromise. *See Rolland v. Cellucci*, 191 F.R.D. 3, 15 (D. Mass. 2000).

In evaluating the first factor, the Court should also weigh the considerations listed in the sixth factor: the potential "risk, complexity, expense and duration" of the litigation. *In re Relafen*, 231 F.R.D. at 72. At the time the Parties agreed to the Settlement, they were engaged in vigorous litigation and further litigation promised to be lengthy and complex, involving numerous competing experts on liability issues concerning Plaintiffs' claims and Defendants' defenses, as well as the Plan's alleged losses. The Parties likely would have filed dispositive motions and pretrial motions, including motions concerning the anticipated expert testimony. Thus, Plaintiffs faced meaningful challenges to their ability to obtain such a significant recovery on behalf of the Plan, which strongly supports final approval. *See Rolland*, 191 F.R.D. at 9.

Plaintiffs and Class Counsel have achieved a favorable Settlement, including prospective relief for the Plans to bolster the fiduciaries' investment and service provider monitoring

processes, and have relieved the Class of the burdens and risks of further litigation. *See id.* at 10 ("When comparing the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation, there are clearly strong argument for approving a settlement.") (internal quotations and citation omitted). Here, the range of realistic and supportable damages ranged from $5,375,238 to $23,940,533 (depending on the damages methodology employed), *see* Berin Decl. ¶ 23, and the recovery, therefore, amounts to over 64.8% of the mid-point of potentially recoverable damages in this case—an excellent recovery under the circumstances, even setting aside the value of the non-monetary relief. *See*, *e.g.*, *In re Relafen*, 231 F.R.D. at 74 (approving a settlement representing "approximately 26% or 55% of the alleged damages" as calculated by opposing experts); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (approving a $3.6 million settlement of an ERISA class action with plan losses estimated to be between $7.5 million and $111 million); *Hochstadt*, 708 F. Supp. 22d at 109 (approving settlement amounting to 27% of conservatively estimated loss in ERISA class action); *Bezdek*, 79 F. Supp. 3d at 345–46 (approving settlement providing relief amounting to 9% of the alleged price premium measure of damages).[3] The Settlement provides substantial monetary relief, as well as meaningful non-

[3]The Parties' Settlement Agreement permits Plaintiffs to seek an award of attorneys' fees of up to 33% of the settlement amount plus expenses. Plaintiffs' request for attorneys' fees is consistent with the Agreement and with the benchmark approved by courts in the First Circuit and others around the country. *See*, *e.g.*, *Boyd*, 299 F.R.D. at 465 ("Fees awarded under the percentage-of-recovery method in settlements under $100 million have ranged from 15% to 40%.") (internal quotations omitted); *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) (granting attorneys' fees of 33.3% and noting that courts "have generally awarded fees in the range of nineteen to forty-five percent."); *Jones v. Coca-Cola Consolidated Inc.*, No. 3:20-cv-00654-FDW-DSC, ECF No. 98 (W.D.N.C. Aug. 2, 2022) (awarding plaintiffs' counsel 33.3% of the common fund in analogous ERISA litigation); *Blackmon v. Zachry Holdings, Inc.*, No. 5:20-cv-00988-ESC, ECF No. 82 (W.D. Tex. Aug. 5, 2022) (same). Likewise, Plaintiffs seek $15,000 each as case contribution awards, which is consistent with the amounts awarded to class representatives in other cases where, like here,

monetary relief related to the ongoing management and administration of the Plan, which this Court has recognized as "a meaningful component of a settlement agreement." *Bezdek*, 79 F. Supp. 3d at 346. Accordingly, the first and sixth factors favors final approval of the Settlement.

The second factor in the settlement approval inquiry considers the reaction of the class to a proposed settlement. This factor is analyzed by "comparing the number of objectors and opt outs with the number of claimants, and by assessing the extent to which notice effectively reached absent class members." *In re Lupron Mktg and Sales Practices Litig.*, 228 F.R.D. 75, 96 (D. Mass. 2005). Applied to the circumstances of the Settlement, this comparison confirms that final approval is warranted. Notice was distributed to over 13,000 potential members of the Settlement Class by email and direct mail to addresses maintained by their retirement plan recordkeeper. *See* Vieira Decl. ¶ 5. Since members of the Settlement Class each participated in the Plan, the address data maintained by the recordkeeper is likely to be highly accurate and provide for effective notice to the largest number of Settlement Class members "practicable under the circumstances." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174 (1974). ***No objections*** have been submitted. Meanwhile, 8,122 members of the Settlement Class would automatically receive proceeds from the Settlement in their Plan accounts and an addition 1,291 former participants and beneficiaries have submitted claim forms to receive Settlement proceeds. *See* Vieira Decl. ¶ 14. In other words, of the approximately 13,000 members of the Settlement Class, ***none*** have objected and at least 9,400 members of the Settlement Class (over ***72%***) would

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plaintiffs were highly engaged, participated actively in the discovery process, and actively supervised the litigation. *See*, *e.g.*, *Ford v. Takeda Pharma. U.S.A., Inc.*, No. 1:21-cv-10090-WGY, 2023 WL 3679031, at *3 (D. Mass. Mar. 31, 2023) (awarding case contribution awards in the amount of $15,000 to each class representative); *In re Marsh ERISA Litig.,* 265 F.R.D. 128, 151 (S.D.N.Y. 2010) (awarding case contribution awards in the amount of $15,000 to each of the three named plaintiffs).

receive Settlement proceeds. *See id.* "The favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval[.]" *Hill v. State Street Corp.*, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015) (approving settlement where court found only a *de minimis* number of objections and none that challenged the amount of the settlement); *see also In re Relafen*, 231 F.R.D. at 72 ("The overall reaction to the settlement has been positive. There have been no objections to the overall amount of the Settlement Fund."); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 473 (D.P.R. 2011) (small number of objections received, none of which challenged the adequacy of the settlement amount, "certainly weighs in favor of approval" of settlement). There is little doubt that this factor supports final approval of the Settlement.

The third factor courts in this Circuit consider is the "stage of the litigation and the amount of discovery completed." *In re Relafen*, 231 F.R.D. at 73. This Settlement Agreement comes after the Parties substantially completed fact discovery, including the production of thousands of pages of documents and depositions of fact witnesses, as well as certain third-party discovery, allowing them to comprehensively evaluate the strengths and weaknesses of the action. *See Hochstadt*, 708 F. Supp. 2d at 107 (explaining that "the applicable standard" asks "whether the parties conducted sufficient discovery to make an intelligent judgment about settlement."). Courts recognize that parties and counsel can develop an understanding of the claims and defenses and value of theoretical outcomes through formal discovery under the Federal Rules of Civil Procedure as well as through other means like investigation and expert analysis. *See In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 789 F. Supp. 2d 935, 966 (N.D. Ill. 2011). Class Counsel conducted substantial investigation and analysis of Plaintiffs' claims, commencing even before the filing of the initial pleading, and, throughout the course of the

litigation and settlement efforts, reviewed and analyzed documents pertaining to the Plans' administration and Defendants' fiduciary process, including, *inter alia*, chartering documents of the fiduciary committee, meeting minutes, materials provided to the committee to support its decision-making, disclosures by service providers, and disclosures made to participants in the Plans. *See* Berin Decl. ¶¶ 3. Additionally, the Parties conducted numerous depositions of Committee members and sought discovery from services providers to the Plan. *Id.* The Parties also exchanged confidential information related to the claims and defenses at issue in the Class Action, and the Plan's alleged losses, in connection with the mediations. *See id.* Given this information, it is Class Counsel's opinion that the Settlement is fair, reasonable, and adequate to the Settlement Class. *See Hochstadt*, 708 F. Supp. 2d at 108 (granting preliminary approval to settle a case "at a stage where both the court and counsel are able to evaluate the merits of the claims."). Class Counsel have significant experience litigating ERISA breach of fiduciary duty actions, and the materials produced by Defendants enabled Class Counsel to meaningfully evaluate the merits of Plaintiffs' claims and assess the risks of continued litigation.

Finally, for the fourth and fifth factors (the opinion of competent counsel and the conduct of negotiations), Courts consider class counsel's background and whether the settlement is the result of "negotiation that occurred at arm[']s[-]length." *In re Lupron Mktg. and Sales Prac. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004). The Settlement is the product of an extensive arm's-length process involving an experienced neutral mediator. *See* Berin Decl. ¶ 4. Further, Class Counsel and Defendants' counsel are experienced in complex ERISA litigation, thoroughly understand the factual and legal issues involved in the Class Action, and believe the Settlement is fair and reasonable. *Id.* ¶¶ 21–22. In addition, the report of the independent fiduciary retained on behalf of the Plan confirms the arm's-length nature of the Settlement. Therefore, the fourth

and fifth factors weigh strongly in favor of Settlement approval. *See Rolland*, 191 F.R.D. at 10; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Hochstadt*, 708 F. Supp. 2d at 107 (granting preliminary approval of a settlement reached through arm's-length negotiations).

In sum, the Settlement is the product of vigorous litigation and arm's-length negotiation by experienced and well-informed counsel, and it provides significant relief to the Settlement Class. Accordingly, the Court should find the Settlement warrants final approval.

2. The Plan of Allocation Should be Approved

The Plan of Allocation provides recovery to members of the Settlement Class on a *pro rata* basis, with no preferential treatment for Plaintiffs or any segment of the Settlement Class, in a manner that has been approved by courts in this District. *See Bussie*, 50 F. Supp. 2d at 75 (approving plan of allocation where "any differences in the nature and value of the benefits received by Class members reflect the Settlement's fairness insofar as they are rationally based on objective differences in the positions of the Class members, such as the kind and size of their insurance policy."). This is substantially similar to plans approved by courts in analogous ERISA litigation. *See, e.g.*, *Clark v. Beth Israel Deaconess Med. Center, et al.,* No. 1:22-cv-10068-DJC, ECF No. 73 (D. Mass. Sept. 22, 23) (granting final approval of settlement agreement and associated plan of allocation as "fair, reasonable, and adequate"); *Blackmon*, No. 5:20-cv-00988-ESC, ECF No. 82; *Coca-Cola Consolidated Inc.*, No. 3:20-cv-00654-FDW-DSC, ECF No. 98; *Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, ECF No. 268 (N.D. Cal. Sept. 8, 2020) ("Settlement Scores will be determined by calculating the Class Member's year-end account balance during the Class Period and dividing that amount by the total sum of year-end asset

amounts in the Plan during the Class Period"). The Plan of Allocation is consistent with the obligation of ERISA fiduciaries to treat plan participants alike, and obviates any potential intraclass conflicts. In addition, the Plan of Allocation provides that members of the Settlement Class with active accounts in the Plans will receive the distributions of settlement proceeds to which they are entitled automatically in their accounts in the Plans. In light of its equitable treatment of the Settlement Class, the Court should find that the Plan of Allocation is fair, reasonable, and adequate.[4]

C. The Court Should Award the Requested Attorneys' Fees, Expenses, and Case Contribution Awards

1. Class Counsel's Efforts Warrant an Award of Attorneys' Fees and Expenses from the Common Fund

Federal Rule of Civil Procedure 23 contemplates that, in the process of approving class action settlements, courts may "award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In class action litigation, the attorneys who secure a recovery for a class are generally "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The court's authority to

[4]Plaintiffs note the following typographical corrections to Paragraph 1.5.3 of the Plan of Allocation (corrections in italics):

> If the total dollar amount of the settlement payment (combining payments under both Freedom Funds and Other Challenged Funds) to a Former Participant, Beneficiary, or Alternate Payee who does not have an Active Account, is initially calculated by the Settlement Administrator to be $10 or less, then that person's payment shall be $10, payable from the Freedom Funds Settlement Amount or Other Challenged Funds Settlement Amount, respectively, in accordance with the *entitlement of the* Former Participant, Beneficiary, or Alternate Payee to receive proceeds from such settlement amount. All such amounts shall be retained in the Settlement Fund for distribution under Paragraph *1.7*.

These corrections are noted merely for purposes of clarification and do not materially alter the Plan of Allocation. Plaintiffs further submit that such corrections do not require further action since they pertain to the instructions given to the Settlement Administrator, rather than a right or obligation of members of the Settlement Class.

reimburse the representative parties . . . stems from the fact that the class-action device is a creature of equity and the allowance of attorney related costs is considered part of the historic equity power of the federal courts." 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure §1803, at 325 (3d ed. 2005).

In common fund settlements, the attorneys' fee award is usually made as a percentage of the fund. The common fund is "based on the equitable notion that those who have benefited from litigation should share its costs." *Skelton v. General Motors*, 860 F.2d 250, 252 (7th Cir. 1988). By awarding fees payable from the common fund, the court spreads litigation costs proportionally among those who will benefit from the Settlement Fund. *See Boeing*, 444 U.S. at 478. Plaintiffs' and Class Counsel's efforts here have resulted in a significant common fund recovery for the Class and reflect the private enforcement aims of ERISA. In light of these substantial efforts, the requested attorneys' fees are warranted.

Courts in this Circuit commonly award up to 35% of a common fund as attorneys' fees and recognize that one-third of the total settlement is consistent with an informal benchmark employed by courts within the First Circuit. *See Bacchi v. Mass. Mut. Life Ins. Co.*, 2017 WL 5177610, at *4 (D. Mass. Nov. 8, 2017) (recognizing that, "[a]lthough the First Circuit has not set a presumptive benchmark for percentage of fund awards," such awards commonly range from 20% to 35%); *see also In re Solodyn Antitrust Litig.*, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (awarding fees totaling $7,690,843.667, representing one-third of the total settlement fund); *In re Asacol Antitrust Litig.*, 2017 WL 11475275, at *4 (D. Mass. Dec. 7, 2017) (awarding fees of $5,000,000, equaling one-third of settlement fund); *In re Relafen*, 231 F.R.D. at 82 (awarding fees of $22,311,000, equaling one-third of the settlement fund). Additionally, courts in this district generally consider factors substantially similar to courts in the Second and Third

Circuits, including the following:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

In re Solodyn, 2018 WL 7075881, at *2 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Goldberger v. Integrated Res.*, 209 F.3d 43 (2d Cir. 2000)).

The size of the fund created and the number of persons benefitted. The Settlement would provide for the establishment of a common fund totaling $9,750,000.00, which represents over 64.8% of the mid-point of the Plan's potentially recoverable losses. *See* Berin Decl., at ¶ 23. When the non-monetary relief provided by the Settlement is accounted for, the value of the recovery is even larger. Indeed, the Settlement provides for meaningful non-monetary relief aimed at strengthening the fiduciary process employed to manage and administer the Plan in the future. Where, as here, the settlement includes substantial affirmative relief, such relief must be considered in evaluating the overall benefit to the class. *See* Manual for Complex Litigation (Fourth) § 21.71, at 337 (2004); *cf. Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning against an "undesirable emphasis" on monetary "damages" that might "shortchange efforts to seek effective injunctive or declaratory relief."). Thus, courts have "recognize[d] that it is important to take into account affirmative relief in addition to monetary relief so as to encourage attorneys to obtain effective affirmative relief." *See Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *1 (S.D. Ill. Nov. 22, 2010) (awarding fees in the amount of one-third of the settlement and finding "[w]hile the true value of the affirmative relief is difficult to pinpoint, it will without a doubt materially add to the monetary recovery to the Plans."). Approximately 60% of Settlement Class members will receive proceeds automatically in their Plan accounts,

while the remaining Settlement Class members will need only submit a brief claim form—over 1,250 have done so already, and claims will be accepted until December 29, 2023. *See* Vieira Decl., at ¶ 14. Thus, the size of the common fund and Plan of Allocation, which are designed to provide relief to the greatest proportion of Plan participants and beneficiaries feasible, as well as the non-monetary relief afforded by the Settlement, counsel in favor of approval.

The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel. Notice to the Settlement Class included the amounts of Plaintiffs' anticipated requests for attorneys' fees and case contribution awards, and indicated that reasonable litigation expenses actually incurred would be sought. To date, there has not been a single objection from a member of the Settlement Class to any aspect of the Settlement or related applications. *See* Berin Decl. ¶ 8; Vieira Decl. ¶ 13. This reception to the Settlement is a further indication of Counsel's skillful and quality representation of Plaintiffs in this litigation, and supports the fee request. *See In re Ranbaxy Generic Drug App. Antitrust Litig.*, 630 F. Supp. 3d 241, 245 (D. Mass. 2022) (finding lack of objections supports settlement approval); *In re Relafen*, 231 F.R.D. at 72 (same). Moreover, the report of the Independent Fiduciary filed on this date reviews each of the requests for awards and finds them to be reasonable. The Independent Fiduciary's approval and authorization of the Settlement and each of the related applications provides the Court an additional, impartial opinion on behalf of the Plan and basis to find the awards are warranted.

The skill and efficiency of the attorneys involved. The result achieved and the quality of representation provided are important factors to be considered in determining the amount of reasonable attorneys' fees under a percentage-of-fund analysis. Despite the significant risk to recovery in this litigation, Class Counsel successfully obtained a substantial cash settlement for

the Class. Miller Shah and Capozzi Adler, P.C. each have extensive experience litigating ERISA class actions and other areas of complex litigation, and the Settlement Class was also capably represented by Whatley Kallas, LLP as local counsel. *See* Berin Decl. ¶¶ 19–21. Class Counsel leveraged its experience and resources to thoroughly evaluate the merits and risk of this litigation, effectively litigate the case, and successfully negotiate the Settlement.

The complexity and duration of the litigation. In complex ERISA litigation, plaintiffs and counsel face significant challenges in proving liability, loss causation, and damages. *See K.D. v. Harvard Pilgrim Health Care, Inc.*, 2023 WL 2701689, at *8 (D. Mass. Mar. 27, 2023) ("The First Circuit has acknowledged the challenges ERISA litigants confront when bringing claims for unpaid benefits."); *Ford v. Takeda Pharms. U.S.A., Inc.*, 2023 WL 3679031, at *1 (D. Mass. Mar. 31, 2023) ("As this Court has previously noted, ERISA claims are complicated.") (internal citations omitted). Indeed, as the court found in *Ford*:

> [t]he subject matter is highly technical, entailing facts about prudent investment practices, industry best practices, fiduciary practices, recordkeeping practices, and complex financial matters, requiring the use of multiple experts for both plaintiffs and defendants. The difficulty of ERISA litigation justifies the requested award.

2023 WL 3679031, at *1 (awarding attorneys' fees equal to one-third of the net settlement amount, plus expenses). This case is no exception. The Parties were engaged in vigorous litigation when they agreed to the Settlement and further litigation promised to be lengthy and complex, involving numerous competing experts on liability issues concerning Plaintiffs' claims and Defendants' defenses, as well as the Plan's alleged losses. The Parties likely would have filed dispositive motions and pretrial motions, including motions concerning the anticipated expert testimony. Therefore, this factor weighs in favor of approval.

The risk of nonpayment. Counsel took this case on a contingent basis and invested significant time, money, and resources to advance the Action while understanding the potential

of recovering nothing. "This Court considers the risk of nonpayment in determining the reasonableness of a fee award." *Ford*, 2023 WL 3679031, at *2 (citing *In re Relafen*, 231 F.R.D. at 79). In light of those risks, it is appropriate to award one-third of the Settlement Fund, plus expenses, in attorneys' fees. *Id.* ("Class Counsel's assumption of the risk of nonpayment supports the reasonableness of the requested [one-third] fee.").

The amount of time devoted to the case by Class Counsel. Counsel and their professionals have spent, in the aggregate, over 4,030 hours prosecuting this case and were prepared to spend any time necessary to vigorously and effectively represent the Plan and the Settlement Class. *See* Berin Decl., at ¶ 17, Ex. A. The time spent by counsel has included the investigation of the underlying claims and preparation of detailed pleadings, comprehensive briefing of a motion to dismiss, negotiation over and review of substantial discovery materials and preparation for meaningful settlement negotiations, including two mediations that involved the exchange of briefing and additional information regarding liability and damages. The time spent by counsel was reasonable in relation to the complexity of the case and the efforts necessary to achieve a successful resolution. *See In re Solodyn*, 2018 WL 7075881, at *2. Defendants were represented by some of the most experienced ERISA defense attorneys in the country and the time and effort spent by Class Counsel was reasonable and necessary to prepare the case against a well-represented, sophisticated adversary. *See* Berin Decl., at ¶ 18, Ex. B. Moreover, if the Court approves the Settlement, Class Counsel will spend additional time in connection with settlement administration. *See id.* at ¶ 18.

The awards in similar cases. In complex ERISA class actions, courts routinely award amounts of up to one-third of the settlement recovery. *See Ford*, 2023 WL 3679031, at *3 (awarding a fee of one-third of the settlement fund, plus expenses); *Gordan v. Mass. Mutual Life*

Ins. Co., 2016 WL 11272044, at *3 (D. Mass. Nov. 3, 2016) (awarding a fee of one-third of the settlement fund); *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, *4 (D. Md. Jan. 28, 2020) (collecting cases). Class Counsel's request of one-third of the Settlement Amount, plus reasonable litigation expenses incurred and carried by Class Counsel, is consistent with decisions in similar ERISA actions and warranted under all of the circumstances.

Although not required, the lodestar cross-check supports the award requested. *See In re Ranbaxy*, 630 F. Supp. 3d at 247 (quoting *In re Thirteen Appeals Arising Out of San Juan Dupont Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 2022)). A 2003 survey of 1,120 class actions by confirmed that the lodestar multipliers averaged 3.89. *See* Attorney Awards in Common Fund Cases, 24 CLASS ACTION REP. 4 (2003). Class Counsel are requesting a small risk premium for their efforts in this contingent fee litigation of less than a 1.4 multiplier of their lodestar, even before accounting for the value of non-monetary relief provided by the Settlement. *See* Berin Decl., at ¶ 17. The lodestar multiplier implied by the request in this case is below "the lower end of multipliers reflected in other cases . . . ." *Bacchi*, 2017 WL 5177610, at *5 (finding 1.31 lodestar is low); *see also Gordan*, 2016 WL 11272044, at *3 (approving 3.66 multiplier in a similar ERISA case); *New England Carpenters Health Bens. Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approving 8.3 multiplier); *Roberts v. TJX Co.*, 2016 WL 8677312, at *13 (D. Mass. Sep. 30, 2016)(collecting cases with multiples from 1 to 2); *cf. In re Synthroid Marketing Litigation*, 325 F.3d 974, 979–80 (7th Cir. 2003) ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced."). "Once established, the lodestar represents a presumptively reasonable fee . . . ." *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir.

1992).[5] This confirms the reasonableness of the fee request, especially when considered against lodestars approved in similarly complex cases; *see also Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis.").

The Court may also award reasonable litigation expenses. *See* Fed. R. Civ. P. 23(h). Class Counsel seek reimbursement of reasonable and necessary expenses separate from the requested award of one-third of the Settlement Fund. *See* Berin Decl. ¶ 18, Ex. B. As is typical in cases such as this, Class Counsel have incurred expenses such as filing fees, fees for experts who have consulted on this litigation, and mediation fees, among others. *See id.* In order to effectively litigate a breach of fiduciary duty case under ERISA arising out of the retention of allegedly imprudent investments and payment of excessive service provider fees, it is necessary to consult with experts regarding the structure and performance of a plan's investments and details of its service arrangements. *See In re San Juan Dupont Hotel Fire Litig.*, 111 F.3d 220, 233–238 (1st Cir. 1997) (approving award of expenses resulting from "legitimate needs arising from the size and complexity of this case"). The other expenses incurred by Class Counsel, such as filing fees and copying expenses, expenses related to discovery (including depositions), and mediation fees, were each necessary to the positive resolution represented by the Settlement. *See*

[5]Class Counsel's hours are supported by the billing records maintained by each firm. In addition, Class Counsel's hourly rates used to calculate the lodestar have been recently approved in similar class action litigation. *See Coca-Cola Consolidated Inc.*, No. 3:20-cv-00654-FDW-DSC, ECF No. 98; *Blackmon*, No. 5:20-cv-00988-ESC, ECF No. 82. In fact, when viewed as a blended rate, Class Counsel's request amounts to less than $585 per hour, even before additional time spent in connection with settlement administration is considered. This is the equivalent of a mid-level associate at a large defense firm and is consistent with rates that have been approved as long as a decade ago. *See Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *9, 13 (S.D. Ill. Nov. 22, 2010) (blended rate of $514.60 per hour to calculate lodestar in 2010); *Tussey v. ABB, Inc.*, 746 F.3d 327, 340-41 (8th Cir. 2014) (same); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *8–9 (D. Minn. July 13, 2015) (same).

id. The notice provided to the Settlement Class indicated that Plaintiffs and Class Counsel could seek a separate award of expenses and no objections have been made to the anticipated request for reimbursement of expenses. This highlights the reasonableness of the request.

2. The Class Representatives Should be Compensated for Their Time and Efforts

The Settlement Agreement also provides for anticipated applications for incentive award to Plaintiffs of $15,000.00 each for serving as representatives of the Settlement Class. In their discretion, Courts regularly award special compensation to the class representatives in recognition of their time and effort. *See In re Relafen*, 231 F.R.D. at 82; *see also In re Lupron*, 2005 WL 2006833, at *7 (D. Mass. Aug. 17, 2005) ("Incentive awards are recognized as serving an important function in promoting class action settlements.").

Plaintiffs' participation was critical to the case's ultimate resolution. *See In re Solodyn*, 2018 WL 7075881, at *2 (finding "a named plaintiff is an essential ingredient of any class action" and granting request for service awards). Plaintiffs were engaged in all phases of this complex litigation, including providing substantial information and assisting in the investigation of the Action prior to the filing of the initial pleading, providing documents to Counsel and preparing to answer discovery requests, preparing for depositions, reviewing pleadings and other court documents to stay apprised of developments in the litigation and fulfill their duties to the class, and participating in nearly a dozen conference calls with Class Counsel. *See* Berin Decl., at ¶ 7; *see also Bezdek*, 79 F. Supp. 3d at 352 (crediting declarations concerning participation of class representatives in pre-suit investigation, review of pleadings, and engagement in discovery). Plaintiffs also participated in settlement discussions and were in touch with Class Counsel during the mediation. *See* Berin Decl., at ¶ 17. Thus, service awards of $15,000.00 are warranted in recognition of Plaintiffs' time and efforts on behalf of the Settlement Class.

Further, notice of Plaintiffs' intention to seek the requested case contribution awards was presented to the Settlement Class and, to date, no member of the Settlement Class has objected to such awards, providing more support that the requested awards are reasonable. The Independent Fiduciary's report also separately evaluates the requested case contribution awards and provides the Court an independent basis to determine that such requests are reasonable.

IV. CONCLUSION

Plaintiffs respectfully submit the Court should grant final approval of the Settlement and approve the related applications.[6]

DATED: December 8, 2023

Respectfully submitted,

/s/ Alec J. Berin

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[6]A [proposed] Final Approval Order is attached as Exhibit D to the Settlement Agreement (*see* ECF No. 116-1, at Ex. D). Plaintiffs would be pleased to provide a Word version of the [proposed] Final Approval Order if helpful to the Court.

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CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1(a)(2), I certify that I conferred in good faith with counsel for Defendants prior to filing this Motion. Counsel for Defendants stated that Defendants do not oppose the Motion.

/s/ Alec J. Berin
Alec J. Berin

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, I caused the foregoing document to be electronically filed with the Clerk of Court, and upon the counsel of record using the CM/ECF system.

/s/ Alec J. Berin
Alec J. Berin