IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KRISTAL M. KHAN, MICHELLE R. BALLINGER, and GEORGE A. CRAAN, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **PTC INC., THE BOARD OF DIRECTORS OF PTC INC., THE INVESTMENT COMMITTEE OF PTC INC., and JOHN DOES 1-30,** **Defendants.**	**Civil Action No. 1:20-cv-11710-WGY**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS KRISTAL M. KHAN, MICHELLE R. BALLINGER, AND GEORGE A. CRAAN'S
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

On May 20, 2022, the Court preliminarily approved the Settlement in this Action (ECF No. 59), which provides for the creation of a $1,725,000.00 Settlement Fund.[1] The Court's Preliminary Approval Order also, *inter alia*, conditionally certified a Settlement Class and appointed the Named Plaintiffs as class representatives and Capozzi Adler, P.C. ("Capozzi Adler") as Class Counsel. *Id*. Plaintiffs and Class Counsel believe each of these findings in the Preliminary Approval Order should be made final because the proposed Settlement represents a fair recovery. In particular, the Settlement represents approximately 59% of the Settlement Class's estimated realistic damages as calculated by Plaintiffs. Gyandoh Decl., ¶ 45. Class Counsel achieved this Settlement only after extended negotiations under the auspices of Hunter R. Hughes, III, a neutral, third-party private mediator with experience mediating many ERISA class actions. Without doubt, the Settlement was reached after arm's length negotiations by experienced counsel on both sides.

The Settlement Class has received full and fair notice of the terms of the Settlement through individualized direct mail and email, and a dedicated internet Settlement website, in accordance with the Preliminary Approval Order. After mailing and emailing the approved form of Notice of Class Action Settlement to Class Members, Class Counsel have thus far received only one objection which is addressed in the contemporaneously filed memorandum in support of attorneys' fees, reimbursement of costs, and case contribution awards to the Named Plaintiffs. Plaintiffs respectfully request this Court to enter the proposed Judgment Approving Class Action Settlement.

II. SUMMARY OF THE CLAIMS

[1] The Settlement Agreement, previously submitted to the Court, is being submitted herein as Exhibit 1 to the Declaration of Mark K. Gyandoh ("Gyandoh Decl.") which is filed contemporaneously with this memorandum. The Settlement Agreement has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); D (Final Order); and E (CAFA Notice). Undefined capitalized terms herein have the same meaning as in the Settlement Agreement.

Plaintiffs Kristal M. Khan, Michelle R. Ballinger, and George A. Craan (together, "Plaintiffs"), participants in the PTC 401(k) Savings Plan (the "Plan"), commenced this action against Defendants[2] (together with Plaintiffs, the "Parties") on September 17, 2020 with the filing of a Complaint (ECF No. 1). The Complaint alleged Defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by failing to prudently manage the Plan. Defendants strongly dispute Plaintiffs' allegations, maintain that the Plan has been prudently managed throughout the relevant period, and deny all liability for the alleged ERISA violations. Specifically, Plaintiffs alleged, *inter alia*, that throughout the putative Class Period, Defendants selected a slate of investment options for the Plan that were imprudent due to their high fees where allegedly identical or nearly identical alternative funds – which, according to Plaintiffs, differed only in price – were available in the marketplace. Plaintiffs alleged had there been a prudent process in place, the majority of these funds would have been replaced with less expensive alternatives as early as the beginning of the Class Period. In addition to the aforementioned claims, Plaintiffs alleged the Plan suffered millions of dollars in damages due to unreasonably high recordkeeping fees that ranged from $292.27 to $380.22 per participant annually when a reasonable amount should have been much less.

Plaintiffs' claims fell under three theories of liability. The first theory is that during the Class Period, several of the funds in the Plan had identical lower share counterparts that were never selected by the Plan's fiduciaries. Complaint, ¶¶ 81-90. The second theory is that Defendants caused Plan participants to over-pay for recordkeeping and administrative services. *Id.* at ¶¶ 100-

[2] "Defendants" herein refers to PTC Inc. ("PTC"), The Board of Directors of PTC Inc. (the "Board"), and The Investment Committee of PTC Inc. and its members (the "Committee").

115. The third theory is that PTC and the Board failed to monitor the Plan's other fiduciaries. *Id.* at ¶¶ 123-129.

As set forth below, Defendants deny and continue to deny the merits of each of these allegations.

III. SETTLEMENT AGREEMENT

A. Proposed Settlement

The Settlement provides Defendants and/or their insurer will pay $1,725,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation.[3] *See* Gyandoh Decl., ¶¶ 34. Additionally, within 18 months from the Settlement Effective Date, if the Plan's fiduciaries have not already done so, the Plan's fiduciaries will conduct or cause to be conducted a request for proposal relating to the Plan's recordkeeping and administrative services. Gyandoh Decl., ¶¶ 35. In exchange, Plaintiffs and the Plan will dismiss their claims with prejudice, as set forth more fully in the Settlement Agreement. The Settlement Agreement also provides for the payment of attorneys' fees of no more than $575,000.00, which is 33 1/3% of the Gross Settlement Amount and Plaintiffs' Case Contribution Awards of no more than $10,000 per Plaintiff, both of which are subject to Court approval. *See* Gyandoh Decl., ¶¶ 39. The proposed "Settlement Class" refers to the following:

> all persons who participated in the Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

[3] The Plan of Allocation, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Plan participant's pro rata distribution based upon the individual's balances in the Plan during the Class Period. *See also* Gyandoh Decl., ¶¶ 38.

See Settlement Agreement at ¶ 1.45. The "Class Period" refers to "the period from September 17, 2014, through the date of the Preliminary Approval Order." *Id.* at ¶ 1.13.

B. Release of Claims

Plaintiffs and Settlement Class members will provide a release and covenant-not-to-sue to Defendants and the other Released Parties covering the claims which were or could have been asserted in the Action based on the facts alleged in the Complaint filed in this case or Defendants' defenses to the Plaintiffs' claims. Settlement Agreement at ¶¶ 1.37, 1.38, 7.1, 7.2, 7.3, 7.4, 7.5. The release and covenant-not-to-sue in the Settlement does not encompass individual claims for vested benefits otherwise due under the terms of the Plan.

IV. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

Pursuant to the Preliminary Approval Order, Class Counsel has overseen the issuance of the Court-approved Class Notice.

The Court approved Class Counsel's selection of JND Legal Administration ("JND") as settlement and notice administrator and duly appointed JND as the Settlement Administrator. *See* Preliminary Approval Order, ¶ 8. JND has submitted a declaration testifying to their efforts regarding sending notice to the Settlement Class. *See* Declaration of Ryan Bahry (attached as Exhibit 2 to the Gyandoh Declaration). On June 6, 2022, JND received two updated spreadsheets from Defendants containing, among other information, the names, mailing addresses, e-mail addresses (where available), social security numbers, and account balance information for a total of 6,424 unique Settlement Class Members.. Bahry Decl., ¶ 6. Prior to mailing notices, JND analyzed the raw data to consolidate duplicate records within the spreadsheets and determined a total of 6,424 unique Settlement Class Members. JND updated the Settlement Class Member contact information using data from the National Change of Address ("NCOA") database. Further, JND

performed advanced address research using the TransUnion skip-trace database to identify current addresses prior to mailing as required under the Order. The Settlement Class Member data was promptly loaded into a secure database established for this Action. Pursuant to the terms of the Settlement Agreement, on June 13, 2022, JND sent the customized Court-approved e-mail notice ("E-mail Notice") via e-mail from an established case inbox (info@PTCERISASettlement.com) to 6,008 unique Settlement Class Members with a valid e-mail address (416 Settlement Class Members were excluded from the e-mail campaign as they did not have a valid e-mail address). Bahry Decl., ¶¶ 7-8.

As of the date of this Declaration, JND tracked 800 E-mail Notices that were returned to JND as undeliverable. Bahry Decl., ¶ 9. Pursuant to the terms of the Settlement Agreement, on June 13, 2022, JND mailed the Court-approved notice ("Class Notice") via USPS first-class mail to 6,423 unique Settlement Class Members with a mailing address (one (1) Settlement Class Member was excluded from the mailed notice as they did not have a mailing address). Bahry Decl., ¶ 10.

As of the date of this Declaration, JND tracked 312 Class Notices that were returned to JND as undeliverable. JND conducted additional advanced address research through TransUnion on these 312 undeliverable Class Notices and received updated address information for 18 Class Members. JND promptly re-mailed Class Notices to these 18 Class Members. As of the date of this Declaration, 6,347 Class Members were e-mailed or mailed a Notice that was not returned as undeliverable, representing 98.8% of total Settlement Class Members.

Further, on June 13, 2022, JND established a Settlement Website (www.PTCERISASettlement.com), which hosts copies of important case documents, including the Class Action Settlement Agreement, Class Notice, Plan of Allocation, answers to frequently

asked questions, and contact information for the Administrator. As of the date of this Declaration, the Settlement Website has tracked 1,084 unique users with over 1,889 page views. JND will continue to update and maintain the Settlement Website throughout the administration process.

On June 13, 2022, JND established a case-specific toll-free number, 1-844-202-9489, for Settlement Class Members to call to obtain information regarding the Settlement. Callers have the option to listen to the Interactive Voice Response ("IVR") system, or to speak with a live agent. The toll-free number is accessible 24 hours a day, seven days a week. As of the date of this Declaration, the toll-free number has received 13 incoming calls. JND will continue to maintain the toll-free number throughout the settlement administration process.

V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Governing Law

To approve a class action settlement, the Court must determine whether the settlement agreement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). After notice to class members and a hearing, "[a]pproval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005). Settlement approval involves two stages: "First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 106-07 (D. Mass. 2010) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 13.14 (2004)). The Court "enjoys considerable range in approving or disapproving a class settlement." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) (quotation omitted). However, there is a "strong public policy in favor of settlements,

particularly in very complex" cases such as this. *Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (quotation omitted); *see also In re Pharm.*, 588 F.3d at 36 (discussing policy favoring settlements in "hard-fought, complex class action[s]").

Federal Rule of Civil Procedure 23(e)(2), as amended (effective December 2018), identifies five factors considered in making such determination: 1) whether the class representatives and class counsel have adequately represented the class; (2) whether the proposal was negotiated at arm's length; (3) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (4) the terms of any proposed award of attorney's fees, including timing of payment;[4] and (5) whether the proposal treats class members equitably relative to each other. These factors overlap significantly with the more detailed list of factors that courts in this Circuit have typically used for purposes of reviewing a proposed class action settlement (the "*Grinnell* factors"): (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation. *Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) (citing *City of Detroit*

[4] Plaintiffs are filing a fee petition contemporaneously with the instant brief. In general, the Settlement does not excessively compensate Class Counsel. The Settlement is not contingent on Class Counsel receiving a specific amount of fees and any fees they receive will be determined by the Court. The amount of fees Class Counsel is requesting, a third of the Settlement, is reasonable and consistent with the fee awards in other ERISA cases.

v. Grinnell Corp., 495 F.3d 448, 463 (2d Cir. 1974)); *see also Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 23 (E.D.N.Y. 2019), *vacated and remanded on other grounds*, 964 F.3d 141 (2d Cir. 2020) (recognizing that amended Rule 23(e)(2) criteria "overlap almost entirely" with the *Grinnell* factors). "The goal of [the] amendment is not to displace any [existing] factor, but rather to focus the court ... on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." FED. R. CIV. P. 23(e) advisory committee note (2018). As discussed below, both the factors in Rule 23(e)(2) and the *Grinnell* factors overwhelmingly favor approval of the Settlement.

B. The Settlement is Fair, Reasonable, and Adequate

i. The Settlement Provides Substantial Monetary and Other Relief to the Class

The Settlement Agreement fashions significant relief for the Class. In this action, Plaintiffs alleged three main theories of liability against Defendants. The first theory is that during the Class Period, several of the funds in the Plan had allegedly identical lower share counterparts that were never selected by the Plan's fiduciaries. Complaint, ¶¶ 81-90. The second theory is that Defendants allegedly caused Plan participants to over-pay for recordkeeping and administrative services. *Id.* at ¶¶ 100-115. The third theory is that PTC and the Board allegedly failed to monitor the Plan's other fiduciaries. *Id.* at ¶¶ 123-129.

When compared to the likely potential outcomes in this case, the $1,725,000 million Settlement is reasonable at this early stage in the litigation. The settlement represents approximately 59% of the total estimated likely damages of $2.9 million based on Plaintiffs' allegation of Defendants' failure to utilize the lowest cost share classes of funds in the Plan as well as failure to pay per participant recordkeeping costs of no more than $35 per participant. Gyandoh Decl., ¶¶ 35. This percentage of recovery is above the typical percentage district courts have

approved. *See Medoff v. CVS Caremark Corp.*, No. 09-CV-554-JNL, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (noting that 5.33% is "well above the median percentage of settlement recoveries in comparable securities class action cases."); *see also Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (recovery representing 20% of estimated damages in ERISA class action approved); *Brotherston v. Putnam Invs, LLC*, No. 15-13825-WGY (ECF No. 220) (D. Mass. April 29, 2020) (preliminarily approved approximately 28% recovery).[5]

The recovery as a percentage of damages is particularly substantial as "[a] high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 73 (D. Mass. 2005) (quoting *Reynolds v. Beneficial Nat. Bank*, 288 F.2d 277, 285 (7th Cir. 2002)). Plaintiffs have designed an allocation methodology that fairly and effectively apportions the relief among class members. Gyandoh Decl., ¶¶ 98. All eligible Settlement Class Members will receive

[5] *See, e.g., Hochstadt*, 708 F.Supp.2d at 109 (D. Mass. 2010) (recovery of approximately 27% of conservatively estimated damages was "plainly reasonable"); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614 (ECF No. 185) (C.D. Cal. July 30, 2018) (approving $12 million ERISA 401(k) settlement that represented approximately 25% of estimated total damages of $47 million); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *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"); *Medoff v. CVS Caremark Corp*., 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (settlement providing recovery of 5.33% of maximum recoverable damages was well above the median percentage of settlement recoveries in comparable securities class action cases); *Baker v. John Hancock Life Ins. Co.*, No. 1:20-cv-10397-RGS (ECF No. 67) (D. Mass. June 2, 2021) (preliminarily approving $14 million recovery therefore representing estimated 23% of the investment damage); *Eaton Vance*, No. 18-12098 (ECF No. 32), at 12 (May 6, 2019) (recovery represented 23% of calculated likely damages); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (average settlement amounts in securities class actions over the past decade "have ranged from 3% to 7% of the class members' estimated losses") (internal citations and quotations omitted); *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-cv-11249-RWZ (ECF No. 95) (D. Mass. June 25, 2019) (granting preliminary approval in ERISA class action where $6.875 million recovery represented approximately 30% of estimated damages).

a pro rata share of the Settlement Fund based on their annual account balances. To minimize costs, each current participant's settlement award will be deposited directly into their Plan account. The former participants will receive a direct payment by check.

ii. Continued Litigation Would Have Entailed Significant Risk

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See Hill v. State Street Corp.*, 2015 WL 127728, at *10 (D. Mass. Jan. 8, 2015) (noting that the risk of continued litigation includes the risk that there could be no recovery at all); *In re Lupron*, 228 F.R.D. at 97 ("[A] significant element of risk adheres to any litigation taken to binary adjudication"). This case involves factually complex claims involving breach of ERISA's fiduciary duty of prudence. See *Brotherston*, 2016 WL 1397427, at *1. The First Circuit has described ERISA jurisprudence as an "important and complex area of law" that "is neither mature nor uniform. . ." *LaLonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004).

Although Plaintiffs believe there is strong support for their claims, there is risk "inherent in taking any litigation to completion." *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 849 (E.D. La. 2007). To prevail on the breach of prudence claims, Plaintiff must prove that Defendants' process for monitoring Plan options was "tainted by failure of effort, competence or loyalty." *Braden v. Wal Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). Plaintiffs would proffer their liability and damages experts, which would undoubtedly be countered by Defendants' proffered experts on both liability and damages. Even if Plaintiffs can establish a fiduciary breach, which defendants dispute, calculation of ERISA damages is "complex, time-consuming and expensive." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004). The process can have unexpected results, and the Parties' assessments of the damages would no doubt vary greatly. Indeed, a battle of experts would likely ensue, which each side presenting differing

damages calculations, and the factfinder "would therefore be faced with competing expert opinions representing very different damage estimates[,] . . . adding further uncertainty." *In re: Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003).[6] If Plaintiffs are unsuccessful in proving any of their claims at trial, the recovery could be diminished or lost. This complexity favors settlement.

Further, this case is far from trial. Absent a settlement, the Parties would have to incur additional litigation costs and risks associated with trial. Class actions advanced under ERISA "often lead […] to lengthy litigation." *Kruger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at*1 (D.Minn. July 13, 2015) ("*Kruger II*"). Significant discovery, including expert discovery, would be required for both Parties. Any summary judgment or trial judgment would present significant legal questions and potentially lead to costly and time-consuming appeals. Indeed, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009). Gyandoh Decl., 45.

iii. ERISA Class Cases are Complex, Expensive, and Often Lengthy

Aside from these risks, continuing the litigation would have resulted in complex and costly additional proceedings, which would have significantly delayed any relief to the class, and might have resulted in no relief at all. These considerations also support approval of the Settlement.

Although all class actions are inherently complex, "[t]he complexity inherent in class actions is amplified in ERISA class actions." *Karpik v. Huntington Bancshares, Inc.*, 2021 WL

[6] *See In re Warner Commcns Sec. Litig.*, 618 F.Supp. 735, 744 (S.D.N.Y. 1985); *Milken & Assoc. Sec. Lit.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement and noting that damage calculations are often a "battle of experts at trial, with no guarantee of the outcome"); *Bonime v. Doyle*, 416 F. Supp. 1372 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 555 (2d Cir. 1977) (difficulty in determining damages a factor supporting settlement).

757123, at *4 (S.D. Ohio Feb. 18, 2021). It is well-recognized that ERISA class actions "often lead[] to lengthy litigation." *See Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). In fact, it is not unusual for these cases to extend for a decade or longer before final resolution. *See, e.g., Tussey v. ABB Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on September 11, 2006). Given the substantial risks, cost, and delay of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways"). One of the chief benefits of the Settlement is that it provides immediate relief while avoiding further delay and expense. *See, e.g., In re StockerYale*, 2007 WL 4589772, at *3 ("In a potential class action of this sort, the time and expense leading up to trial would have been significant."); *In re Lupron*, 228 F.R.D at 95 (favoring settlement due to the burden that complex litigation places on the parties); *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-cv-00187, 2007 WL 119157, at *2 (N.D.N.C. Jan. 10, 2007) (recognizing that "ERISA is a highly complex and quickly-evolving area of the law" as a factor supporting the proposed settlement).

iv. The Case Was Ripe for Settlement

There is no question that the case was ripe for settlement. As noted above, the mediation occurred only after Class Counsel undertook a thorough investigation of the matter prior to filing suit and reviewed numerous documents produced by Defendants in response to Plaintiffs' request

pursuant to Section 104(b)(4) of ERISA. Additionally, the briefing on the motion to dismiss informed both parties' views of the strengths and weaknesses of their respective cases, and the parties also drafted detailed mediation statements before negotiating the current settlement. Courts in the First Circuit have approved settlements at similar and even less advanced stages. *See Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, ECF No. 95 at 2 (Mar. 24, 2021) (noting that settlement was entered into prior to class certification and depositions); *Price v. Eaton Vance Corp.*, No. 18-12098, ECF No. 32, at 14 (D. Mass. May 6, 2019) (noting that motion to dismiss was pending at the time of settlement); *Curtis v. Scholarship Storage Inc.*, 2016 WL 3072247, at *2 (D. Me. May 31, 2016) (approving settlement entered into 16 months after filing of complaint, "before many of the complex issues were raised"); *In re StockerYale*, 2007 WL 4589772, at *3 (settlement was warranted based on document discovery and counsel's internal investigation prior to filing the case because "class counsel adequately appreciated the merits of the case before negotiating").

v. The Settlement Proceeds Will Be Distributed Equitably and Efficiently

The Settlement outlines an equitable and effective method of distribution consistent with Rule 23. *See* FED. R. CIV. P. 23(e)(2)(C)(ii), (D). As noted herein, the proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Settlement Class member's distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section II.D of the Plan of Allocation is less than ten dollars ($10.00) shall receive a distribution of ten dollars ($10.00). *See* Plan of Allocation at Section II.D. Current participants will receive their share of the Settlement Fund through a distribution to their Plan account while participants without accounts under the Plan will

receive a check. *See* Plan of Allocation at Section II.E and D. The allocation formula and distribution method are consistent with other ERISA settlements that have been approved in this District. *See, e.g.*, *Moitoso v. FMR LLC*, No. 1:18-cv-12122, ECF No. 243-1 ¶¶ 5.1(b), 5.2, 5.3 (July 2, 2020); ECF No. 265 (D. Mass. Jan. 22, 2021) (granting final approval); *Toomey*, No. 1:19-cv-11633, ECF No. 79-1 ¶¶ 6.4-6.6 (Nov. 20, 2020); ECF No. 100 (D. Mass. Apr. 7, 2021) (granting final approval); *Velazquez v. Mass. Fin. Services Co.*, No. 17-cv-11249, ECF No. 91-1 ¶¶ 6.4.2, 6.5, 6.6 (June 14, 2019); ECF No. 108 (D. Mass. Dec. 5, 2019) (granting final approval).

vi. The Class Members Support the Settlement

A "favorable reaction of class to settlement... constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Hill*, 2015 WL 127728, at *8 (citing *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 473 (D.P.R. 2011)). To date, only one potential class member, Matthew Ender, has objected to the Settlement. Plaintiffs address this objection in the Fee Memorandum given the objector's focus on the attorney fee request. Importantly, the objector did not base his objection on the facts and law; only his perception of how the Plan operated.

vii. Defendants' Ability to Withstand A Greater Judgment Is Not A Reason to Withhold Approval of the Settlement in Light of Other Factors

While PTC could potentially withstand a judgment in an amount larger than the Settlement amount, the substantial risks and expenses attendant to continuing this litigation, including the potential for the depletion of available insurance coverage, combined with the immediacy of the benefit to Settlement Class members, easily outweigh this factor. *See Hill*, 2015 WL 127728, at *10 ("[A] defendant is not required to empty its coffers before a settlement can be found adequate[.]") (quotation omitted). Because the other *Grinnell* factors weigh heavily in favor of the Settlement, it should be approved regardless of whether PTC could withstand a greater judgment.

See Hill, 2015 WL 127728, at *10 (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)).

C. The Negotiations Were Conducted at Arm's Length and the Class Was Adequately Represented

A proposed class action settlement enjoys a "presumption in favor of the settlement" if "sufficient discovery has been provided and the parties have bargained at arms-length." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). The proposed Settlement here is the result of lengthy and complex arms-length negotiations between the Parties under the auspices of a neutral, third-party private mediator with extensive experience mediating ERISA class actions. *See Briana Wright v. S. New Hampshire Univ.*, 2021 WL 1617145, at *7 (D.N.H. Apr. 26, 2021) ("The court notes, first, that the presumption of reasonableness applies here. The record establishes that counsel for the parties negotiated the Agreement at arm's length, at times with the assistance of an experienced and neutral mediator, following a thorough investigation and mutual exchange of evidence."); *Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) ("[T]he participation of an experienced mediator . . . also supports the Court's finding that the Settlement is fair, reasonable, and adequate.").

Plaintiffs also had sufficient information to make an informed decision prior to settling. On May 1, 2020, May 13, 2020, June 23, 2020, July 30, 2020, and July 31, 2020, prior to filing suit, Plaintiffs requested numerous documents and information from Defendants pursuant to Section 104(b)(4) of ERISA. Gyandoh Decl. ¶ 31. Additionally, during discovery, Defendants produced over 3,400 pages of documents, including Plan documents, summary plan descriptions, participant investment disclosures, committee charters, investment policy statements, trust and recordkeeping agreements, fee schedules, committee meeting minutes and materials, and account

statements. Gyandoh Decl. ¶¶ 35. In light of the forgoing, the Parties were clearly able "to make an intelligent judgment about settlement." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015).[7]

Additionally, "[w]hen the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci, 191 F.R.D. 3, 10 (D. Mass. 2000).* Proposed Class Counsel Capozzi Adler, P.C. has done substantial work, has experience litigating ERISA class actions and complex matters, and has committed ample resources to prosecute this matter. *See* Gyandoh Decl. ¶¶ 76. Accordingly, they are well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement. Thus, Plaintiffs retained highly qualified and experienced attorneys in satisfaction of Rules 23(a) and 23(g).

VI. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

"Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon Office Solutions, Inc., Securities Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) (quoting *In re Computron Software, Inc.*, 6 F.Supp.2d 313, 321 (D.N.J. 1998)). "In general, a plan of allocation that reimburses class members based on the type

[7] Courts in the First Circuit have approved settlements at similar stages. *See Price v. Eaton Vance Corp.*, No. 18-12098, ECF No. 32, at 21 (D. Mass. May 6, 2019) (memorandum supporting successful preliminary approval motion, noting that motion to dismiss was pending at the time of settlement); *Curtis v. Scholarship Storage Inc.*, 2016 WL 3072247, at *2 (D. Me. May 31, 2016) (approving settlement entered into 16 months after filing of complaint, "before many of the complex issues were raised"); *In re P.R. Cabotage Antitrust Litig.*, 269 F.R.D. 125, 141 (D.P.R. 2010) (noting that the parties were sufficiently informed by "limited discovery" that occurred prior to settlement).

and extent of their injuries is reasonable." *Id.* The proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Settlement Class member's distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section II.D of the Plan of Allocation is less than ten dollars ($10.00) shall receive a distribution of ten dollars ($10.00). *See* Plan of Allocation at Section II.D. Further, current participants will receive their share of the Settlement Fund through a distribution to their Plan account. *Id*. at Section E.

VII. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

In its May 20, 2022 Preliminary Approval Order, the Court preliminarily certified the following Class for purposes of Settlement:

> All persons who participated in the Plan at any time during the Class Period (September 17, 2014 through May 12, 2022), including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

See ECF No. 59 at ¶ 1. In the motion for preliminary approval, Plaintiffs established that: (1) the class is numerous; (2) Plaintiffs demonstrate the existence of common questions of law or fact; (3) Plaintiffs' claims are typical of other Class Member's claims; (4) Plaintiffs are adequate class representative; (5) Class Counsel are experienced and competent; (6) class certification is appropriate under FED. R. CIV. P. 23(b)(1)(A) due to the risk of inconsistent adjudications; (7) class certification is also appropriate under FED. R. CIV. P. 23(b)(1)(B) because any individual adjudication would be dispositive of the interests of other class members. *See* ECF No. 56.

Nothing has changed since the Court preliminarily certified the Class. Accordingly, the Court should reaffirm its approval of the Class.

VIII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the accompanying proposed Final Approval Order.

Dated: August 1, 2022

Respectfully submitted,

CAPOZZI ADLER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: *Mark K. Gyandoh*
Mark K. Gyandoh, Esq.