IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

NORA RUIZ, individually and on behalf of all others similarly situated, **Plaintiff,** **v.** **BASS PRO GROUP LLC, and BPS DIRECT LLC, d/b/a BASS PRO SHOPS,** **Defendants.**	**Case No. 6:24-cv-03122-MDH**

PLAINTIFF'S SUGGESTIONS IN SUPPORT OF UNOPPOSED MOTION TO DIRECT CLASS NOTICE AND GRANT PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiff alleges that Bass Pro Group violated the Employee Retirement Income Security Act by deducting a tobacco surcharge from workers' wages without meeting the statute's safe harbor requirements. The claims presented numerous novel issues, including the impact of *Loper Bright* on federal regulations, the scope of remedies available under ERISA to recoup the tobacco surcharge Plaintiff alleged was unlawful, and the interplay of arbitration and class waiver agreements in the context of ERISA.

Following written discovery, a voluntary exchange of additional information and class-wide data, and a full-day mediation, the parties accepted a double-blind mediator's proposal submitted by respected neutral Frank X. Neuner, Jr. resulting in a $4,950,000 non-reversionary class action settlement to resolve this case. The fund will be used to pay class members, the cost of settlement administration, Class Counsel's attorneys' fees and expenses, a modest $5,000 reserve fund, and a $10,000 service award. Net of all fees and costs, Class Counsel conservatively estimate that the average *per capita* settlement check will be more than $580—some will be more and some will be less given that payments are allocated *pro rata* based on the amount of surcharges each class member paid during the relevant period.

Importantly, there is no claims process; instead, class members who do not opt out will automatically receive a check in the mail for their share of the settlement fund. In exchange for these payments, class members agree to release claims that were or could have been asserted based on the facts alleged in the Complaint.

Pursuant to Rule 23(e)(1), an order directing notice to the class is justified where the Court concludes it will likely be able to (1) approve the settlement as fair, reasonable, and adequate, and (2) certify the class for purposes of settlement. Plaintiff submits for the reasons discussed within that the Court will likely be able to approve the settlement as fair, reasonable, and adequate.

Further, the class should be properly certified for settlement purposes pursuant to Rule 23. Accordingly, Plaintiff requests that the Court permit the issuance of notice to the class of the proposed settlement, approve the form and manner of notice to the class, appoint Plaintiff's counsel as Class Counsel, appoint Plaintiff as class representative, and schedule a final approval hearing within approximately 100 days of the order granting this motion to determine whether the settlement should be finally approved. The Settlement Agreement (including all attachments) is attached as **Exhibit 1**.[1]

THE NATURE OF THE CLAIMS

Plaintiff Ruiz worked (and continues to work) for Defendants Bass Pro Group LLC and/or BPS Direct LLC d/b/a Bass Pro Shops (hereinafter "Defendants") as an outfitter support specialist and was required to pay a tobacco surcharge to maintain health insurance coverage. Plaintiff asserted that Defendants violated ERISA by deducting this tobacco surcharge from her wages. Specifically, Plaintiff alleged that Defendants (1) failed to provide plan participants with a reasonable alternative standard to simply not being a tobacco user that offered the same reward (*i.e.*, avoiding the tobacco surcharge); and (2) failed to provide plan participants with notice of a reasonable alternative standard in plan documents. At its core, Plaintiff's Complaint alleged that, to avoid the tobacco surcharge while participating in Defendants' Plan, a participant must be tobacco free. In other words, Plaintiff argued that Defendants' Plan offered no reasonable alternative standard violating several of ERISA's requirements for outcome-based wellness plans.

Plaintiff alleged Defendants' group health plan violated ERISA's non-discrimination provision, passed as part of the Health Insurance Portability and Accountability Act ("HIPAA"),

[1] The Settlement Agreement and its exhibits are attached to the contemporaneously-filed Declaration of Alexander T. Ricke ("Ricke Decl.").

by imposing a surcharge against employees who use tobacco products, without having met the safe harbor requirements to make such a surcharge lawful giving rise to a claim for equitable relief (*see* 29 U.S.C. § 1132(a)(3)(B)(i)) and a claim for breach of fiduciary duty (*see* 29 U.S.C. § 1132(a)(2)).

The relevant ERISA provision, 29 U.S.C. § 1182, provides that a group health plan may not discriminate against an individual participant on the basis of "health status":

> A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, *may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater* than such premium or contribution for a similarly situated individual enrolled in the plan *on the basis of any health status-related factor* in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

29 U.S.C. § 1182(b)(1) (emphasis added). The statute then carves out a safe harbor for compliant "wellness programs", stating that health plans may "establish[] premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention." 29 U.S.C. § 1182(b)(2)(B).

The implementing regulations "set forth criteria for a program of health promotion or disease prevention offered or provided by a group health plan or group health insurance issuer that *must be satisfied* in order for the plan or issuer to *qualify for an exception* to the prohibition on discrimination based on health status . . . ." *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans*, 78 Fed. Reg. 33158 at 33160 (June 3, 2013) (emphasis added). As relevant here, these requirements include: (1) a reasonable alternative standard provided to all participants who do not meet the initial standard (*i.e.*, the an alternative way to avoid the tobacco surcharge other than meeting the original standard of being tobacco free);[2] (2) that for any alternative standard (such as attending a tobacco cessation program) to be deemed reasonable under the law,

[2] 29 C.F.R. § 2590.702(f)(4)(iv); 78 Fed. Reg. 33158 at 33160.

"[t]he full reward under the outcome-based wellness program must be available to all similarly situated individuals" (*i.e.*, if a participants completes a cessation program all tobacco surcharges during the plan year are refunded);[3] and (3) the plan must disclose in all plan materials describing the terms of the tobacco surcharge the availability of a reasonable alternative standard to avoid the surcharge.[4]

Plaintiff alleged that Defendants' tobacco surcharge could only be lawful if it qualified as an outcome-based wellness plan, but that it failed to meet the three above criteria. Most importantly, Plaintiff principally alleged that Defendants' failed to offer a reasonable alternative standard because Defendants required the participant to be tobacco free to avoid the surcharge.

For their part, Defendants asserted various substantive and procedural defenses to Plaintiff's claims. For example, Defendants argued that the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) invalidated the regulations at issue in Plaintiff's claims and that, without the regulations, Defendants' tobacco surcharge complied with the plain text of ERISA. In addition, Defendants asserted that Plaintiff's claims were subject to individual arbitration, *see* Docs 22, 27, that Plaintiff failed to state a viable claim for relief, and that ERISA's remedial provisions do not permit recovery of the tobacco surcharges, among other defenses. Suffice to say these claims were hotly-contested and, as described below, were only resolved with the assistance of an experienced mediator.

PROCEDURAL HISTORY OF THE LITIGATION

On April 26, 2024, Plaintiff filed a three-count Class Action Complaint. Doc. 1. The case was assigned to the Court's Mediation and Assessment Program ("MAP"). Doc. 2. Ricke Decl. at ¶ 3.

[3] 29 C.F.R. § 2590.702(f)(4)(iv).
[4] 29 C.F.R. § 2590.702; 42 U.S.C. § 300gg-4(j)(3)(E).

On May 28, 2024, the Court entered an Order setting deadlines for the filing of a proposed scheduling order and for the parties' Rule 26(f) conference. Doc. 12. The Court ordered the parties to file a joint proposed scheduling order on or before August 1, 2024. *Id*; Ricke Decl. at ¶ 4.

On June 17, 2024, following their entry of appearance and after obtaining a stipulated enlargement of time to respond to the Complaint, Defendants filed their Answer, denying all liability. Doc. 13; Ricke Decl. at ¶ 5.

On or about July 1, 2024, the parties held their initial Rule 26(f) conference via Zoom. During this call, the parties discussed potential mediators and mediation dates for the purpose of complying with their MAP assignment. The parties also discussed the possibility of an informal exchange of information necessary to make their MAP mediation productive. Ultimately, the parties agreed to a voluntary exchange of information and documents (including class-wide damage data) in advance of the mediation that would allow the parties to evaluate and consider a class-wide resolution. Ricke Decl. at ¶ 6.

On July 12, 2024, Plaintiff served her initial disclosures pursuant to Rule 26(a)(1), along with Plaintiff's First Set of Interrogatories and First Set of Requests for Production of Documents to Defendants. Doc. 25. On July 24, 2024, Defendants served their initial disclosures pursuant to Rule 26(a)(1), along with Defendants' First Interrogatories and First Requests for Production of Documents to Plaintiff. Doc. 24; Ricke Decl. at ¶ 7.

On July 15, 2024, consistent with the MAP's General Order, the parties filed a Designation of Mediator, jointly designating Francis (Frank) X. Neuner, Jr. of Neuner Mediation & Dispute Resolution from the Court's List of Approved Mediators. The mediation was originally scheduled for an in-person session on September 4, 2024, at the offices of Mr. Neuner in St. Louis, Missouri. Doc. 15; Ricke Decl. at ¶ 8.

On August 1, 2024, the parties submitted their Joint Report of the Parties' Rule 26(f) Planning Conference and Proposed Scheduling Order. Doc. 18. The parties jointly agreed to deadlines for amendments to pleadings, discovery, experts, Daubert motions, dispositive motions, and class certification motions. *Id*; Ricke Decl. at ¶ 9.

On August 12, 2024, Defendants provided responses and objections to Plaintiff's first set of discovery requests. Defendants also served documents in response to Plaintiff's requests for production. In total, Defendants produced 2,385 pages of documents. Ricke Decl. at ¶ 10. On August 22, 2024, the Court entered a Scheduling Order/Discovery Plan largely tracking the parties' proposed scheduling order and discovery plan. Doc. 20; Ricke Decl. at ¶ 11.

On August 23, 2024, Plaintiff provided responses and objections to Defendants' first set of discovery requests. Plaintiff also produced approximately 200 pages of documents. Ricke Decl. at ¶ 12.

On September 5, 2024, Defendants informed Plaintiff that they had recently discovered that Plaintiff Ruiz had signed an arbitration and class waiver agreement in 2021 and planned to amend Defendants' Answer to revise their defenses and responses accordingly. Defendants also informed Plaintiff that they intended to move to compel arbitration and would seek to enforce the class waiver through subsequent briefing. Nevertheless, the parties agreed to move forward with the MAP mediation. Ricke Decl. at ¶ 13.

On September 12, 2024, Defendants filed a Motion for Leave to Amend Answer. Doc. 22. Defendants informed the Court that the reason for the proposed amendment was that on August 27, 2024, they obtained information that Plaintiff agreed (a) to arbitrate any and all claims against Defendants which were related to her employment, and (b) to waive any right to pursue class, collective, or representative claims, including the claims raised in Plaintiff's Complaint. Based on

this new information, Defendants sought to amend their Answer to include related affirmative defenses and substantively revise their responses as necessary. *Id*. That same day, the parties filed an Amended Designation of Mediator, which requested a brief extension by which to conduct their MAP mediation until October 17, 2024. Doc. 23; Ricke Decl. at ¶ 14.

On September 24, 2024, Plaintiff responded to Defendants' Motion for Leave. Doc. 25. Plaintiff stated that she did not oppose Defendants' motion for leave to amend their answer, but she would reserve the right to oppose Defendants' attempt to compel arbitration, because: (1) one or more of her claims were outside the scope of the arbitration clause, (2) one or more of her claims were not arbitrable under federal law, and/or (3) Defendants waived the right to compel arbitration by voluntarily participating in litigation, including by propounding and receiving discovery under the Federal Rules of Civil Procedure. Doc. 25. The Court granted Defendants' unopposed motion, and Defendants filed their Amended Answer on October 1, 2024. Doc. 27; Ricke Decl. at ¶ 15.

On October 10, 2024, Plaintiff filed a Motion for Leave to File a First Amended Complaint. Doc. 28. Plaintiff sought leave to plead additional theories of liability. First, Plaintiff added an additional cause of action for violation of the terms of the plan under ERISA § 502(a)(1)(B)—a theory of liability that was not a "covered claim" under Defendants' alleged arbitration provision. Second, Plaintiff stated that she desired to join an additional defendant, that being ERISA plan (the Bass Pro Group Health and Welfare Plan) administered by Bass Pro, a separate entity not party to or covered by the arbitration agreement. *Id*; Ricke Decl. at ¶ 16.

On October 14 and 15, 2024, the parties exchanged comprehensive mediation statements in advance of their MAP mediation, which set forth the strengths and weaknesses of their claims and defenses, a detailed analysis of the arbitration and class waiver issues that would require

significant briefing if the case did not resolve, an evaluation of the merits of the claims based on the discovery exchanged to date, and an initial settlement demand. Ricke Decl. at ¶ 17.

On October 18, 2024, the parties participated in a full-day mediation with Mr. Neuner. At the conclusion of the mediation, Mr. Neuner submitted a double-blind mediator's proposal to be accepted or rejected by the parties within ten days. On October 28, 2024, Mr. Neuner informed the parties that his mediator's proposal had been accepted. Over the last two months, the parties worked diligently to memorialize the mediator's proposal into a written settlement agreement now before the Court. Ricke Decl. at ¶ 18.

SUMMARY OF THE SETTLEMENT

I. The Class Covered by the Settlement

Plaintiff moves the Court to certify the following Rule 23 class ("Class") for purposes of settlement: "All participants in Defendants' group health plan who had a tobacco surcharge deducted from their wages from April 26, 2018 through October 18, 2024." Ex. 1, Settlement Agreement, ¶ I.S. There are approximately 5,500 members of the Class. Ricke Decl. at ¶ 21.

II. The Settlement Provides a $4,950,000 Common Fund

The settlement creates a $4,950,000 non-reversionary common fund to pay class members, the cost of settlement administration, a service award, a modest reserve fund to correct any omissions, and Class Counsel's attorneys' fees and expenses. Ex. 1, Settlement Agreement at ¶ I.Q. Based on Class Counsel's damage calculations, the $4,950,000 common fund represents approximately 35% of the tobacco surcharges deducted from the Class Employees' wages in violation of ERISA. Each Class Member's estimated share of the Net Settlement Amount will be calculated *pro rata* by comparing the amount of any tobacco surcharges that each Class Member had deducted from his or her pay from April 26, 2018 through October 18, 2024, against the total

amount of tobacco surcharges that all Class Members had deducted from their pay from April 26, 2018 through October 18, 2024. Ex. 1, Settlement Agreement, at ¶ III.A; Ricke Decl. at ¶¶ 22-24.

Class Counsel estimates that, after accounting for the projected costs of settlement administration, a $10,000 service award for the Named Plaintiff, a modest $5,000 reserve fund for errors and omissions, one-third of the fund for Class Counsel's attorney's fees and up to $35,000 in litigation expenses, the net settlement fund available for distribution to class members will be approximately $3,200,000. Net of all fees and costs, Class Counsel conservatively estimates that the average *per capita* settlement check will be approximately $580. Ricke Decl. at ¶¶ 22-24.

III. The Proposed Notice Program, Settlement Structure, and Release

Within 14 days of the Court's Order preliminarily approving the settlement, Defendants will provide the settlement administrator with the information necessary to calculate class members' estimated settlement payments and their contact information. Ex. 1, Settlement Agreement at ¶ IV.B.1. Within 14 days of receiving the class list, the settlement administrator will send the notice of settlement (*see* Proposed Settlement Notice, Ex. A to Settlement Agreement) to each class member. *Id*. at ¶ IV.B.2. The notice explains in clear and easy to understand language the settlement structure, the settlement amount, the requested attorneys' fees and expenses, the requested service award, the scope of the release, and the class member's options to participate, object, or request to be excluded. *See generally* Proposed Settlement Notice (Ex. A to Settlement Agreement). The notice explains that class members may opt out or object within 45 days of the mailing of the notice. Ex. 1, Settlement Agreement at ¶ IV.B.2.b. Class members will also be able to find more information about the settlement on the settlement website. *See generally* Proposed Settlement Notice (Ex. A to Settlement Agreement).

To participate in the settlement, class members do not need to do anything—there is no claims process. Class members who do not request to be excluded from the settlement will receive

a check in the mail for their settlement allocation. Class members who negotiate their checks will release all claims that were or could have been asserted based on the facts alleged in the Complaint as more fully explained in the Settlement Agreement. *Id*. at ¶¶ I.AA, BB. The settlement checks will be valid and negotiable for a period of 120 days from issuance. *Id*. at ¶ IV.B.4.b. Any portion of the Net Settlement Amount that is not claimed by Class Members because those individuals did not timely negotiate their Settlement Checks (the "Unnegotiated Settlement Checks"), shall be transferred by the Settlement Administrator to the unclaimed property fund of the state where the Class Member worked to be held for that Class Member in exchange for their release of claims. *Id*. at ¶ IV.C.1.

IV. Service Award, Attorneys' Fees, and Expenses

The Settlement Agreement provides for a $10,000 service award for Plaintiff Ruiz, which will be paid from the settlement fund subject to the Court's approval. Ex. 1, Settlement Agreement at ¶ III.C. In addition, and subject to approval by the Court, the settlement fund will be used to pay Class Counsel's attorneys' fees and expenses. *Id*. at ¶ III.D. Prior to the deadline for class members to object or opt out of the settlement, Class Counsel will file a motion for attorneys' fees not to exceed one-third of the common fund ($1,650,000) and reasonable expenses not to exceed $35,000, which will be posted on the settlement website. This request is well within the range approved by the Eighth Circuit when awarding attorneys' fees on a percentage of the fund basis. *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions."). The settlement is not contingent on the Court awarding any specific amount to Class Counsel as attorneys' fees and any amounts not awarded will be distributed *pro rata* to class members under the method of allocation. Ex. 1, Settlement Agreement at ¶ III.D.

ARGUMENT

Class action settlements must be approved by the Court. Fed. R. Civ. P. 23(e). The first step in the approval process is the Court's evaluation of whether directing notice of the proposed settlement to the settlement class is justified. Notice should issue if the parties have demonstrated to the court that it will likely be able to: (i) approve the proposed settlement under Rule 23(e)(2) as fair, reasonable, and adequate; and (ii) certify the class for purposes of judgment on the proposed settlement. Fed. R. Civ. P. 23(e)(1)-(2).

First, Plaintiff's proposed class is based on Defendants' common policy of deducting tobacco surcharges from the wages of participants in their group health plan. The class presents a common and predominant liability question: whether Defendants' tobacco surcharge policy violated ERISA. The question is certainly capable of adjudication on a class-wide basis where the answer is the same for all class members. As explained below, the record supports Rule 23 certification because Plaintiff's proposed Rule 23 class satisfies the requirements of Rule 23(a) and (b)(3).

Second, in determining whether a proposed settlement should be approved as fair, reasonable, and adequate, courts in the Eighth Circuit consider the factors set forth in the 2018 amendment to Federal Rule of Civil Procedure 23(e)(2) as well as those commonly known as the "*Van Horn* factors" from the Eighth Circuit opinion, *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). *See Holt v. Community America Credit Union*, 2020 WL 12604383, at *2 (W.D. Mo. Sept. 4, 2020) (citing *Van Horn*, 840 F.2d at 607; *Swinton v. SquareTrade, Inc.*, 2020 WL 1862470, at *5 (S.D. Iowa Apr. 14, 2020) (holding that it is "appropriate for the Court to consider the Rule 23(e)(2) factors along with the *Van Horn* Factors."); *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2019 WL 7160380, at *1 (W.D. Mo. Nov. 18, 2019)); *see also* Fed. R. Civ. P. 23(e)(2) Committee Notes to 2018 amendments ("The goal of this amendment [to Rule

23(e)(2)] is not to displace any [circuit case-law] factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

> The factors identified in Federal Rule of Civil Procedure 23(e)(2) are whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The four *Van Horn* factors are: (1) the merits of the plaintiffs' case weighed against the terms of the settlement; (2) the defendants' financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Van Horn*, 840 F.2d at 607. "No one factor is determinative, but the 'most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement.'" *Holt*, 2020 WL 12604383, at *2 (quoting *Van Horn*, 840 F.2d at 607).

I. The Court Should Grant Rule 23 Certification for Purposes of Settlement.

A. The Class is Sufficiently Numerous.

Rule 23(a)(1) requires that the class be sufficiently numerous such that joinder of all members would be impracticable. "In considering this requirement, courts examine the number of persons in the proposed class and factors such as the nature of the action, the size of the individual claims, and the inconvenience of trying the individual claims." *Cromeans v. Morgan Keegan & Co., Inc.*, 303 F.R.D. 543, 551 (W.D. Mo. 2014) (citing *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982)). "The Eighth Circuit has not set forth an arbitrary number or arbitrary rules regarding numerosity." *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999).

Here, the proposed class contains approximately 5,500 individuals. Thus, the size of the class exceeds those previously found sufficient by the Eighth Circuit. *Ark. Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (20 class members sufficient); *Paxton*, 688 F.2d at 561 (impracticable to join some portion of the 74 class members). Numerosity is satisfied.

B. The Commonality Requirement is Satisfied.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." A plaintiff must show that the claims "'depend upon a common contention' that 'is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Cromeans*, 303 F.R.D. at 552 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "[A] single common contention… is sufficient." *Flynn v. FCA US LLC*, 327 F.R.D. 206, 222-23 (S.D. Ill. 2018) (citing *Dukes*, 564 U.S. at 359)). Commonality "does not require that every question of law or fact be common to every member of the class ... and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 278-79

(W.D. Mo. 2018) (citations omitted). For this reason, "[c]ommonality is easily satisfied in most cases." *Id.* at 278.

Here, the proposed Class satisfies Rule 23(a)(2)'s commonality requirement. Plaintiff's ERISA claims generally rise (or fall) on the same basis. Again, the common question that binds members of the class is the same: whether Defendants' tobacco surcharge policy was compliant with all legal requirements. This is a common question capable of adjudication on a class-wide basis in one stroke. *See Lipari-Williams v. Missouri Gaming Co., LLC,* 339 F.R.D. 515, 525-26 (W.D. Mo. 2021) (Bough, J.) (commonality requirement satisfied where "Plaintiffs' theory of liability is based on common, class-wide tobacco surcharge documents that were distributed and/or available to all participants"). Thus, Rule 23(a)'s commonality requirement is satisfied.

C. The Plaintiff's Claims are Typical of the Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement "is fairly easily met, so long as other class members have claims similar to the named plaintiff." *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 555 (W.D. Mo. 2017) (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). In assessing typicality, courts consider whether the named plaintiff's claim "arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

The typicality requirement is satisfied here because the proposed class representative's claims are typical of other members of the Class because all the claims arise from the same course of conduct by Defendants—its collection of an unlawful surcharge—and are based on the same legal theories. *See Lipari-Williams,* 339 F.R.D. 515, 526 (typicality satisfied where class claims were "typical of Plaintiffs' claims—whether Defendants' tobacco surcharge violated ERISA and the corresponding surcharges paid as a result of that violation."). Defendants' tobacco surcharge

policy affected Plaintiff and the putative class she seeks to represent in the same manner. Thus, Rule 23(a)'s typicality requirement is satisfied.

D. The Adequacy Requirement is Satisfied.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (internal citation omitted). The focus is on whether (1) the class representatives have common interests with class members, and (2) the class representatives will vigorously prosecute the interests of the other class members through qualified counsel. *Paxton*, 688 F.2d at 562-63.

The proposed class representative, Plaintiff Ruiz, has no interest that is antagonistic to, or conflicting with, the interests of class members. To the contrary, her interests are coextensive with those of class members in establishing Defendants' violations of ERISA through their tobacco surcharge policy. *See Lipari-Williams,* 339 F.R.D. at 526 (adequacy established in tobacco surcharge case where "there does not appear to be any conflict between the interests of Plaintiffs and the proposed classes"). Plaintiff has also demonstrated her commitment to the prosecution of these claims by seeking out experienced counsel, attaching her name to this lawsuit, and participating in a lengthy negotiation process. Finally, Plaintiff has retained qualified attorneys who are experienced in class action litigation. In fact, Judge Bough appointed Stueve Siegel Hanson and McClelland Law Firm as class counsel in the only other litigated tobacco surcharge ERISA class action. *Id.*; Ricke Decl. at ¶¶ 30-32.[5] Thus, Rule 23(a)'s adequacy requirement is satisfied.

[5] Stueve Siegel Hanson and McClelland Law Firm are among the leaders in this field and have been quoted by national legal publications on the ERISA tobacco surcharge litigation trend. *See, e.g.*, Emily Cousins, *ERISA Class Actions Surge Over Health Plans' Tobacco Surcharges*, ALM

E. Rule 23(b)(3)'s Requirements Are Satisfied.

1. Common Questions Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. When determining whether common questions predominate, the Court asks whether, if the plaintiff's general allegations are true, common evidence could suffice to make out a prima facie case for the class. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) ("A common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."); *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010). When there are issues common to the class that predominate, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." D*ay v. Celadon Trucking Servs., Inc.*, 827 F. 3d 817, 833 (8th Cir. 2016) (internal citation omitted).

In this case, a single common question predominates among the class to warrant adjudication of their unlawful tobacco surcharge policy claims on a representative basis. As previously explained, Plaintiff's claims under ERISA generally rise (or fall) on the same basis. The common question that predominates and binds members of each the class is the same: whether Defendants' tobacco surcharge policy violated federal law. As Judge Bough found in certifying a similar class, issues related to "class-wide documents Defendant distributed and/or made available to all participants" pertaining to the tobacco surcharge predominate over any individualized ones. *See Lipari-Williams*, 339 F.R.D. at 528. This class-wide, dispositive question predominates over

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Law.com, https://www.law.com/ctlawtribune/2024/10/29/erisa-class-actions-surge-over-health-plans-tobacco-surcharges/

all others and supports certification for settlement purposes. Thus, Rule 23(b)(3)'s predominance requirement is satisfied.

2. The Class Action Vehicle is Superior.

In addition to predominance, Rule 23(b)(3) requires a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) provides that matters pertinent to this finding include: "(A) the class members' interested in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

Because the ERISA claims all rise (or fall) on the same common question susceptible to generalized, class-wide proof as to all similarly situated employees, a representative action is clearly superior to other available methods for fairly and efficiently adjudicating the controversy in a single forum. *See Lipari-Williams,* 339 F.R.D. at 528-29 (superiority satisfied in ERISA tobacco surcharge class action). Additionally, each class members' interest in individually controlling the prosecution of a separate action is quite low. As far as counsel is aware, this lawsuit is the only known action against Defendants raising these claims on an individual or representative basis in any forum. Finally, the parties' ability to reach an agreement on Rule 23 certification of the class also supports a finding of superiority and underscores the parties' and the Court's ability to efficiently manage the litigation as a class action. Thus, Rule 23(b)(3)'s superiority requirement is satisfied. Accordingly, the Court should conclude that Plaintiff's proposed class meets all the requirements for class certification.

II. The Proposed Settlement is Fair, Reasonable, and Adequate

As demonstrated below, the proposed settlement is fair, reasonable, and adequate under the factors identified in Rule 23(e) and by the Eighth Circuit in *Van Horn* such that the Court should conclude it will likely be able to approve the settlement, and therefore, that issuing notice to the settlement classes is justified.

A. The Class Representative and Class Counsel have provided excellent representation to the class.

This factor focuses "on the actual performance of counsel acting on behalf of the class." Fed. R. Civ. P. 23, Advisory Committee Notes (Dec. 1, 2018) (hereafter "Advisory Committee Notes"). In this case, the adequacy factor is satisfied. First, Class Counsel has effectively pioneered private litigant ERISA tobacco surcharge claims and has obtained (as far as Class Counsel is aware) one of the only litigated class certification orders to date (*see Lipari-Williams, supra*), one of the only approved class settlements involving such claims to date, and has continued to press these claims in Courts around the country on behalf of workers subject to these unlawful wage deductions.

Additionally, Class Counsel are on the cutting edge of these types of claims, have successfully litigated them before, and possess significant experience in class actions on behalf of workers generally. Ricke Decl. at ¶¶ 29-38. Courts have recognized Class Counsel's skill, experience, and reputation in approving class and collective action settlements on behalf of workers. *See, e.g., Bartakovits v. Wind Creek Bethlehem, LLC,* 2022 WL 702300 (E.D. Pa. Mar. 7, 2022) ("Class Counsel is uniquely skilled and efficient in prosecuting casino wage and hour cases"); *James v. Boyd Gaming Corp*., 2022 WL 4482477, at *15 (D. Kan. Sept. 27, 2022) ("the two law firms representing the collective members have extensive experience in this area of law. This skill and experience most likely contributed to their success in securing conditional

certification of the two collectives and resolving the litigation through a settlement that provides significant benefits to collective members."). Accordingly, this factor supports settlement approval.

B. The settlement is the result of arm's-length negotiations overseen by a mediator.

The settlement was the product of significant negotiation by experienced counsel on both sides with the assistance of an experienced, well-respected mediator culminating in the execution of the Settlement Agreement attached hereto as Exhibit 1. Ricke Decl. at ¶ 18. The arm's-length nature of the negotiations amongst experienced counsel supports a finding that the settlement is fair, reasonable, and adequate and will likely be approved such that issuing the Proposed Settlement Notice is justified. *See* Advisory Committee Notes ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Vill. Bank v. Caribou Coffee Co., Inc*., 2020 WL 13558808, at *2 (D. Minn. July 24, 2020) (finding that "[t]he assistance of a retired United States Magistrate Judge as a mediator in the settlement process supports the conclusion that the Settlement was non-collusive and fairly negotiated at arm's length"); *Kelly v. Phiten USA, Inc*., 277 F.R.D. 564, 570 (S.D. Iowa 2011) (finding the proposed settlement's fairness was supported by the fact that it was reached "after significant investigation and extensive arm's-length negotiations"). Accordingly, this factor supports settlement approval.

C. The relief provided by the settlement is meaningful.

Rule 23(e) charges the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of

payment; and (iv) any agreement required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(c)(i-iv).

In this case, there is no doubt these factors point towards settlement approval. All of the factors identified by Rule 23(e)(2)(C) should be viewed in light of the meaningful monetary benefit this settlement confers on class members and the fact that class members will be mailed a check without the need to participate in a claims process. Using Defendants' class-wide data, Class Counsel calculated class-wide ERISA damages (value of tobacco surcharges) of $14,065,410. The $4,950,000 common fund thus represents approximately 35% of the value of the ERISA claims' actual damages. Net of all fees and costs, Class Counsel conservatively estimates that the average *per capita* settlement check will exceed $580. Ricke Decl. at ¶¶ 23-24. This is a significant recovery in any wage case (and class actions generally). *Singleton v. First Student Mgmt. LLC*, 2014 WL 3865853, at *7 (D.N.J. Aug. 6, 2014) (approving wage and hour settlement where "the proposed settlement amount is about 40% of the Plaintiffs' estimate.").

Though every case has its own strengths and weaknesses, looking to settlements of similar claims approved as fair, reasonable, and adequate can provide benchmarks for reasonableness. In the only other private litigant ERISA tobacco surcharge class settlement granted final approval of which Class Counsel is aware (and which was prosecuted by Class Counsel), the Court approved a gross settlement fund that recovered approximately 62% of the tobacco surcharges alleged to be unlawful under ERISA. *See Lipari-Williams v. The Missouri Gaming Co.*, Case No. 20-cv-06067-SRB, Doc. 149 (W.D. Mo. May 25, 2023). However, importantly, in *Lipari-Williams*, there was no arbitration agreement or policy in place that threatened to derail the putative class action and restrict the case to an individual arbitration proceeding. Here, Defendants produced an arbitration agreement it used with its workforce, and stated their intention to move to dismiss the litigation

and compel Plaintiff's claims to individual arbitration. Further, *Lipari-Williams* predates the Supreme Court's decision overturning *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which Defendants here (and in other cases pending around the country) argued undermined the strength of the claims.

Thus, Plaintiff's ability to recover 35% of the tobacco surcharges on a class-wide basis is a favorable outcome for Plaintiff and Class Members, given the potential risks attendant to obtaining class certification or even proceeding on the merits in this forum.[6] Viewed through that lens, this settlement is an appropriate resolution under the circumstances and should be approved as fair, reasonable, and adequate.

1. The duration, costs, risks, and delay of trial and appeal support approval of the settlement of these ground-breaking claims.[7]

As noted above, the settlement provides class members with a considerable portion of their damages (35%) and provides meaningful settlement payments and does so now avoiding all of the risks of taking these class claims through motions to dismiss, motions to compel arbitration, summary judgment, class decertification, trial, and appeal. Although Plaintiff is confident in the merits of her class claims, Defendants are not without arguments and those must be factored into the risk analysis.

[6] Class Counsel is currently litigating the issue of enforceability of mandatory arbitration provisions containing class action waivers in ERISA benefit plans before the Ninth Circuit. *See Platt v. Sodexo, S.A.*, 2023 WL 4832660 (C.D. Cal. July 25, 2023) (denying motion to compel arbitration in an ERISA tobacco surcharge case); *Platt v. Sodexo*, Case No. 23-55737 (9th Cir.) (Sodexo's appeal of the district court's order denying Sodexo's motion to compel arbitration is fully submitted to the Ninth Circuit).

[7] Plaintiffs also address herein *Van Horn* factors 1 and 3: "the merits of the plaintiffs' case weighed against the terms of the settlement," and "the complexity and expense of further litigation." *Van Horn*, 840 F.2d at 607.

There is no dispute that Plaintiffs' tobacco surcharge theory is an issue of first impression when it comes to the merits. Given that novelty, there is inherent risk. Defendants' merits arguments presented legitimate risks had this case proceeded beyond mediation. For example, Defendants argued that Plaintiff's case suffered from the following challenges: (a) Plaintiff (like her coworkers) signed a mandatory arbitration agreement when she was hired in 2021, that required this matter to be referred to individual arbitration; (b) the same agreement included a class waiver provision undercutting any class claim; (c) the applicable ERISA regulations were invalid under recent Supreme Court precedent; (d) there was no basis for class certification; and (e) Plaintiff cannot establish that ERISA's civil enforcement provisions allow for the monetary relief she was seeking. Any of these arguments, if accepted by this Court or the Eighth Circuit, could dramatically limit the scope of the putative class and Plaintiff's claims. Ricke Decl. at ¶¶ 26-28.

As the Eighth Circuit has recognized, "[t]he single most important factor" in evaluating the settlement—"the merits of the plaintiffs' case weighed against the terms of the settlement," *Van Horn*, 840 F.2d at 607, as well as the "the complexity and expense of further litigation," *id.*, and "the duration, costs, risks, and delay of trial and appeal," Fed. R. Civ. P. 23(e)(2)(C)(i), support approval of the settlement. Therefore, "[w]eighing the uncertainty of relief against the immediate benefit provided in the settlement" supports approval here. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005). This factor supports settlement approval.

2. The proposed method of distributing relief to class members—direct mailing of checks with no claims process—supports approval of the settlement.

Under this factor, the Court "scrutinize[s] the method of claims processing to ensure that it facilitates filing legitimate claims" and "should be alert to whether the claims process is unduly demanding." Advisory Committee Notes. In this case, class members are not required to file claim forms to receive a settlement payment. Instead, unless class members request to be excluded,

they will be sent a check for their settlement amount. *See* Ex. 1, Settlement Agreement, ¶ IV.B.4. Moreover, every individual covered by the settlement will receive an individualized notice form that explains the settlement and specifies his or her anticipated settlement payment and the allocation plan. *See* Proposed Settlement Notice, Ex. A to Settlement Agreement.

That each class member is receiving an equitable portion of the settlement fund according to the amount of alleged loss suffered without needing to submit a claim supports approval of the settlement. *See, e.g.*, *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1351 (S.D. Fla. 2011) ("The absence of a claims-made process further supports the conclusion that the Settlement is reasonable."); 4 Newberg and Rubenstein on Class Actions § 13:53 (6th ed.) (stating a class settlement distribution method should be "in as simple and expedient a manner as possible"). Given the simplified process for paying each class member and the fact that no funds allocated to class members will revert to Defendants, this factor weighs in favor of approval.

3. The terms of the award of attorneys' fees support approval of the settlement.

This factor recognizes that "[e]xamination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement." Advisory Committee Notes. The Settlement Agreement provides that class Counsel may seek an award of attorneys' fees representing one-third of the common fund plus expenses of up to $35,000 from the common fund. The Settlement Agreement is *not* contingent on the Court awarding any particular fee to Class Counsel. Ex. 1, Settlement Agreement at ¶ III.D.

At the final approval stage, Class Counsel will fully brief the fairness and reasonableness of the requested attorneys' fees under the Eighth Circuit's factors. In the meantime, it is likely that the amount and timing of the proposed attorneys' fees will support final approval because courts in the Western District of Missouri and the Eighth Circuit regularly award attorneys' fees

upwards of 36% of a common fund in class action settlements. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (36% fee award reasonable). This factor weighs in favor of settlement approval.

4. There is no agreement required to be identified under Rule 23(e)(3).

Under Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Here, there is no agreement between the Parties here, except those set forth or explicitly referenced in the Settlement Agreement. Ricke Decl. at ¶ 19. Accordingly, this factor supports approval of the settlement.

D. The settlement treats class members equitably to one another.

This factor seeks to prevent the "inequitable treatment of some class members *vis-a-vis* others." Advisory Committee Notes. Class members will receive their *pro rata* portion of the net settlement fund based on their individual damage figure compared to the total damage amount. *Id.* at ¶ III.A. This factor is likely to be satisfied and weighs in favor of settlement approval.

E. Defendants' financial condition is neutral.[8]

There is no indication Defendants—one of the largest retailers in the country—will not be able to comply with their financial obligations under the settlement. This factor is neutral. *See Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015) (finding this factor neutral where defendant was "in good financial standing, which would permit it to adequately pay for its settlement obligations or continue with a spirited defense in the litigation").

[8] *Van Horn*, 840 F.2d at 607 (factor 2).

F. The "amount of opposition to the settlement" factor supports the settlement.[9]

As explained above, Plaintiff and Class Counsel believe the settlement is an excellent result for the class members, especially given the risks and delay of continued litigation, as detailed above. Ricke Decl. at ¶¶ 28-39; *see Claxton v. Kum & Go, L.C.*, 2015 WL 3648776, at *6 (W.D. Mo. June 11, 2015) (recognizing that when evaluating a settlement, the court should accord "deference to the attorneys in assessing their clients' claims/defenses"); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (stating class counsel's "experience in this type of litigation" supports providing deference to their views as to the fairness of the settlement). Here, Class Counsel's experience litigating class and collective cases has provided them a thorough understanding of the risks and potential ranges of recovery in this case, which has allowed Class Counsel to fairly consider the merits of the claims here and the value of the settlement to class members. In addition, Plaintiff also supports and approves the settlement as evidenced by her signature on the Settlement Agreement.

Although class members have not yet had the opportunity to provide their views on the proposed settlement, Class Counsel believe it will be well received, and any objections thereto will be provided to the Court and addressed in advance of the final fairness hearing. Accordingly, this factor supports approval of the settlement.

III. The Court Should Appoint Stueve Siegel Hanson LLP and McClelland Law Firm, P.C. as Class Counsel.

George A. Hanson and Alexander T. Ricke of Stueve Siegel Hanson LLP and Ryan L. McClelland of McClelland Law Firm, P.C. should be appointed as Class Counsel for purposes of this settlement.

[9] *Van Horn*, 840 F.2d at 607 (factor 4).

Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). Class Counsel meet these criteria and have been previously found to be adequate representatives of a similar ERISA tobacco surcharge matter before this Court. *See Lipari-Williams v. The Missouri Gaming Company, LLC*, Case No., 5:20-cv-06067, Doc. 149 at ¶ 4 (W.D. Mo. May 25, 2023) (Bough, J.).

IV. The Notice Satisfies Rule 23 and Due Process

When a class action lawsuit is settled, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). To that end, Rule 23 requires "the best notice that is practicable under the circumstances, including individual notice to all class members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Such notice can be effectuated through "United States mail, electronic means, or other appropriate means." *Id*. Also, any notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed R. Civ. P. 23(c)(2)(B).

Here, all of the above requirements are satisfied. Pursuant to the Settlement Agreement, Defendants will provide the settlement administrator with the names, addresses, and payroll or other data needed for purposes of sending notice to all class members. Ex. 1, Settlement Agreement at ¶ IV.B. The settlement administrator will also take reasonable steps to ensure that it has the correct address for each class member before mailing notice. The administrator will then mail to each class member a packet containing the notice. *Id*. If the post office returns any package to the administrator with a forwarding address, the administrator will promptly re-mail the packet to the forwarding address. *Id*. If the post office returns any packet to the administrator without a forwarding address, the administrator will work diligently to obtain an updated address and will promptly mail the package to any updated address. *Id*. Individuals will have 45 days from the mailing of the notice to exclude themselves from or object to the settlement. *Id*. at ¶ IV.B.4.b. That said, class members who previously filed a Consent to Join the litigation will not be afforded further opportunity to opt out as they have already indicated their desire to participate in the case and any settlement that the parties might reach. *Id*. at IV.B.2.a.

Moreover, the notice forms are written in clear, easy-to-understand language and accurately describe the nature of the action, the settlement, the scope of the release, and the process class members must follow to exclude themselves from or object to the settlement. *See generally* Proposed Settlement Notice (Ex. A to Settlement Agreement). Importantly, each notice packet includes an individualized page informing class members of their anticipated award and an explanation of how it was calculated. *Id*. Likewise, class members can find more information about the claims in the case and the settlement (including reviewing the Settlement Agreement) on the settlement website. This detailed notice weighs in favor of settlement approval.

V. The Court Should Schedule a Final Fairness Hearing.

The last step in the settlement approval process is a final fairness hearing at which the Court may hear all evidence and argument necessary to determine whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). During this hearing, class members or their counsel may be heard in support of or in opposition to the settlement. The Court will determine after the final approval hearing whether the settlement should be approved, and whether to enter a final approval order and judgment under Rule 23(e). Plaintiff requests the Court set a final fairness hearing approximately 100 days after entering an Order granting preliminary approval of the class action settlement.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant Plaintiff's unopposed motion to direct class notice and grant preliminarily approval of this class action settlement and the relief prayed for therein, enter the proposed Order (attached to the Settlement Agreement as Exhibit C), including setting a final fairness hearing, and for any other relief the Court deems appropriate under the circumstances.

Dated: January 6, 2025

Respectfully submitted,

STUEVE SIEGEL HANSON LLP

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 6, 2025, the foregoing document was filed with the Court's CM/ECF system, which served a copy of the foregoing document on all counsel of record.

/s/ *Alexander T. Ricke*

COUNSEL FOR PLAINTIFF