IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Paul Andrus and Ronald Berresford, individually and as representatives of a class of similarly situated persons, and on behalf of the New York Life Agents Progress-Sharing Investment Plan and the New York Life Insurance Company Employee Progress-Sharing Investment Plan, Plaintiffs, v. New York Life Insurance Company, New York Life Investment Management LLC, New York Life Investment Management Holdings LLC, Cornerstone Capital Management Holdings LLC, Cornerstone Capital Management LLC, Board of Trustees of the New York Life Agents Progress-Sharing Investment Plan, Board of Trustees of the New York Life Insurance Company Employee Progress-Sharing Plan, Maria J. Mauceri, Barry A Schub, John Y. Kim, Arthur H. Seter, Drew E. Lawton, Michael M. Oleske, Robert J. Hynes, and Johns Does 1–30, Defendants.	Case No. 1:16-cv-05698-KPF **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Regulations, and Statutes

Other Authorities

INTRODUCTION

Plaintiffs Paul Andrus and Ronald Berresford submit this Memorandum in support of their Motion for Preliminary Approval of their Class Action Settlement Agreement with Defendants New York Life Insurance Company, New York Life Investment Management LLC, New York Life Investment Management Holdings LLC, Cornerstone Capital Management Holdings LLC, Cornerstone Capital Management LLC, Board of Trustees of the New York Life Agents Progress-Sharing Investment Plan, Board of Trustees of the New York Life Insurance Company Employee Progress-Sharing Plan, Maria J. Mauceri, Barry A Schub, John Y. Kim, Arthur H. Seter, Drew E. Lawton, Michael M. Oleske, Robert J. Hynes, and Johns Does 1–30 ("Defendants"). A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit 1 to the accompanying Declaration of Kai Richter ("*Richter Decl.*").[1] This Settlement resolves Plaintiffs' putative class action claims against Defendants under the Employee Retirement Income Security Act ("ERISA") regarding the utilization and retention of the MainStay S&P 500 Index Fund ("MainStay S&P 500 Fund") in the New York Life Agents Progress-Sharing Plan and the New York Life Insurance Company Employee Progress-Sharing Plan (the "Plans").[2]

Under the terms of the proposed Settlement, Defendants will pay a gross settlement amount of $3,000,000 into a common fund for the benefit of class members, plus an additional $50,000 to cover certain administrative expenses associated with the Settlement as set forth below. This is a fair and reasonable recovery for the Settlement Class in comparison to the amount of the allegedly excessive fees associated with the

[1] All capitalized terms have the meaning assigned to them in Article 2 of the accompanying Settlement Agreement, unless otherwise specified herein.
[2] Defendants dispute the allegations and deny liability for any alleged ERISA violations.

MainStay S&P 500 Fund during the Class Period, and the attendant risks of litigation.[3] Moreover, the issue giving rise to this suit has now been resolved, as the MainStay S&P 500 Fund has been removed from the Plans and replaced with a less-costly Vanguard Institutional Index Fund. *See Complaint, ¶ 177.*

For the reasons set forth below, the settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed notices of Settlement can be sent to the Settlement Class. Among other things supporting preliminary approval:

- The Settlement was negotiated at arm's length by experienced and capable counsel, with the assistance of a well-respected mediator, Hunter R. Hughes, III;
- The Settlement provides for significant monetary relief;
- The Settlement provides for automatic distribution of the settlement funds to the accounts of Class Members who are Current Participants[4] in the Plans; and for a simple claim form to be submitted by Former Participants[5] in the Plans, which allows Former Participants to elect either to roll their distribution into another qualified retirement account or to receive a cash distribution;
- The Class Release in the Settlement Agreement is narrowly tailored to apply only to claims like those asserted in this lawsuit;
- The MainStay S&P 500 Fund at issue in this case is no longer offered as an investment option to the Plans' participants;
- The proposed Settlement Notices provide fulsome information to Class Members about the Settlement, and will be distributed via first-class mail; and

[3] The Complaint alleged that the Plans incurred $2.97 million in excessive fees during the period from 2010 to 2014, due to the Plans' retention of the MainStay S&P 500 Fund as an investment option. *See Complaint, ECF No. 1, ¶ 178*. When the entire class period is included, Plaintiffs estimate that the amount of the excessive fees was approximately $3.9 million. *See Richter Decl. ¶ 5.*

[4] A "Current Participant" is a person with an Active Account in any of the Plans as of the date of this motion and whose Plan account included an investment in the MainStay S&P 500 Fund during the Class Period.

[5] A "Former Participant" is a person who had an account in either of the Plans that included an investment in the MainStay S&P 500 Fund during the Class Period and who does not have an Active Account as of the date of this motion.

- The Settlement Agreement provides Class Members the opportunity to raise any objections they may have to the Settlement and appear at the final approval hearing.

Accordingly, Plaintiffs respectfully request that this Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Settlement Notices and authorizing distribution of the Notices; (3) certifying the proposed Settlement Class; (4) designating Plaintiffs as Class Representatives; (5) designating Plaintiffs' counsel as Class Counsel; and (6) scheduling a final approval hearing. This motion is not opposed by Defendants as parties to the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY

A. The Complaint

Plaintiffs initiated this matter by filing their Class Action Complaint ("Complaint") on July 18, 2016 on behalf of themselves and the Plans, as well as on behalf of participants and beneficiaries of the Plans during the relevant timeframe. *See ECF No. 1.* The gravamen of the Complaint is that Plaintiffs, the Plans, and members of the Settlement Class were financially harmed by the improvident retention of the MainStay S&P 500 Fund in the Plans' investment lineup, when a less-expensive alternative investment was readily available from Vanguard. *Id.*, ¶¶ *1, 4-5, 178.* Defendants are the Plans' fiduciaries and other persons who allegedly profited from the alleged imprudent retention of the MainStay S&P 500 Fund in the Plans. *Id.*, ¶¶ *22-123.*

According to the Complaint, the MainStay S&P 500 Fund is managed by affiliates of Defendant New York Life Insurance Company ("NY Life"). *Id.*, ¶ *3.* From the beginning of the class period in 2010 until July 19, 2016, the MainStay S&P 500

Fund was included and retained in the Plans' investment lineup. *Id.*, ¶¶ *4, 177*. The Complaint alleges that it was imprudent for the Plans' fiduciaries[6] to retain the MainStay S&P 500 Fund because the MainStay S&P 500 Fund had annual costs of 35 bps (0.35%) per year, whereas a comparable index fund offered by Vanguard had annual expenses of only 2 bps (0.02%) per year. *Id.*, ¶ *4*.

Effective July 19, 2016, NY Life removed the MainStay S&P 500 Fund from the Plans' menu of investment options and replaced it with the Vanguard Institutional Index Fund at the close of business that day. *Id.*, ¶ *177*.[7] Plaintiffs allege that by this point, however, the Plans' participants already had incurred significant losses due to excess fees. During the relevant period, hundreds of millions of dollars of Plan assets were invested in the MainStay S&P Fund. *Id.*, ¶ *178*. Based on the significant amount of monies that were invested in the MainStay S&P 500 Fund, Plaintiffs estimate that the Plans incurred approximately $3.9 million in excess costs during the class period (from July 18, 2010 to July 19, 2016). *See supra* at 1 n.2. These allegedly excessive costs were deducted from Class Members' retirement accounts.

B. Mediation & Informal Discovery

Prior to the deadline for the Defendants to answer Plaintiffs' Complaint, the Parties agreed to engage in voluntary mediation. *ECF No. 56.* In the absence of mediation, Defendants would have moved to dismiss the Complaint and would have asserted numerous defenses to the claims asserted in the Complaint. *Settlement Agreement* ¶ *1.2.* In advance of the mediation, Defendants produced pertinent documents

[6] The Plans' fiduciaries include New York Life, the Agents Plan Board, the Employee Plan Board, and the individuals referenced in the Complaint. *Id.*, ¶ *200.*

[7] Plaintiffs allege that this change was made in response to Plaintiffs' counsel's pre-litigation investigation.

and information to Plaintiffs' counsel, *id.*, ¶ *1.3*, including Plan documents and disclosures, relevant minutes from Board meetings relating to the Plans, and information regarding the Plans' holdings in the MainStay S&P 500 Fund, and the expenses and performance of the fund. *Richter Decl.* ¶ *11*. In addition, Plaintiffs' counsel engaged a consulting expert to assist in analyzing the data that was produced by Defendants, and assessing Class Members' damages. *Id.*

The parties agreed to engage Hunter R. Hughes, III, as mediator in this matter. *Richter Decl.* ¶ *10.* Mr. Hughes is an experienced and well-respected mediator, who has successfully resolved numerous ERISA cases and other actions. *Richter Decl.* ¶ *10 & Ex. 2.* The parties engaged in a full-day, in-person mediation with Mr. Hughes on November 4, 2016. *See ECF No. 58.* Through mediation with Mr. Hughes, the parties reached an arms-length, class-wide resolution of this matter in principal, subject to the Court's approval. *Id.* Thereafter, the parties negotiated the comprehensive Settlement Agreement that is the subject of the present motion.

II. OVERVIEW OF THE SETTLEMENT TERMS

A. Proposed Settlement Class

The Settlement Agreement calls for certification of a Settlement Class defined as:

> All persons who participated in the Plans whose Plan account included an investment in the MainStay S&P 500 Fund at any time during the Class Period, including any Beneficiary of a deceased person who participated in the Plans at any time during the Class Period, and/or, Alternate Payees, in the case of a person subject to a Qualified Domestic Relations Order who participated in the Plans at any time during the Class Period.

Settlement Agreement, ¶ *2.42.* The "Class Period" is the period from July 18, 2010 to July 19, 2016. *Id.*, ¶ *2.12.*

B. Monetary Relief

Under the Settlement, Defendants will contribute a gross settlement amount of $3 million to a settlement fund (the "Gross Settlement Fund"). *Settlement Agreement*, ¶ *5.4.* Separate from the Gross Settlement Fund, Defendants also will pay up to $50,000 toward the cost of administering the settlement. *Id.*, ¶ *5.7.* The Gross Settlement Fund will be distributed to Class Members after deductions are made for (i) attorneys' fees and costs; (ii) administrative expenses, if any, exceeding the $50,000 paid separately by defendants; (iii) service awards paid to the class representatives, as described below; and (iv) a contingency reserve set aside for any anticipated administrative expenses after the effective date of the settlement. *Id.*, ¶ *5.8.*

Following these deductions, Payments to Class Members will be according to the following Plan of Allocation: First, the Settlement Administrator will determine each Class Member's "Average MainStay Account Balance," which consists of the average, aggregate quarter-ending account balance invested in the MainStay S&P 500 Fund for the period July 18, 2010 through July 19, 2016 (*i.e.* the Class Period covered by this Settlement). *Id.*, ¶ *6.4.1; see also id.*, ¶ *2.12* (defining the "Class Period"). Each Class Member will receive a pro rata share of the settlement fund based on his or her Average MainStay Account Balance compared to the sum of the Average MainStay Account Balances for all Class Members. *Id.*, ¶ *6.4.2.* In other words, Class Members will receive a share of the Settlement proportionate to their level of investment in the MainStay S&P 500 Fund relative to all Class Members.

Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Id.*, ¶ *6.5.* Former Participants will be required to

submit a claim form, which allows them to elect to have their distribution rolled-over into an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.*, ¶ *6.6.*[8]

C. Prospective Relief

Defendants have removed the MainStay S&P 500 Fund from the Plans effective July 19, 2016. *ECF No. 1, ¶ 177.* Accordingly, prospective relief is not necessary as part of the Settlement.

D. Review by Independent Fiduciary

As required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the settlement on behalf of the Plans. *Settlement Agreement*, ¶ *3.1.1; see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary's fees and expenses shall be paid separately by Defendants and not from the Settlement Fund. *Settlement Agreement, ¶ 3.1.3.*

E. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class will release Defendants and affiliated persons and entities from all claims:

- That were asserted in this lawsuit, or that arise out of the conduct alleged in the Complaint, regarding holdings in the MainStay S&P 500 Fund for the Plans;
- That relate to: (1) the selection, oversight, retention, or performance of the MainStay S&P 500 Fund, (2) fees, costs, or expenses for the MainStay S&P 500 Fund, and (3) disclosures or failures to disclose information regarding the MainStay S&P 500 Fund;
- That would be barred by *res judicata* based on the entry by the Court of any Final Approval Order;

[8] The Claim Form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks.

- That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Settlement Fund pursuant to the Plan of Allocation; or

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

See Settlement Agreement, ¶¶ *2.3.7, 2.3.8, 8.1.*

F. Class Notice and Settlement Administration

Class Members will be sent a direct notice of the settlement ("Settlement Notice") via U.S. Mail. *Settlement Agreement,* ¶¶ *2.44, 3.3.1, & Exs. 3 & 4.* The Settlement Notice sent to Former Participants also will include a Claim Form enabling them to make the elections described above. *Settlement Agreement,* ¶ *3.3.2 & Ex. 1.*

The Settlement Notices provide information to the Settlement Class regarding, among other things: (1) the nature of the class claims; (2) the scope of the Settlement Class; (3) the terms of the settlement; (4) Settlement Class members' right to object to the settlement and the deadline for doing so; (5) the release that will apply; (6) the identity of Class Counsel and the amount of compensation they will seek in connection with the Settlement; (7) the date, time, and location of the final approval hearing; (8) Settlement Class members' right to appear at the final approval hearing; and (9) the process for submitting claims (Former Participants only). *Settlement Agreement,* ¶ *2.44 & Exs. 3-4.*

To the extent that Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website on which it will post the following documents or links to the following documents: the operative Complaint, Settlement Agreement and its Exhibits, Settlement Notices, Former Participant Claim Form, Class Counsel's Motion for Attorneys' Fees and Costs and Award of Compensation to Class Representatives, any Court orders related to the

Settlement, any amendments or revisions to these documents, and any other documents or information mutually-agreed upon by the Settling Parties. *Settlement Agreement, ¶ 11.2.*

G. Attorneys' Fees and Expenses

The Settlement Agreement provides that Class Counsel will file a motion for attorneys' fees and costs at least 30 days before the deadline for objections to the proposed Settlement. *Settlement Agreement, ¶¶ 7.1 – 7.2.* As explained in the notices that will be sent to the Settlement Class, Class Counsel will seek an award of attorneys' fees of no more than $1,000,000, or one-third of the Gross Settlement Fund, and actual litigation costs incurred by Class Counsel not to exceed $25,000. *Settlement Agreement, ¶ 7.1 & Exs. 3 & 4.* In addition, the Settlement Agreement provides that service awards of up to $10,000 may be sought for the Class Representatives, subject to Court approval, to compensate these individuals for the time, effort, and risks assumed by them in connection with this action. *Id., ¶ 7.2.*

ARGUMENT

I. STANDARD OF REVIEW

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. This involves a "two-step process." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). In the first step, the court considers whether the settlement warrants preliminary approval, such that notice of the settlement may be sent to the class members. *Id.* In the second step, after notice of the proposed settlement has been issued and class members have had an opportunity to be heard, the court considers whether the settlement warrants final court approval. *Id.*

The decision whether to approve a proposed class-action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). However, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted); *see also In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41 (4th ed. 2002). As a result, "courts should give proper deference to the private consensual decision of the parties … [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation[.]" *Clark v. Ecolab Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citations omitted).

This is particularly true on a motion for preliminary approval, which involves only an "initial evaluation" of the fairness of the proposed settlement. *Clark*, 2009 WL 6615729, at *3 (*citing* NEWBERG § 11:25). To grant preliminary approval, the court need only find that there is "probable cause" to submit the settlement to class members and hold a full-scale hearing as to its fairness. *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980). The court is not required to answer the ultimate question of whether the settlement is fair, reasonable, and adequate. *See* 5 MOORE'S FEDERAL PRACTICE § 23.83[a], at 23-336.2 to 23-339. Instead, the court simply evaluates whether the settlement "appears to fall within the range of possible approval[.]" *Clark*, 2009 WL 6615729, at *3; NEWBERG § 11:25. Thus, "preliminary approval should be granted and notice of the proposed settlement given to the class if there are no obvious deficiencies in the proposed settlement." *In re Medical X-ray Film Antitrust Litig.*, 1997 WL 33320580,

*6 (E.D.N.Y. Dec. 26, 1997); *see also In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Here, both the terms of the settlement and the manner in which they were negotiated strongly support preliminary approval.

A. The Settlement is the Product of Arms-Length Negotiations Between Experienced Counsel

At the preliminary approval stage, a proposed class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's-length negotiations conducted by experienced counsel knowledgeable in complex class litigation." *In re Excess Value Ins. Coverage Litig.*, 2004 WL 1724980, *10 (S.D.N.Y. July 30, 2004); *see also Wal-Mart*, 396 F.3d at 116; MANUAL FOR COMPLEX LITIGATION § 30.42 ("[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel."). That is precisely the situation presented here. Counsel for Plaintiffs and Defendants are knowledgeable and experienced in complex class actions, particularly actions involving allegations of breaches of fiduciary duties under ERISA.[9] The Settlement of this matter occurred after Plaintiffs' counsel conducted a thorough investigation, analyzed data produced by Defendants in advance of mediation, and engaged an expert consultant to assist with calculating damages. *Richter Decl.*, ¶¶ *9, 11*. The Settlement also was

[9] Plaintiffs' counsel's qualifications in this regard are described in greater detail in the discussion of adequacy under Rule 23(a), below. *See infra* at 19-20.

negotiated with the assistance of an experienced and well-regarded mediator. All of these factors lend the Settlement a presumption of fairness.

B. The Settlement Provides Significant Relief to Class Members

The recovery for members of the Settlement Class is fair and reasonable. The $3 million amount that was negotiated here represents a significant amount of the allegedly excessive fees, *see infra* at 1 n.2, and is an appropriate result in comparison to typical class action settlements. *See In re Checking Account Overdraft Litig.*, 830 F.R.D. 1330, 1346 (S.D. Fla. 2011) (recovery of 9 percent was reasonable); *Newbridge Networks Sec. Litig.*, 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly 6 to 12 percent of a potential recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").[10]

Moreover, prior to the settlement, Defendants remedied the issue giving rise to this lawsuit by replacing the MainStay S&P 500 Fund with a less expensive S&P 500 index fund from Vanguard. *See Complaint, ¶ 177.* Although this relief is not written into the Settlement Agreement itself, it represents an additional benefit to the Settlement Class that will result in savings for Settlement Class members.

To ensure fairness, the terms of the Settlement will be subject to review and approval by an independent fiduciary under PTE 2003-39. *Settlement Agreement, ¶ 3.1.1.* The opinion of the independent fiduciary will be provided to the Court prior to the

[10] *Accord City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

Fairness Fearing. Should the independent fiduciary approve the Settlement, that opinion would provide additional indicia of fairness.

C. Plaintiffs Would Have Faced Potential Litigation Risks and Substantial Delay in the Absence of the Settlement

In the absence of a Settlement, Plaintiffs would have faced potential litigation risks. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). The Settlement Agreement expressly notes that "Defendants would have moved to dismiss the Complaint and would have asserted numerous defenses to the claims asserted in the Complaint." *Settlement, ¶ 1.2.* Although Plaintiffs believe there is strong support in this District for the type of claims asserted here,[11] it is uncertain whether they would have prevailed. For example, Defendants likely would have cited decisions skeptical of Vanguard-based cost comparisons. *See Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 345 (2d Cir. 2006) ("That a mutual fund has an expense ratio higher than Vanguard, a firm known for its emphasis on keeping costs low, raises little suspicion."). In addition, Defendants would have cited other authority for the proposition that plan fiduciaries are not required to "scour the market" for the cheapest possible funds. *See Hecker v. Deere & Co*, 556 F.3d 575, 586 (7th Cir. 2009).

Aside from these risks, continuing the litigation would have resulted in complex, costly, and lengthy proceedings before this Court and likely the Second Circuit, which would have significantly delayed any relief to Class Members (at best), and might have

[11] *See Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307 (S.D.N.Y. Oct. 13, 2016) (denying motion to dismiss ERISA breach of fiduciary duty claims based, in part, on comparisons of index funds in plan to Vanguard alternatives); *Leber v. Citigroup 401(k) Investment Cmte.*, 2014 WL 4851816, at *4 (S.D.N.Y. Sept. 30, 2014) ("Essential to the plausibility of plaintiffs' claims was the allegation that the Affiliated Funds charged higher fees than those charged by comparable Vanguard funds.").

resulted in no relief at all. Given the risks, expenses, and delays associated with further litigation, it was reasonable and appropriate for Plaintiffs to accept a Settlement that provided the Class with an immediate, guaranteed recovery of over a significant portion of their estimated damages due to allegedly excessive fees.

III. THE CLASS NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

In addition to reviewing the substance of the parties' Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the proposed settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here.

The Settlement Agreement provides that the Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via U.S. Mail. *Settlement Agreement, ¶¶ 2.44, 3.3.1.* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Settlement Notice is also reasonable. Both Settlement Notices include, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a claim (in the event one is required); (6) instructions as to how to object to the Settlement and a date by which Settlement Class members must object; (7) the date, time, and location of the final approval hearing; (8) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount that Class Counsel may seek in

attorneys' fees and expenses. *Settlement Agreement, Exs. 3 & 4.* This Settlement Notice is clearly reasonable as it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *See Lomeli v. Sec. & Inv. Co. Bahrain*, 546 Fed. App'x 37, 41 (2d Cir. 2013) (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007)) (internal citations omitted); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (settlement notice "need only describe the terms of the settlement generally").

IV. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

In addition to approving the Settlement and Settlement Notice, the Court should certify the Settlement Class under Federal Rule of Civil Procedure 23(b)(1) for settlement purposes. In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)). As a result, doubts as to whether or not to certify a class action should be resolved "in favor of allowing the class to go forward." *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002).

To certify the class, Plaintiffs must satisfy the requirements of Rule 23(a) and meet one of the prerequisites of Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345-46 (2011). In the context of settlement, however, the court need not inquire whether a trial of the action would be manageable on a class-wide basis because "the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620

(1997). Thus, "[t]he requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993) (citations omitted); *see also Horton v. Metropolitan Life Ins. Co.*, 1994 U.S. Dist. LEXIS 21395, at *15 (M.D. Fla. Oct. 25, 1994). Here, all of the requirements of Rules 23(a) and 23(b)(1) are met, and the Settlement Class should be certified.[12]

A. The Requirements of Rule 23(a) are Satisfied

Rule 23(a) sets forth four requirements applicable to class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem*, 117 S. Ct. at 2245; Fed. R. Civ. P. 23(a). Each of these requirements are met here.

1. Numerosity

Numerosity requires that the number of persons in the proposed class is so numerous that joinder of all class members would be impracticable. Fed. R. Civ. P. 23(a)(1). This standard is clearly met for the Settlement Class, which numbers approximately 16,000 persons. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members."); *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 339 (S.D.N.Y. 2012) ("Because joinder of the thousands of [participants] would obviously be impracticable, we conclude that numerosity is satisfied.").

2. Commonality

Commonality requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(1). This does not mean that all class members must make identical claims and arguments, but only that "plaintiff's grievances share a common

[12] Defendants do not concede that a class would be appropriate for litigation purposes.

question of law or fact." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001). Thus, "[t]he commonality element is generally satisfied when a plaintiff alleges that defendants have engaged in a standardized course of conduct that affects all class members." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 673 (S.D. Fla. 2011) (internal brackets and quotations omitted).

Here, "the questions of whether Defendants breached their fiduciary duties by causing the Plan to select imprudent investment options ... , and whether the Plan suffered losses from those breaches, are common to all Plan participants' claims[.]" *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014); *see also Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 103 (D. Mass. 2010) (finding that "questions concerning Defendants' alleged breaches of fiduciary duties under ERISA" satisfied commonality requirement). Moreover, the answer to this question will be the same for all class members because prudence under section 404(a) of ERISA [29 U.S.C. § 1104(a)] is measured by an objective standard. *See Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) ("Under this ***objective standard,*** whether an ERISA fiduciary''s investment decision is improvident depends on what a prudent man in like circumstances would do.") (emphasis added). Questions that can be resolved by reference to an "objective standard" are "common to all members of the class" and satisfy the commonality requirement. *Amgen*, 133 S. Ct. at 1191. For this reason as well, the commonality requirement is satisfied in this case.

3. Typicality

The typicality requirement "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Typicality is satisfied

"when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (internal quotations omitted). This does not require that the situations of the named representatives and the class members be identical. *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 238 (S.D.N.Y. 2006). Rather, it is sufficient that "the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 280 (S.D.N.Y. 2003).

Here, Plaintiffs' claim arises from the retention of the MainStay S&P 500 Fund in the Plans. The Named Plaintiffs do not have any unique claims against Defendants beyond those shared with the Settlement Class, and they are not subject to any unique or individualized defenses.[13] "Rather, as Plan participants alleging breaches of fiduciary duties Defendants owed to the Plan, [Plaintiffs] are seeking redress of similar grievances under the same legal and remedial theories" that apply to other class members. *Ameriprise,* 304 F.R.D. at 573. Thus, "typicality is satisfied in this case." *Id.*

4. Adequacy

Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." To satisfy this requirement: (1) class counsel must be qualified, experienced and generally able to conduct the litigation; and (2) the representative plaintiff's interests must not be antagonistic to those of the class.

[13] The mere fact that retirement plan participants exercise "independent control" over the assets in their 401(k) accounts "does not serve to relieve a fiduciary from its duty to prudently select and monitor any … designated investment alternative offered under the plan." 29 C.F.R. § 2550.404c-1(d)(1)(iv); *accord Tussey v. ABB, Inc.*, 746 F.3d 327, 336-37 (8th Cir. 2014).

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000). Both of those requirements are met.

Plaintiffs' counsel, Nichols Kaster, PLLP ("Nichols Kaster") is well-qualified to conduct the litigation and oversee the settlement. Nichols Kaster is a well-respected law firm,[14] focused on representing employees and consumers, which has been engaged in the practice of law for over 30 years. *Richter Decl.*, ¶ *25*. The firm's lawyers have litigated dozens of cases through trial and are also well-regarded for their appellate work, which includes two recent cases before the United States Supreme Court.[15] *Id.* ¶ *28*. Over the course of its history, the firm has been appointed class counsel or interim class counsel in hundreds of class and collective actions. *Id.* ¶ *26*. In connection with these cases, Nichols Kaster has recovered hundreds of millions of dollars for its clients. *Id*.[16]

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[14] Nichols Kaster was named one of the top 50 elite trial firms by National Law Journal in September 2014, and has been ranked as a Best Law Firm by U.S. News and World Report. *Richter Decl.*, ¶ *27*. Nichols Kaster also has received praise from numerous courts for its work. *Id*.

[15] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2010).

[16] Nichols Kaster's lead counsel in the present action, Kai Richter, is the former manager of the Complex Litigation Division of the Minnesota Attorney General's office. *Id.* ¶ *22*. Since joining Nichols Kaster in April 2010, Mr. Richter has spearheaded class action litigation against several major financial institutions, including JPMorgan Chase, Bank of America, U.S. Bank, Wells Fargo, Citibank, GMAC Mortgage, RBS Citizens, and MidFirst Bank. *Id.* ¶ *17*. For example, Mr. Richter successfully argued contested class certification motions in *Hofstetter v. Chase Home Finance, LLC*, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011) and *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953 (N.D. Cal. June 13, 2014), successfully argued before the First Circuit Court of Appeals in *Lass v. Bank of Am., N.A.*, 695 F.3d 129 (1st Cir. 2012), and successfully argued and/or briefed dispositive motions in numerous other class action cases, including *Jackson v. Wells Fargo Bank, N.A.*, 2013 WL 5945732 (W.D. Pa. Nov. 7, 2013); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093 (N.D. Cal. 2013); *Casey v. Citibank, N.A.*, 915 F. Supp. 2d 255 (N.D.N.Y. 2013); *Berger v. Bank of Am., N.A.*, 931 F. Supp. 2d 292 (D. Mass. 2013); *Morris v. Wells Fargo Bank, N.A.*, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012); *Ulbrich v. GMAC Mortgage, LLC*, 2012 WL 3516499 (S.D. Fla. Aug. 15, 2012); *Walls v. JPMorgan Chase Bank, N.A.*, 2012 WL 3096660 (W.D. Ky. July 30, 2012); *Skansgaard v. Bank of Am., N.A.*, 896 F. Supp. 2d 944 (W.D. Wash. 2011); and *Wulf v. Bank of Am., N.A.*, 798 F. Supp. 2d 586 (E.D. Pa. 2011). In total, Mr. Richter been appointed class counsel and/or interim class counsel in over a dozen class action matters, and has negotiated class action settlements providing for more than $175 million in available relief to consumers nationwide. *Id.* ¶*15*. In addition, Mr. Richter is currently spearheading the firm's ERISA class action practice, and serves as counsel of record in several putative class action cases asserting breach of fiduciary duty claims under ERISA. *Id.* ¶ *18*.

Nichols Kaster has specialized experience litigating ERISA breach of fiduciary duty cases, and already has achieved several significant victories since launching its ERISA practice group in 2015. *See Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307 (S.D.N.Y. Oct. 13, 2016); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117 (C.D. Cal. Aug. 5, 2016); *Brotherston v. Putnam Invs., LLC*, 2016 WL 1397427 (D. Mass. Apr. 7, 2016); *Bowers v. BB&T Corp.*, Nos. 15-cv-732, ECF No. 58 (M.D.N.C. April 19, 2016). Moreover, the firm is viewed as a leader in this area, and attorneys from Nichols Kaster have been interviewed by National Public Radio, Bloomberg, Bankrate.com, and several trade publications in connection with their ERISA work. *Id. 20*. Based on Nichols Kaster's extensive class action experience, including its experience litigating other ERISA cases, it is well-qualified to represent the Settlement Class in the present actions.

The Named Plaintiffs are also adequate class representatives. The Named Plaintiffs are each a member of one of the Plans, have assisted Plaintiffs' counsel's investigation, and have reviewed and approved the Settlement. Plaintiffs' interest in pursuing a recovery on behalf of the Plans is aligned with the Settlement Class, and ERISA grants them the express the right to bring suit on behalf of the Plans. *See* 29 U.S.C. §§ 1109(a), 1132(a). There is no indication that their interests are antagonistic to the Settlement Class or that there is any conflict of interest between Plaintiffs and the Settlement Class they seek to represent. *See Amchem*, 521 U.S. at 625 (adequacy inquiry looks for "conflicts of interest between named parties and the class they seek to represent"). To the contrary, Plaintiffs have submitted sworn declarations indicating that

they are unaware of any conflicts that would impede their ability to represent the Settlement Class. *See Andrus Decl., ¶ 12; Berresford Decl., ¶ 11*.

B. The Prerequisites of Rule 23(b)(1) are Met

The proposed class also satisfies Rule 23(b)(1). Under Rule 23(b)(1), a class may be certified if prosecution of separate actions by individual class members would create a risk of:

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

Fed. R. Civ. P. 23(b)(1). Here, the proposed Settlement Class satisfies both prongs (A) and (B). *See, e.g., Krueger*, 304 F.R.D. at 576-78 (certifying class under both prongs). "Because of ERISA's distinctive representative capacity and remedial provisions, **ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class**." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (emphasis added, quotation omitted); *see also Hochstadt*, 708 F. Supp. 2d at 105 ("[I]n light of the derivative nature of ERISA § 502(a)(2) [29 U.S.C. § 1132(a)(2)] claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(l) class, as numerous courts have held.") (emphasis added) (quotation omitted); *Tussey v. ABB, Inc.*, 2007 WL 4289694, at *8 (W.D. Mo. Dec. 3, 2007) ("Alleged breaches by a fiduciary to a large class of

beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(l)."); *DiFelice v. US. Airways, Inc.*, 235 F.R.D. 70, 79 (E.D. Va. 2006) (same).[17]

1. Rule 23(b)(1)(A)

The fiduciary duties imposed by ERISA are "duties with respect to a plan" that are intended to protect the "interest of the participants and beneficiaries" collectively. *See* 29 U.S.C. § 1104(a). Accordingly, "class certification in this case is properly granted under Rule 23(b)(1)(A)" because "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible standards to govern Defendants conduct, such as ... determinations of differing 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Ameriprise,* 304 F.R.D. at 577; *see also Shanehchian v. Macy's, Inc.*, 2011 WL 883659, *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible."); *Harris v. Koenig*, 271 F.R.D. 383, 394 (D.D.C. 2010); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008).

2. Rule 23(b)(1)(B)

For similar reasons, class certification is also appropriate under Rule 23(b)(l)(B). *See Hochstadt,* 708 F. Supp. 2d at 105-06 ("Given that the present case involves an ERISA § 502(a)(2) claim brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class

[17] Plaintiffs address class certification only under Rule 23(b)(1) because Plaintiffs contend that certification is proper under Rule 23(b)(l), and Rule 23(b)(3) is intended to address "situations in which class action treatment is not as clearly called for as it is in Rule 23(b)(1)." *Amchem,* 117 S. Ct. at 2245.

member, I find that Rule 23(b)(l)(B) is clearly satisfied."). Under common law, litigation over breach of duty to a trust is binding on all beneficiaries. *See Kerrison v. Stewart*, 93 U.S. 155, 160 (1876) ("It cannot be doubted, that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him."). Thus, "as a practical matter, the adjudication of one participant's § 1132(a)(2) action will influence a subsequent adjudication of the same claims brought by another participant and ... could dispose of the other participants' actions on behalf of the Plan." *Ameriprise*, 304 F.R.D. at 577.

The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) in "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23, Advisory Committee Note (1966). "[T]his case falls squarely within the meaning articulated by the Advisory Committee as Plaintiffs allege breaches of fiduciary duties affecting the Plan[] and the thousands of participants in the Plan[]." *Shanehchian*, 2011 WL 883659, at *10. Accordingly, class certification should be granted under Rule 23(b)(1)(B), consistent with the Advisory Committee Note and the overwhelming weight of case law.[18]

[18] *See Ameriprise*, 304 F.R.D. at 577; *Hochstadt*, 708 F. Supp. 2d at 105; *Shanehchian*, 2011 WL 883659, at *10; *In re Beacon Assocs. Litig.*, 282 F.R.D. at 342 ("[A] breach of fiduciary duty claim brought by one member of a retirement plan necessarily affects the rights of the rest of the plan members to assert that claim, as the plan member seeks recovery on behalf of the plan as an entity. Accordingly, by the very nature of the relief sought, the prosecution of separate actions would risk prejudice to putative class members.") (quoting *In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *4 (S.D.N.Y. Sept. 27, 2006)); *Harris*, 271 F.R.D. at 394 ("Historically, § 502(a)(2) actions brought on behalf of the entire plan

CONCLUSION

For the foregoing reasons, the Court should enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Settlement Notices and authorizing distribution of the Notices; (3) certifying the proposed Settlement Class; (4) designating Plaintiffs as class representatives; (5) designating Plaintiffs' counsel as Class Counsel; and (6) scheduling a final approval hearing.

Dated: February 14, 2017

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have been considered especially appropriate for Rule 23(b)(1)(B) certification."); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 174 (E.D. Pa. 2009) ("because of the unique and representative nature of an ERISA§ 502(a)(2) suit, numerous courts have held class certification proper pursuant to Rule 23(b)(l)(B)"); *In re Norte/Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *15 (M.D. Tenn. 2009) (finding class certification appropriate under Rule 23(b)(1)(B) because "[i]f individual adjudications would be dispositive of the interests of other Plan Participants, it would be better for those Plan Participants to be members of a class"); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009) (certifying a class under Rule 23(b)(1)(B) because "[g]iven that [named plaintiff]'s claim seeks 'Plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief "); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, MDL No. 1658, 2009 WL 331426, at *10 (D.N.J. Feb. 10, 2009) (finding class certification appropriate under Rule 23(b)(l)(B) because "[i]f the prudence claims proceeded individually, and one court removed a Plan fiduciary, this would be, as a practical matter, dispositive of the interests of the other Plan members in that particular regard"); *In re Tyco, Int 'l, Ltd. Multidistrict Litig.*, 2006 WL 2349338, at *7 (D.N.H. Aug. 15, 2006) ("the majority of courts have concluded that certification under 23(b)(1)(B) is proper" for ERISA fiduciary class actions); *In re Williams Co. ERISA Litig.*, 231 F.R.D. 416, 425 (N.D. Okla. 2005) ("due to ERISA's distinctive 'representative capacity' and remedial provisions, class treatment under Rule 23(b)(1)(B) is appropriate in this case."); *Koch v. Dwyer*, 2001 WL 289972, at *5 (S.D.N.Y. March 23, 2001) ("Since Plaintiff is seeking relief on behalf of both Plans as a whole, prosecution of separate actions by individual members would create a risk of adjudications which would be dispositive of the interests of the other members not parties to such adjudications."); *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000) ("given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief.").

*admitted *pro hac vice*

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