

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

KERI EVANS, et al.,

Plaintiffs,

v.

JOHN F. AKERS, et al.,

Defendants.

MARK SIAMIS, et al.,

Plaintiffs,

v.

JOHN F. AKERS, et al.,

Defendants.

**Consolidated Under
Case No. 04-11380-WGY**

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO
PRELIMINARILY APPROVE SETTLEMENT, CONDITIONALLY CERTIFY A
SETTLEMENT CLASS, APPROVE NOTICE PLAN AND SET A
FINAL FAIRNESS HEARING**

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Plaintiffs Keri Evans, Timothy Whipps and Mark Siamis (“Plaintiffs” or “Named Plaintiffs”) respectfully submit the following memorandum in support of their motion for an order preliminarily approving the settlement, conditionally certifying a settlement class, approving the manner of giving notice of the settlement to the proposed settlement class, and setting a date for a final fairness hearing.¹

I. Introduction

Plaintiffs, who in the course of litigating their Action faced, among other things, a bankrupt Plan sponsor, uncertain case law and dismissal of their claims due to lack of standing, respectfully submit that they have achieved an outstanding settlement for members of the proposed Class. Indeed, this was a hard-fought litigation from the start. The proposed Settlement² provides for a cash payment of \$10 million (plus interest) and resolves all claims asserted by Plaintiffs in this litigation.

Plaintiffs respectfully submit that the proposed settlement is fair, reasonable and adequate under the governing standards for evaluating class action settlements in this Circuit and FED. R. CIV. P. 23(e) and that preliminary certification of a Settlement Class is clearly appropriate pursuant to FED. R. CIV. P. 23(a)-(b). Further, the proposed Class Notice plan easily satisfies the requirements of due process and is consistent with the type of notice approved of in analogous

¹ Plaintiffs have set forth in this Memorandum various factors (factual, legal, and financial) that they believe support the conclusion that the settlement is fair, reasonable, and adequate. Plaintiffs are not, by entering into the settlement, admitting to the ultimate truth or falsity of any of the factual, legal or financial factors or conclusions discussed in this Motion that favor Defendants; rather, Plaintiffs are merely acknowledging, for settlement purposes only, that the Court could find such factors exist and provide a sound basis for preliminarily approving the settlement.

² All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement, attached to the Declaration of Edward W. Ciolko (“Ciolko Decl.”) as Exhibit A.

settlements as discussed herein. Upon preliminary approval of the Settlement, pursuant to FED. R. CIV. 23(e)(1)(B), Settlement Class members will receive notice advising them of the terms of the Settlement, how to object to the Settlement, and the date of the Fairness Hearing. The Class Notice will also explain who is a member of the Settlement Class. As an integral part of the Settlement Agreement, the parties seek class certification, for settlement purposes, of a class of all persons who were participants in or beneficiaries of the Plan at any time between July 1, 1999 and April 19, 2004 (the “Class Period”), and whose accounts included investment in the Company Stock Fund at any point during that time period (excluding Defendants).

In light of the significant hurdles facing the Plaintiffs, detailed below, and the very real risk that, despite their best efforts, the Class might recover nothing at all, Plaintiffs respectfully submit that the result reached was truly an extraordinarily favorable one. Notably, this result was achieved in what the First Circuit has recognized 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). As set forth below, all prerequisites for preliminary approval of the Settlement have been met and Plaintiffs respectfully request that this motion for preliminary approval be granted.

II. Background

A. Plaintiffs’ Claims

Plaintiffs, former employees of W.R. Grace & Co. (“Grace” or the “Company”), allege that the Defendants³ violated the fiduciary duties owed to participants of the W. R. Grace & Co.

³ Defendants are the Investments and Benefits Committee of the Plan, the Administrative Committee of the Plan, and John F. Akers, Ronald C. Cambre, Marye Anne Fox, John J. Murphy, Paul J. Norris, Thomas A. Vanderslice, H. Furlong Baldwin, Brenda Gotlieb, Robert M. Tarola, W. Brian McGowan, Michael Piergrossi, Eileen Walsh, David Nakashige, Elyse Napoli, Martin Hunter and Ren Lapadario. Because it filed for bankruptcy on April 2, 2001, and was thus protected by a litigation stay, Plaintiffs did not name Grace in their Complaint.

Savings and Investment Plan (the “Plan”), a defined contribution “employee pension benefit plan” as defined by ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

Specifically, Plaintiffs allege, on behalf of the Plan and a Class of its participants similarly situated, that Defendants breached their ERISA-mandated duties of prudence, loyalty and care by maintaining and allowing ongoing investment of Plan assets in Company stock. As set forth in the First Amended Complaint For Violations of the Employee Retirement Income Security Act of 1974 (the “Complaint”), Plaintiffs allege that maintaining investments in Grace stock was imprudent under ERISA in light of information known (or knowable) to Defendants about the true state of the Company’s finances, operations and prospects.

According to the Complaint, Defendants knew or should have known Grace stock was an imprudent investment for participant retirement savings due to public and non-disclosed information pertaining to, *inter alia*, (1) setbacks in and the true size of the Company’s massive asbestos litigation liability, (2) the rising number of newly filed asbestos-related suits during the Class Period, (3) the Company’s under-funding of its asbestos litigation reserves/funds; (4) the Company’s impending collapse due to these factors and (5) W.R. Grace’s doomed and costly attempt to shield itself from litigation liability through asset sales.

Defendants were fiduciaries of the Plan and allegedly breached their fiduciary obligations under ERISA by, among other things: (1) failing to prudently and loyally manage the Plan’s investments in Grace securities; (2) failing to monitor other plan fiduciaries and provide them with accurate information to assist them in prudently managing the Plan; and (3) breaching their duties of loyalty by failing to avoid or ameliorate inherent conflicts of interest that impaired their ability to prudently manage the Plan as mandated under ERISA.

Further, Plaintiffs maintained in the Complaint that corporate mismanagement related to the aforementioned issues ultimately drove the Company to bankruptcy on April 1, 2001. Finally, the Complaint alleges that Defendants' fiduciary misconduct and neglect – given their actual or constructive knowledge of the above-listed problems - decimated the retirement savings of Plan participants during the proposed Class Period.

B. Plaintiffs' Claims Have Been Aggressively Litigated

1. Procedural History

Plaintiff Keri Evans filed her class action complaint in this Court on June 16, 2004. Because of issues relating to Grace's bankruptcy, the action was administratively closed on November 16, 2004. Specifically, on August 10, 2004, the Grace Debtors filed a motion in the Bankruptcy Court Requesting an Order (1) To Show Cause Why Counsel for Evans Is Not In Contempt of Court For Refusing to Refrain From Prosecuting A Prohibited Action Against Debtors' Affiliates and (ii) Extending the Scope of the Automatic Stay and the Preliminary Injunction ("Motion to Show Cause"). Plaintiffs subsequently became actively involved in the Bankruptcy proceedings, seeking to protect the interests of the Class in every possible forum.

On September 13, 2004, Plaintiffs filed a memorandum in the Bankruptcy Court opposing the Motion to Show Cause. In connection with this briefing, Plaintiffs' Counsel reviewed and analyzed the Modified Preliminary Injunction, as well as associated legal memoranda, hearing transcripts, and other relevant documents. Plaintiffs noted that no Debtors were named in their Complaint and argued that the automatic stay should not apply to the Non-Debtor Defendants named in their Complaint. Plaintiffs' counsel attended a hearing in the Bankruptcy Court on September 27, 2004, where the Court refused to grant sanctions and ruled that the case in the District Court would be stayed as to the officers, directors, State Street and

Fidelity through December 31, 2004, but would automatically be lifted as to those parties on January 1, 2005.⁴

On February 4, 2005, Defendants filed a motion to reopen the case, which this Court granted on February 10, 2005. In the meantime, Defendants successfully moved to transfer another action, *Bunch et al v. W.R. Grace & Co. et al.*, (“*Bunch*”) to this Court. The *Bunch* plaintiffs alleged that certain overlapping defendants were liable to the Plan and its participants for divesting (versus maintaining) the Plan’s Grace equity holdings.⁵ Over the objections of Plaintiffs and the *Bunch* plaintiffs, the Court entered an Order consolidating the two cases on August 22, 2005. On October 24, 2005, the Court entered Plaintiffs’ Stipulation with Fidelity Management Trust Company to dismiss it as a defendant in the Action.

Named Plaintiffs Evans and Whipps filed the Complaint on December 19, 2005. The Defendants answered on January 1, 2006 and Defendants State Street Global Advisors and State Street Bank & Trust Company (“State Street”) moved to dismiss. After conferring with counsel for the State Street entities and receipt of certain documentation, Plaintiffs dismissed them from their Action without prejudice. On March 2, 2006, the Court held a hearing on State Street’s motion to dismiss in the *Bunch* action as well as a Rule 16 conference. The parties then met and conferred and submitted a proposed schedule pursuant to Local Rule 16.1 on April 13, 2006, which the Court entered (as modified) on April 14, 2006.

In accordance with the scheduling order, Plaintiffs Evans and Whipps filed a motion for class certification on May 15, 2006. Defendants opposed the motion on May 30, 2006, arguing, primarily, that Evans and Whipps, as former plan participants, did not have standing to bring

⁴ On December 21, 2004, Plaintiffs filed an Objection to the Adequacy of the Disclosure Statement for Debtors’ Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code, to further ensure protection of the Class.

⁵ The Settlement of this Action does not release the claims contained in *Bunch*.

their claims on behalf of the plan pursuant to ERISA § 409. Plaintiffs filed their reply on June 15, 2006 and the Court heard oral argument on September 28, 2006. On December 6, 2006, the Court entered a Memorandum and Order finding that these Plaintiffs did not have standing to bring their claims and dismissing their Action. Plaintiffs timely appealed to the United States District Court of Appeals for the First Circuit on or about January 3, 2007. Because of the uncertain effect of the Action's consolidation with *Bunch v. W.R. Grace & Co.*, in order to ensure the putative class's right to appeal was preserved, Plaintiffs petitioned for appeal under FED. R. CIV. P. 23(f) as well as filing an appeal as of right under 28 U.S.C. 1291.⁶

In light of the District Court's holding, in order to protect the interests of the Class, another class member, Mark Siamis, sought to intervene into the Evans/Whipps action on May 30, 2007. Defendants opposed and the District Court denied his motion on June 26, 2007. Mr. Siamis, a current participant in the Plan, filed a separate class action complaint on February 6, 2008. Mr. Siamis' claims were substantially similar to the claims alleged by Plaintiffs Evans and Whipps and were alleged against the same Defendants. Defendants moved to dismiss the Siamis complaint on May 15, 2008, which Siamis opposed on June 17, 2008. Defendants filed their reply on July 1, 2008. The motion was still pending when the Parties reached an agreement to settle the Action.

After briefing and oral argument, the Court of Appeals reversed the District Court's decision dismissing the Evans/Whipps action, finding that former Plan participants had standing to bring their claims on behalf of the Plan, and remanded the Action to the District Court on July 18, 2008. *See Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008). On August 20, 2008, the Siamis case was consolidated with the Evans/Whipps case.

⁶ Ultimately, the First Circuit held that the dismissal of the Action was a final appealable Order.

2. Investigation

Even before filing the Complaint, Plaintiffs conducted an extensive investigation and informal discovery in relation to the potential claims, including the: (a) review and analysis of Plan-related documentation and communications, including Plan annual reports to the SEC and Department of Labor (“DOL”); (b) review and analysis of Grace’s public disclosures to the SEC and equity analysts; (c) analysis of Grace’s publicly disseminated financial statements; (d) review of media reports and public financial analyst reports; (e) review and analysis of voluminous publicly-available materials – media reports, filings in factually related cases, and governmental investigations – with regards to the factual predicates outlined in the Complaint; (f) research and review of filings and pleadings in related litigation involving the Company; (g) interview of a number of participants, including the Plaintiffs; (h) extensive research of the applicable law with respect to the claims asserted in the Complaint and Defendants’ potential defenses thereto; and (i) monitoring and evaluating the performance of Grace stock during and after the proposed Class Period. Thereafter, Plaintiffs reviewed newly filed and published public filings, annual reports, press releases and other public statements as part of their ongoing investigation. For example, Plaintiffs reviewed numerous reports and studies prepared by academics and other experts regarding the effect of asbestos liabilities on companies such as Grace. *See e.g., Joseph E. Stiglitz et al., The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, December, 2002 (Sebago Associates, Commissioned by the American Insurance Association). In addition, Plaintiffs monitored and reviewed any relevant documents filed in other related Grace litigation, including the Bankruptcy litigation and the criminal trial concerning Libby, Montana.

Other documents were obtained and analyzed by Plaintiffs. For instance, Plaintiffs received and reviewed Defendants initial disclosures, as well as provided their initial disclosures to Defendants, which the parties exchanged pursuant to FED. R. CIV. P. 26. Plaintiffs also reviewed the publication “W.R. Grace Projected Liabilities for Asbestos Personal Injury Claims As of April 2001,” Mark A. Peterson, Legal Analysis Systems, June 2007. The report summarizes results of analyses to estimate the liability of Grace for asbestos personal injury claims that had been filed and claims that would be filed in the future (as of the date of Grace’s bankruptcy petition in April, 2001). Peterson was a founding member of RAND Corporation’s Institute for Civil Justice. He estimated that Grace’s ultimate liabilities were up to \$6.2 billion.

In addition to extensive review of publicly available documents, Plaintiffs reviewed hundreds of pages of a negotiated set of Plan documents produced by Defendants, including master Plan documents, Summary Plan Descriptions, Summary Material Modifications and Collective Bargaining Agreements. Plaintiffs’ counsel drew on their extensive knowledge of ERISA law with respect to fiduciary duties relating to the investment of company stock in defined contribution plans to plead the case as strongly as possible, including with reference to the factual results of their investigation. Moreover, in the course of briefing their motion and reply in support of class certification, and then briefing their appeal to the First Circuit, Plaintiffs continued to develop and analyze their legal theories.

Plaintiffs also continued to review materials in Grace’s Bankruptcy proceedings, as well as other publicly available documents, including press releases, SEC filings and documents in other litigations. Plaintiffs also served formal discovery requests, including a thorough request for production of documents, on Defendants. The parties met and conferred extensively to negotiate a set of requests that would avoid unnecessary discovery motion practice.

Prior to the production of documents related to these requests, the parties agreed to mediate, as described below, and Defendants produced thousands of pages to Plaintiffs, which Plaintiffs reviewed to prepare for mediation. Documents included multiple versions of plan documents, documents relating to State Street's analysis and decision to sell the Plan's Grace stock (including notes, presentations and meeting minutes), backup documents for Grace's stated asbestos liabilities, press releases and official communications to Plan participants relating to the financial condition or possibility of bankruptcy of Grace, insurance policies and fidelity bonds, notes, reports, agendas and meeting minutes of the Investment and Benefits Committee, Administrative Committee and Compensation Committee, Plan financial statements and others.

Prior to the mediation Plaintiffs engaged a consulting expert to perform a damages calculation based on available information provided by Defendants and obtained from public sources. Plaintiffs then prepared an extensive mediation statement to submit to the mediator.

As a result of their substantial investigation, and briefing, which included class certification and appellate briefing, Plaintiffs were sufficiently informed to enter into settlement negotiations.

3. Mediation and Settlement

In the summer of 2006, Defendants suggested that the parties attempt to mediate their dispute. In advance of the mediation, Defendants produced to Plaintiffs thousands of pages of documents responsive to Plaintiffs' request for production of documents. The parties met with experienced mediator, retired federal judge Nicholas H. Politan on August 15, 2006. In preparation for the mediation, Plaintiffs drafted a thorough mediation statement and engaged a consulting expert to provide an ERISA damages analysis. The mediation lasted most of the day,

but, despite their best efforts, the parties did not come close to reaching agreement and agreed to return to full litigation posture immediately.

The parties continued with their hard-fought litigation, as described above, including class certification briefing and the appeal to the First Circuit. After the First Circuit's decision, the parties agreed to meet for another mediation with Judge Politan, which was scheduled for September 17, 2008. Again, Plaintiffs prepared a memorandum for Judge Politan, updating him on the status of the litigation, as well as recent developments in the law. Counsel for Plaintiffs, Defendants, Defendants' Insurer and the Bunch Plaintiffs participated in the mediations.

In addition to the formal mediations, the parties continued to negotiate via telephone, sometimes using Judge Politan as an intermediary, sometimes with counsel speaking directly and/or with an insurer. Finally, the parties reached an agreement in principal and began negotiations over the Settlement Agreement. The negotiations over the terms of the Settlement Agreement were unquestionably hard-fought and conducted at arm's-length. Numerous drafts were considered and rejected. The parties finally agreed to the terms (and exhibits) of the Settlement Agreement, which they executed on April 26, 2009.

The Settlement Agreement provides that Defendants shall pay the sum of \$10 million into an interest-bearing escrow account (the "Settlement Fund"). This money will be placed in the Settlement Fund within thirty days after the Court enters the Order preliminarily approving the Settlement. The Settlement Fund will be paid directly to the Plan and then from the Plan to current and former Plan participants pursuant to Plaintiffs' proposed Plan of Allocation, which Plaintiffs believe will fairly and adequately allocate the proceeds among the Settlement Class members.

Notably, in accordance with the requirements of the Settlement Agreement, the Debtors in the W. R. Grace Bankruptcy case, with Plaintiffs’ full support, filed a Motion of Debtors for Entry of an Order Authorizing Debtors’ Entry Into Settlement Agreements to Resolve Pending ERISA Litigation on April 27, 2009. On May 26, 2009, the United States Bankruptcy Court for the District of Delaware entered an Order Authorizing Debtors’ Entry Into Settlement Agreements to Resolve Pending ERISA Litigation (the “Bankruptcy Approval Order”), attached to the Ciolko Decl. as Exhibit B, permitting the Debtors to enter into the Settlement and, *inter alia*, to “take whatever other actions may be necessary to consummate the transactions contemplated by the Settlement Agreement.” Thus, nothing in the Bankruptcy proceedings is an impediment to consummating the Settlement Agreement.

III. Proposed Schedule

If the Court is inclined to grant preliminary approval to the proposed Settlement, Plaintiffs respectfully submit the following procedural schedule for the Court’s review. The proposed Preliminary Approval Order (attached to the Ciolko Decl. as Exhibit 1 to Exhibit A) includes three blank dates – the date for mailing Notice, the date of the Final Fairness Hearing and the deadlines for the submission of objections. These dates must be determined by the Court in order to properly effectuate the notice process. In this regard, Plaintiffs suggest the following generalized schedule of events to the Court:

Event	Time for Compliance
Deadline for Mailing of the Notice and publishing the website (the “Notice Date”)	60 calendar days before Fairness Hearing (Proposed Preliminary Approval Order, ¶5)
Deadline for Filing Objections	14 calendar days before Fairness Hearing (Proposed Preliminary Approval Order, ¶6, 12)

Final Fairness Hearing	Scheduled for _____, 2009 at _____.m. (Proposed Preliminary Approval Order, ¶4)
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Further, at least seven (7) days prior to the Fairness Hearing, Class Counsel will file a Motion in Support of Final Approval of Settlement, Application for Award of Counsel Fees and Reimbursement of Expenses, and for a Case Contribution Award to Named Plaintiffs, and Response to Objections. As part of this filing, Class Counsel will submit a declaration certifying that it has distributed the Notice in full compliance with the Order. Many of the events set forth above are tied to the Fairness Hearing Date, which **Plaintiffs respectfully request be scheduled for approximately one-hundred and twenty (120) days** after the entry of the proposed Preliminary Approval Order, or later at the Court’s convenience. If this schedule is not convenient for the Court, Plaintiffs request that the Court use at least the same or greater intervals between each event listed in the schedule in order to provide all parties sufficient time to comply with the proposed Preliminary Approval Order.

IV. Preliminary Approval

A. The Standard for Preliminary Approval of a Class Action Settlement

Plaintiffs present this Settlement to the Court for its review under FED. R. CIV. P. 23(e): Settlement, Voluntary Dismissal, or Compromise.

- (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
- (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
- (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

As a matter of public policy, settlement is a highly favored means of resolving disputes. *U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000); *Hotel Holiday Inn de Isla Verde v. N.L.R.B.*, 723 F.2d 169, 173 (1st Cir. 1983) (settlement agreements “will be upheld wherever possible because they are a means of amicably resolving doubts and preventing lawsuits.”) This policy is especially applicable to complex class action litigation. *See, e.g., In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) (“the law favors class action settlements.”); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) (“There is little doubt that the law favors settlements, particularly of class action suits.”) (citations omitted).

Court approval of a proposed class action settlement generally involves two steps:

The judge is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice and an opportunity to be heard. This usually involves a two-stage procedure. 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.

In re Relafan Antitrust Litig., 231 F.R.D. 52, 57 (D. Mass. 2005) (Young, C.J.) (quoting MANUAL FOR COMPLEX LITIGATION, Fourth § 13.14 at 171); MCL § 21.632 (“review of a proposed class action settlement generally involves two hearings.”). *See also, In re Lupron Marketing and Sales Practices Litig.*, 345 F. Supp.2d 135 (D. Mass. 2004).

Given this two-step process, at this preliminary stage of the proceedings the Court is *not* required to undertake an in-depth consideration of the relevant factors for final approval. Instead, the “judge must make a preliminary determination on the fairness, reasonableness, and

adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.” MCL § 21.632. If the court finds a settlement proposal “within the range of possible approval,” it then proceeds to the second step in the review process, the fairness hearing. *See, e.g., In re Gilat Satellite Networks, Ltd.*, No. 02-CV-1510, 2007 U.S. Dist. LEXIS 29062, at *31 (S.D.N.Y. Apr. 19, 2007) (“Preliminary approval of a proposed settlement is appropriate where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . and where the settlement appears to fall within the range of possible approval.”) (citing MCL § 30.41; *In re Med. X-Ray Film Antitrust Litig.*, No. 93-CV-5904, 1997 U.S. Dist. LEXIS 21936, at *6 (E.D.N.Y. 1997). *See also, In re Lupron Marketing and Sales Practices Litig.*, 345 F. Supp. 2d 135, 137-38 (D. Mass. 2004).

In determining whether to grant preliminary approval of a settlement agreement, the Court must focus “on whether the settlement is fair, reasonable, and adequate.” *Rand v. M/A-Com, Inc.*, No. 86-CV-1347, 1993 WL 410874, at *3 (D. Mass. July 19, 1993) (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *see also, Durrett v. Housing Authority of the City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990); *In re Indigo Sec. Litig.*, No. 96-MD-1111, 1998 U.S. Dist. LEXIS 3157, at *4 (D. Mass. Mar. 5, 1998); *M. Berenson Co., Inc., et al., v. Faneuil Hall Marketplace, Inc., et al.*, 671 F. Supp. 819, 822 (D. Mass. 1987). Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the First Circuit has cautioned that:

[a]ny settlement is the result of a compromise -- each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial.

Greenspun v. Bogan, 492 F.2d 375, 381 (1st Cir. 1984) (citing *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971)); *Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Rather, a strong presumption of fairness attaches to the proposed settlement if the settlement is “reached after meaningful discovery [and] after arm’s length negotiation [] conducted by capable counsel.” *M. Berenson Co., Inc.*, 671 F. Supp. at 822; *Rolland, et al. v. Cellucci, et al.*, 191 F.R.D. 3, 6 (D. Mass. 2000); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992).

This initial presumption of fairness and adequacy applies with special force here because the Settlement was reached by experienced, fully-informed counsel after protracted and intense arm’s-length negotiations. “So long as the integrity of the arm’s length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement.” *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). *See also*, *Annotated Manual for Complex Litigation* § 21.6 (4th ed. 2006) (the “*Manual*”); NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.42 (4th ed. 2008); 3B MOORE’S FEDERAL PRACTICE ¶ 23.160, *et seq.* (3d ed. 2009). In addition, no question exists that Plaintiffs’ Counsel was fully informed of the merits and weaknesses of the case by the time the Settlement was consummated. Thus, little doubt exists that this Settlement is entitled to the presumption of fairness dictated by First Circuit law and the Court should direct that notice under FED. R. CIV. P. 23(e) be given to class members of a formal fairness hearing, at which arguments and evidence may be presented in support of, and in opposition to, the Settlement. *See In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *Rand*, 1993 WL 410874, at *3; *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1026 n.3 (2d Cir. 1992); MCL at § 21.632.

A hearing on a motion for preliminary approval is not a fairness hearing. Rather, its purpose is to determine whether to notify class members of the proposed settlement and proceed with a fairness hearing. See *In re Traffic Executive Assoc. – Eastern Railroads*, 627 F.2d 631, 633 (2d Cir. 1980) (grant of preliminary approval is not “tantamount to a finding that the settlement is fair and reasonable. It is at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness”); *Armstrong v. Board of School Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980).

B. The Proposed Settlement Satisfies the Standards for Preliminary Approval

The proposed Settlement clearly satisfies the standard for preliminary approval as set forth in the relevant case law and in the *Manual*. As noted by this Court, preliminary approval of a settlement is fair, reasonable and adequate ““when the court finds that: (1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected,”” *In re Lupron Marketing and Sales Practices Litig.*, 345 F. Supp. 2d at 137 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.1995)).

1. The Negotiations Occurred at Arm’s Length.

The proposed settlement is the result of multiple serious, good faith, arm’s-length negotiation sessions spanning *two years*. The negotiations of the terms of the Settlement Agreement alone, took months, and spanned each detail of the written Settlement Agreement that was eventually signed. Plaintiffs’ Counsel have vigorously represented the interests of the Class in all aspects of this Action – from bankruptcy Court to the First Circuit and through intense and detailed settlement negotiations. Each side vigorously advocated its position in the numerous negotiation sessions, including two formal mediations with an experienced mediator. The time,

effort and circumstances of the negotiations, viewed in conjunction with the oversight of a highly-regarded mediator, are persuasive indicators that there was no collusion in either the mediation process or the result achieved. See *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00-CV-6689, 2003 U.S. Dist. LEXIS 17090 (S.D.N.Y. Sept. 29, 2003) (“[T]he fact that the Settlement was reached after exhaustive arm’s-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable”) (citing *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280-81 (S.D.N.Y. 1999) (“[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.”) (internal quotation marks and citation omitted)).

Moreover, the Settlement Agreement provides that the Settlement will be reviewed by an independent fiduciary to ensure it is in the best interest of the Plan and members of the proposed Class. Here, the lengthy arm’s-length negotiations between experienced counsel over an extended period of time, weigh in favor of preliminarily approving the proposed Settlement.

2. Sufficient Discovery Was Conducted in this Matter

“The court is required to ascertain whether sufficient evidence has been obtained through discovery to determine the adequacy of the settlement.” *Rolland, supra*, 191 F.R.D. at 10; see also, *Gusto-Bravo, et al. v. United States Veterans Administration, et al.*, 853 F. Supp. 34, 36 (D.P.R. 1993).

There is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At a minimum, the court must possess sufficient information to raise its decision above mere conjecture.

Newberg & Conte, NEWBERG ON CLASS ACTIONS §11.45 (4th ed. 2008). “[T]he Court need not find that the parties have engaged in extensive discovery” to approve the Settlement. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000), *aff’d sub nom.*, *D’Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (citing *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) (holding that it is not necessary for the Court to find parties engaged in extensive discovery to approve the settlement; the Court must find merely that plaintiffs engaged in sufficient investigation to enable Court to make intelligent appraisal of case)).

The volume and substance of Plaintiffs’ Counsel’s knowledge of this case are unquestionably adequate to support the Settlement. Plaintiffs’ Counsel undertook an extensive investigation and engaged in a substantial amount of discovery as detailed above. Prior to entering into the Settlement, Plaintiffs’ Counsel conducted a thorough investigation and analysis of the Plaintiffs’ claims and the defenses raised by Defendants.

As noted above, even before filing the Complaint, Plaintiffs’ Counsel conducted an extensive investigation and informal discovery in relation to the Action, including the: (a) review and analysis of Plan-related documentation and communications, including Plan annual reports to the SEC and Department of Labor (“DOL”); (b) review and analysis of Grace’s public disclosures to the SEC; (c) analysis of the Grace’s publicly disseminated financial statements; (d) review of media reports and public financial analyst reports; (e) review and analysis of voluminous publicly-available materials – media reports, filings in factually related cases, and governmental investigations – with regard to the factual predicates outlined in the Complaint; (f) research and review of filings and pleadings in related litigation involving Grace; (g) interview of a number of participants, including the Plaintiffs; (h) extensive research of the applicable law with respect to the claims asserted in the Complaint and Defendants’ potential defenses thereto;

and (i) monitoring and evaluating the performance of Grace stock during and after the proposed Class Period. Thereafter, Plaintiffs' Counsel reviewed newly filed and published public filings, annual reports, press releases and other public statements as part of their ongoing investigation.

Significantly, as noted above, Plaintiffs' Counsel negotiated with Defendants' counsel to receive a number of ERISA Plan and related documents, which were instrumental in the filing of the Complaint. Plaintiffs' Counsel expended a great deal of time and energy reviewing these complex documents and using them to help shape their case. Moreover, the parties met and conferred numerous times during the course of the litigation.

Plaintiffs' Counsel also drafted the detailed and comprehensive Complaint and researched and drafted the opposition to Defendants' motion to dismiss. Throughout the prosecution of this action, Plaintiffs have conducted a thorough investigation of the facts alleged as well as the law supporting Plaintiffs' claims, as described above. "Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims." *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2001); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir.1981)). All that is required is that the parties have "engaged in sufficient investigation of the facts to enable the Court to intelligently make an appraisal of the settlement." *In re Austrian & German Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (internal quotations and citations omitted), *aff'd sub nom.*, 236 F.3d 78 (2d Cir. 2001).

The extensive litigation conducted by Plaintiffs' Counsel provided the parties with a strong basis to assess the strengths and weaknesses of their respective cases and their positions on liability and damages. Thus, this litigation had advanced to a stage where the parties certainly had a clear view of the strengths and weaknesses of their cases. *See Duhaime v. John Hancock*

Mut. Life Ins. Co., 177 F.R.D. 54, 67 (D. Mass. 1997) (“[T]he stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of Plaintiffs’ claims.”) (quoting *Armstrong v. Bd. Of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980)); *see also*, *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992) (“The compromise reached by class counsel has been neither arbitrary nor premature, but formed after careful investigation and weighing of facts. . . .”).

3. The Proponents of the Settlement are Experienced in Similar Litigation

Courts also recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration. *Rolland, supra*, 191 F.R.D. at 10; *Bussie v. Allmaerica Financial Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983)); *see also*, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“The fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight”), *aff’d*, 661 F.2d 939 (9th Cir. 1981). Plaintiffs’ Counsel Barroway Topaz Kessler Meltzer & Check, LLP (“BTKMC”) has extensive experience and expertise in ERISA class action litigation.⁷ Acknowledging the firm’s history and track record of impressive results, courts have not hesitated to appoint BTKMC as class counsel in numerous ERISA breach of fiduciary class actions, directly analogous to the instant matter.⁸

⁷ The Court’s attention is respectfully referred to the firm biographical data of Barroway Topaz Kessler Meltzer & Check, LLP, attached hereto as Exhibit B.

⁸ *See, e.g.*, *In re 2008 Fannie Mae ERISA Litig.*, No. 09-cv-01350, MDL No. 2013 (S.D.N.Y. May 15, 2009); *In re Constellation Energy, Inc. ERISA Litig.*, No. 08-cv-02662 (D. Md. Jan. 27, 2009); *In Re: Bear Stearns Cos, Inc. Sec., Derivative, and ERISA Litig.*, 08-md-1963, 2009 WL 50132 (S.D.N.Y. Dec. 29, 2008); *In re: SLM Corp. ERISA Litig.*, No. 08-CV-

The firm's dedication to prosecute matters on behalf of class members to the fullest is unsurpassed. Indeed, just three weeks ago, BTKMC as Co-Lead Class Counsel completed a trial in *Brieger v. Tellabs, Inc.*, No. 06-CV-01882 (N.D. Ill.) ("*Tellabs*"), an ERISA "company stock" breach of fiduciary duty class action, similar to this Action. To the best of BTKMC's knowledge, this was only the **third or fourth** such ERISA case to go to trial. *Tellabs* was a case that spanned three years from its inception to the conclusion of trial and required the expenditure of tremendous resources, both financially and personnel-wise. Prosecution of *Tellabs* through trial is but one example of the dedication BTKMC employs in every case it handles.

Moreover, in the course of prosecuting ERISA class actions such as this as lead or co-lead class counsel across the country, BTKMC has prepared numerous consolidated pleadings, responded to innumerable motions to dismiss, propounded discovery requests and reviewed millions of pages of plan-related documents and related merits discovery. Indeed, the firm's litigation efforts have resulted in favorable and oft-cited opinions in a number of ERISA decisions denying defendants' motions to dismiss or for summary judgment.⁹

4334 (S.D.N.Y. Sept. 30, 2008); *Dresslar v. Wellpoint, Inc.*, 08-cv-00679-DFH-TAB (S.D. Ind. May 22, 2008); *Grosick v. Nat'l City Corp.*, 08-cv-00144-PAG (N.D. Ohio Jan. 17, 2008); *Riccio v. Huntington Bancshares Inc.* 08-cv-00165-GLF-TPK (S.D. Ohio Feb. 20, 2008); *In re First Am. Corp. ERISA Litig.*, 08-CV-01357-JVS-RNB (C.D. Cal. Nov. 16, 2007); *In re Beazer Homes USA, Inc. ERISA Litig.*, 07-cv-00952-RWS (N.D. Ga. April 30, 2007); *Nowak v. Ford Motor Co.*, 240 F.R.D. 355 (E.D. Mich. 2006); *In re Lear ERISA Litig.*, No. 06-CV-11735 (E.D. Mich. Apr. 10, 2006); *In re Honeywell ERISA Litig.*, No. 03-CV-1214 (D.N.J. Oct. 22, 2004); *Wilson v. Federal Home Loan Mortgage Corp.*, MDL No. 1584, No. 04-CV-2632 (JES) (S.D.N.Y. Apr. 7, 2004);); *Koch v. Loral Space & Commc'ns Ltd.*, 03-CV-9729 (S.D.N.Y. Dec. 8, 2003); *In re Schering-Plough Corp. ERISA Litig.*, No. 03-cv-1204 (D.N.J. July 30, 2003); *Gee v. UnumProvident Corp.*, 03-CV-1552 (E.D. Tenn. Sept. 3, 2003); *In re Raytheon ERISA Litig.*, No. 03-CV-10940-RGS (D. Mass. Mar. 19, 2003); *In re Westar Energy Inc. ERISA Litig.*, 03-CV-4032 (D. Kan. Mar. 7, 2003).

⁹ See, e.g., *Brieger v. Tellabs, Inc.* No. 06-CV-01882 (N.D. Ill. Mar. 16, 2009); *In re Ford Motor Co. ERISA Litig.*, No. 06-CV-11718, 2008 WL 5377955, at *3 (E.D. Mich. Dec. 22, 2008); *In re First Am. Corp. ERISA Litig.*, No. 08-CV-01357, 2008 WL 5666637 (C.D. Cal. July 14, 2008); *In re Diebold ERISA Litig.*, No. 06-CV-0170, 2008 WL 2225712 (N.D. Ohio May 28,

In addition to its extensive litigation experience, the firm has also successfully engaged in extensive, intricate and successful settlement negotiations involving complex legal and factual issues involving ERISA claims, including court-ordered mediations. These negotiations and mediations have resulted in large recoveries for affected classes of Plan participants. *See In re AOL ERISA Litig.*, 02-CV-8853 (S.D.N.Y.) (as Co-Lead Counsel, BTKMC helped obtain a \$100 million settlement); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004) (settlement providing injunctive relief and \$78 million payment for plan losses); *In re Bristol-Myers Squibb Co. ERISA Litig.*, No. 02-CV-10129 (LAP) (S.D.N.Y.) (as Co-Lead Counsel, achieved a cash recovery of \$41.22 million and significant structural relief regarding how the 401(k) plans at issue are administered valued at up to \$52 million); *Lewis et al. v. El Paso Corp.*, No. H-02-4860 (S.D. Tex) (as sole Lead Counsel, obtained a \$17 million settlement); *In re Honeywell Int'l ERISA Litig.*, No. 03-CV-1214 (DRD) (D.N.J. 2004) (as sole Lead Counsel, achieved a \$14 million recovery as well as significant structural relief regarding the retirement plan's administration and investment of its assets). Gilman and Pastor, LLP, a

2008); *Brieger v. Tellabs, Inc.*, 473 F. Supp. 2d 878 (N.D. Ill. 2007); *In re Lear ERISA Litig.*, No. 06-CV-11735 (S.D. Mich. Apr. 10, 2006); *In re: Merck & Co., Inc. Sec. Derivative & ERISA Litig.*, No. 05-CV-2369, 2006 WL 2050577 (D.N.J. July 11, 2006); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351 (N.D. Ga. 2005); *In re JDS Uniphase Corp. ERISA Litig.*, No. 03-CV-4743, 2005 WL 1662131 (N.D. Cal. July 14, 2005); *In re AOL Time Warner, Inc., Sec. & "ERISA" Litig.*, No. 02-CV-8853, 2005 WL 563166 (S.D.N.Y. Mar. 10, 2005); *Wilson v. Federal Home Loan Mortgage Corp.*, MDL No. 1584, No. 04-CV-2632 (S.D.N.Y. Feb. 7, 2005); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461 (S.D.N.Y. 2005); *Gee v. UnumProvident Corp.*, No. 03-CV-0147, 2005 WL 534873 (E.D. Tenn. Jan. 13, 2005); *In re Honeywell Intern. ERISA Litig.*, No. 03-CV-1214, 2004 WL 3245931 (D.N.J. Sept. 14, 2004); *In re ADC Telecomms., Inc. ERISA Litig.*, No. 03-CV-2989, 2004 WL 1683144 (D. Minn. July 26, 2004); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-CV-8324, 2004 WL 407007 (N.D. Ill. March 3, 2004); *Falk v. Amerada Hess Corp.*, No. 03-CV-2491 (D.N.J. May 10, 2004); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970 (C.D. Cal. 2004); *In re CIGNA Corp. ERISA Litig.*, No. 03-CV-00714 (E.D. Pa. Aug. 2, 2004); *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361 (N.D. Ga. 2004).

well-respected firm that has vast experience in complex class action litigation ably assisted in this matter as well,¹⁰

Moreover, counsel for Defendants, Arent Fox, LLP have a long track record in complex class actions and ERISA and have vigorously defended the Defendants throughout the course of the litigation. Thus, this case was litigated and settled by counsel thoroughly experienced in this area of the law.

4. The Number and Nature of Objections

At the current stage of the litigation, prior to class notice, no members of the Settlement Class, including the Plaintiffs, have indicated any objections to the proposed settlement.

5. Additional Considerations

The proposed Settlement of \$10 million is well within the range of possible approval and provides for a significant recovery for the Plan and proposed Class, which faced a very real risk of recovering nothing at all. As mentioned above, Plaintiffs were prevented from pursuing any claims against Grace in light of the Bankruptcy stay. Therefore, they could proceed only as against the Individual Defendants, making a potential recovery more challenging. Indeed, Plaintiffs' claims were already dismissed once, and their bid for class certification denied. Plaintiffs' damages potential could total tens of millions of dollars but that would mean winning most or all of the legal arguments relating to liability and the proper measure of calculating losses.

Defendants, ably represented by their counsel, raised a number of arguments, any one of which could have eviscerated Plaintiffs' case if accepted by the Court. First, Defendants raised the absolute defense of statute of limitations. A motion to dismiss on this issue was pending at

¹⁰ Attached as Exhibit D to the Ciolko Decl. is the resume of Gilman and Pastor, LLP.

the time of the Settlement. Defendants' argument that Plaintiffs should have had actual knowledge of the breach by the time of (and likely prior to) Grace's bankruptcy filing might well have proven persuasive to the Court. In another recent fiduciary breach case involving a company subject to asbestos liabilities that filed for bankruptcy, the court agreed with defendants that the plaintiffs should have been aware of the fiduciary breaches during the period when the company was sliding into bankruptcy. *See Brown v. Owens-Corning*, No. 06-CV-2125, 2008 WL 5378361, at *5 (N.D. Ohio Dec. 24, 2008):

The Court has searched and struggled to find what it is that was unknown to Plaintiffs in the fall of 2000 that would preclude the application of the three-year statute of limitations. . . . Although Plaintiffs argue that only with discovery can they know if and when the Plan fiduciaries failed in their duty to monitor the OC stock, and therefore whether the stock should have been sold sooner, Plaintiffs knew the necessary facts by October 2000 that formed the basis for a potential claim [T]he three-year statute of limitations is applicable, and this action is time barred.

Even if Plaintiffs could survive that significant hurdle, they would have had to contend with Defendants' arguments concerning causation. Indeed, the existence of causation and damages were likely to prove extremely contentious, with powerful arguments on both sides. Defendants would likely have raised the complex issue of determining the appropriate points to begin and end the Class Period, including arguing that it should either begin and/or end at a point that would make proving damages much more difficult, if not impossible. This was evident in Defendants' motion to dismiss the Siamis complaint, where Defendants argued that their "alleged breach – their failure to sell the stock before July 1, 1999 – did not cause the Plan harm." *See* Defendants' Memorandum in Support of their Motion to Dismiss, May 15, 2008, at 2.

As noted by Defendants, "while the value of the stock declined for a few years after 1999 as Grace headed into bankruptcy, and bottomed out at a little over \$1 per share, it rebounded in

subsequent years. By the end of June 2004, it was trading above \$6 per share. By October, 2004, it was trading around \$10 per share. And by December 15, 2006, Grace stock was trading at a price higher than the \$19.19 price it had at the beginning of the putative class period.” See W.R. Grace stock chart for class period, attached as Exhibit E to the Ciolko Decl.

One particularly troubling argument that Defendants pursued tirelessly during mediation was the issue of when during the class period the alleged imprudence would end. Although a class may be certified in such instance until the present, by the end of discovery, Plaintiffs would have had to have chosen an imprudence end-date, which would have been exceedingly difficult in light of the facts and circumstances in this case, where the stock had already dropped so significantly toward the beginning of the class period and the Company declared bankruptcy in 2001. See, e.g., *In re Schering Plough Corp.*, No. 03-CV-1204, 2008 WL 4510039, at *5 (D.N.J. Sept. 30, 2008) (“the parties do not yet have at their disposal a workable measure of when the stock was in fact imprudent because ‘merits based’ discovery has not begun.”). Choosing an end-point, and then defending it, would have posed additional challenges to the Plaintiffs.

Complicating the issue of choosing appropriate dates for the beginning and ending dates of the imprudence period is the fact that the *Bunch* defendants, as noted above, successfully argued before this Court and the First Circuit that divestiture of the Plan’s Grace equity holdings was prudent at the time it was undertaken. *Bunch v. W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009). On December 15, 2003 State Street became the investment manager for the Company Stock Fund. State Street began divesting the Company Stock Fund of Grace stock on April 12, 2004. The obvious import is that the Plaintiffs would be hard-pressed to prosecute this matter, through trial if necessary, and convince the Court that divestiture of the Grace equity from the Plan should have taken place at an earlier date. See also *Summers v. State Street*, 453 F.3d 404,

411 (7th Cir. 2006) (“So even if the methods of litigation could feasibly determine the point at which the ESOP trustee should sell in order to protect the employee-shareholders against excessive risk, the plaintiffs have made no effort to establish that point.”)

Moreover, recent Circuit-level analogous case law developments have strengthened a number of Defendants’ defenses. For example, in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), the Fifth Circuit affirmed the dismissal of analogous action on summary judgment, strengthening the presumption of prudence and accepting the defendants’ argument that they might be excused from meeting their disclosure requirements in order to avoid liability for insider trading. Notably, the Fifth Circuit recognized that a fiduciary who sells company stock too quickly may be sued for taking that action. This is precisely what happened in the *Bunch* case. *See also, Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006) (“Of course, if State Street had sold earlier and the stock had then bounced back, as American Airlines’ stock did, State Street might well have been sued by the same plaintiffs”). This “damned if you do, damned if you don’t” argument would have been especially powerful here.¹¹

Moreover, the Seventh Circuit, in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), recently gave more support to the defense arguably provided by ERISA § 404(c), which Defendants raised as an affirmative defense in their Answer. Section 404(c) provides a limited exception to fiduciary liability for losses resulting from participants’ exercise of control over investment decisions. *See* 29 C.F.R. §2550.404(c)-1(a)(1). *Hecker* found, albeit in *dicta*, that “even if § 1104(c) does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of §

¹¹ In addition, the Fifth Circuit gave credence to a “settlor”-based defense, raised by Defendants in their Answer.

1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss.” *Id.* at 589. Thus Defendants would argue they met the criteria for protection under ERISA § 404(c).

While Plaintiffs are confident in the theories of their case, they have no choice but to recognize the substantial risks of recovering nothing in light of these developments in the case law. Losing on any number of these liability or causation arguments would result in damages being calculated at or near \$0.

Plaintiffs’ Counsel respectfully submits that any recovery in this range should be recognized by the Court as falling within the range of reasonableness. Thus, viewing the size and percentage of the recovery, in light of the risks presented by continuing litigation, Plaintiffs’ Counsel respectfully submit that the proposed Settlement falls squarely within the “range of possible approval” or “range of reasonableness.” *See, e.g., Vista Healthplan, Inc. v. Bristol-Myers Squibb Co.*, 266 F. Supp. 2d 44 (D.D.C. 2003) (granting preliminary approval to a settlement “sufficiently within the range of reasonableness”).

For these reasons, preliminary approval of the proposed Settlement is fully warranted. *Hawkins v. N.H. Dept. of Health and Human Services*, No. 99-CV-0143, 2004 U.S. Dist. LEXIS 807, at *15 (D.N.H. Jan. 23, 2004) (“A presumption in favor of the proposed settlement arises when sufficient discovery has been provided, counsel have experience in similar cases, and the parties have bargained at arms-length.”)

C. The Proposed Form and Method of Class Notice are Appropriate and Satisfy the Requirements of FED. R. CIV. P. 23

Rule 23 of the Federal Rules of Civil Procedure requires that notice of a settlement be “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” FED. R. CIV. P. 23(c)(2)(B). Further, notice

must be “reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also, In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 120 (D.N.J. 2002) (finding that notice was adequate where it set forth the settlement terms, nature of the action, class member criteria, recovery sought, hearing date, and how class members could request exclusion).

The Class Notice, attached to the Settlement Agreement as exhibit 1.A, informs class members of the nature of the Settlement and the options available to them and meets the requirements of Rule 23 and due process. FED. R. CIV. P. 23 requires that notice of a settlement be “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” FED. R. CIV. P. 23(c)(2)(B). *See also, Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS*, §8.2 at 162-65 (4th ed. 2008).

The proposed Class Notice describes the terms of the Settlement, including an explanation of why Plaintiffs’ Counsel believe the Settlement to be fair, reasonable and adequate, the maximum counsel fees and plaintiff incentive awards that may be sought, how the Settlement Fund will be allocated among Settlement Class members, the procedures for objecting, and the date and place of the Fairness Hearing. Notices containing similar content have been found to meet the requirements of Rule 23. *See e.g., Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477-78 (E.D. Pa. 2007); *Colesberry v. Ruiz Food Products, Inc.*, No. 04-CV-5516, 2006 WL 1875444, at *7 (E.D. Cal. June 30, 2006).

Plaintiffs intend to distribute the Class Notice via U.S. Mail to potential class members, as well as maintain a website and toll-free phone number to provide information regarding the

Settlement to Class Members. Similar notice plans utilized in the settlement of analogous actions have been judicially approved as appropriate, fair and adequate. *See, e.g.*, Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date for Hearing on Final Approval, *In re Loral Space ERISA Litig.* No. 03-CV-9729 (LTS) (S.D.N.Y. Sept. 9, 2008) (attached to Ciolko Decl. as Exhibit F; Preliminary Approval, *Lewis v. El Paso Corp.*, No. H-02-4860 (S.D. Tex. Feb. 3, 2009) (attached to Ciolko Decl. as Exhibit G); Findings and Order Preliminarily Certifying a Class for Settlement Purposes, Preliminarily Approving Proposed Settlement; Approving Form and Dissemination of Class Notice, and Setting Date for Hearing on Final Approval of Settlement, *In re: Raytheon ERISA Litig.*, No. 03-CV-10940 (RGS) (D. Mass. Dec. 1, 2006) (attached to Ciolko Decl. as Exhibit H); Order Preliminarily Approving Settlement, Approving Amendment of Complaint and Certifying Class for Purposes of Settlement, Approving Form and Manner of Notice, and Scheduling Hearing on the Fairness of Settlement, *Kling v. Fidelity Mgt. Trust Co.*, No. 01-11939-MEL (D. Mass. Mar. 22, 2006) (attached to Ciolko Decl. as Exhibit I); and Order Preliminarily Approving Proposed Settlement, Approving Form and Dissemination of Class Notice, and Setting Date for Hearing on Final Approval, *Stein v. Smith*, No. 01-CV-10500 WGY (D. Mass. Aug. 22, 2005) (attached to Ciolko Decl. as Exhibit J).¹²

Because the proposed Class Notice informs the potential Settlement Class members of the mechanics of the Settlement, and their rights and obligations under it, the proposed notice

¹² Although some similar notice plans also contained publication notice, Plaintiffs do not believe it is necessary here, where the class members may be contacted through their last known address in the possession of Grace's recordkeeper, and documents from the case will be made available on a dedicated website. This has been held to satisfy the standards in numerous cases including *El Paso* and *Loral*, *supra*. *See also, Aguilar v. Melkonian Enterprises, Inc.*, No. 05-CV-00032, 2006 WL 3199074, at *5 (E.D. Cal. Nov. 3, 2006).

form satisfies the requirements of due process. *See* NEWBERG ON CLASS ACTIONS, § 8.34 (4th Ed. 2008).

Therefore, Lead Counsel respectfully submits that this Court should find that the proposed Class Notice process fulfills all of the requirements of due process and Rule 23.

V. Class Certification

A. The Proposed Class Meets the Prerequisites for Class Certification under Rule 23(a)

One of this Court's functions in reviewing a proposed class action is to determine whether the action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. *See Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). Rule 23(a) sets forth four prerequisites to class certification, which are referred to in the shorthand as: (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy of representation. In addition, the class must meet one of the three requirements of Rule 23(b). *See* FED. R. CIV. P. 23. The proposed "Settlement Class" is defined in the Settlement Agreement as follows:

All persons who were participants in or beneficiaries of the Plan at any time between July 1, 1999 to April 19, 2004 and whose amounts included investment in the Company Stock Fund at any point during that time period, excluding the Defendants.

It is appropriate to certify a class action for settlement purposes. *See Amchem Prods., Inc.*, 521 U.S. at 620. "One exception to the requirement that a court 'conduct a rigorous analysis of the prerequisites established by Rule 23' arises in the settlement-only certification context." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 68 (D. Mass. 2005) (Young, C.J.) (quoting *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003)). *See also, Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 474 (E.D. Pa. 2007). As explained below, the Settlement Class satisfies each of the Rule 23 requirements.

1. Numerosity

First, Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable FED. R. CIV. P. 23(a)(1). Plaintiffs' burden on this issue is not difficult. *McAdams v. Mass. Mut. Life Ins. Co.*, No. 99-CV-30284, 2002 U.S. Dist. LEXIS 9944, at *9 (D. Mass. May 15, 2002), citing *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 303 (E.D. Mich. 2001). Courts have ruled that a class of greater than 40 people "satisfies the presumption that joinder is impractical and class treatment is appropriate." *Coffin v. Bowater, Inc.*, 228 F.R.D. 397, 402 (D. Me. 2005), citing *Carrier v. JPB Enters.*, 206 F.R.D. 332 (D. Me. 2002); see also, 1 Herbert Newberg & Albert Conte, *NEWBERG ON CLASS ACTIONS* § 3.05 (4th ed. 2008).

In the instant case, the Plan had thousands of participants dispersed over a wide geographic area during the proposed Class Period, many of whom are outside the geographical confines of this Court's jurisdiction, thereby making joinder impractical. For example, in 2001, the Forms 5500 filed with the Internal Revenue Service and Department of Labor on behalf of the Grace Hourly and Salaried Plans (direct predecessors to the Plan) indicated that there were approximately 10,920 total participants. See <http://www.freeerisa.com>. Accordingly, Plaintiffs submit that the numerosity element has been satisfied.

2. Commonality

Second, Rule 23(a)(2) is satisfied where there are questions of law and fact common to the class. *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987). "The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class [and] [t]herefore, this requirement is easily met in most cases." *In re Pharm. Indus.*

Average Wholesale Price Litig., 230 F.R.D. 61, 78 (D. Mass. 2005) (citing Herbert B. Newberg & Alba Conte, *NEWBERG ON CLASS ACTIONS* § 3.10 (4th ed. 2008)); *see also*, *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 325 (D. Mass. 1997) (noting that Rule 23 does not require that all class members share identical claims; but rather that claims be common, and not in conflict).

Here, questions which are common to the proposed Class include:

- (a) Whether Defendants breached their fiduciary duties by failing to conduct an appropriate investigation into the merits of continued investment in Grace stock in the face of obvious red flags that, at minimum, raised questions regarding the risks of continued investment in Grace stock; (Complaint ¶146)
- (b) Whether Defendants breached their fiduciary obligations to the Plan and its participants by failing to loyally manage the Plan's assets when they knew or should have known that Grace securities were not a prudent investment for the Plan; (Complaint ¶148)
- (c) Whether Defendants breached their fiduciary obligations to the Plan and its participants by continuing Company matching/employer contributions to be made in Grace stock, when they knew or should have known it was not a prudent investment for the Plan; (Complaint ¶149)
- (d) Whether Defendants breached their fiduciary duties by failing to provide monitored fiduciaries with complete and accurate information concerning Grace and its business problems; (Complaint ¶161-162)
- (e) Whether Defendants breached their fiduciary duties by failing to provide Plan participants with complete and accurate information regarding Grace stock, the Company's precarious financial condition, making public misrepresentations and inflated forecasts regarding the likelihood of the Company's recovery, and the consequent artificial inflation of the value of Grace stock and the prudence of investing retirement contributions in Grace stock. (Complaint ¶ 171)
- (f) Whether Defendants breached their duty to avoid conflicts of interest and promptly resolve them by, *inter alia*, failing to timely engage independent fiduciaries who could make independent judgments concerning the Plan's investment in Grace stock; (Complaint ¶ 181); and
- (g) Whether, as a result of Defendants' fiduciary breaches, the Plan, its participants, and their beneficiaries suffered losses.

The Complaint alleges violations of the duties imposed by ERISA brought as a representative action on behalf of the Plan, and is thus, as explained above, uniquely suited for class treatment. Under these circumstances, the commonality requirement is clearly satisfied. *See, e.g., Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C. 2008) (finding commonality in breach of fiduciary duty action brought on behalf of defined contribution plans) (citing *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) (“In general, the question of defendants’ liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries.”)); *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 349 (N.D. Ill. 2007) (finding commonality in an analogous ERISA matter where the named representatives and class members all allege that Defendants breached their fiduciary duties by imprudently investing the assets of the plan); *Aguilar v. Melkonian Enters., Inc.*, No. 05-CV-00032, 2006 WL 3199074, at *3 (E.D. Cal. Nov. 3, 2006) (same). Accordingly, Plaintiffs respectfully submit that they have fully satisfied Rule 23(a)(2)’s prerequisite of commonality for class certification.

3. Typicality

Third, Rule 23(a)(3) is satisfied when the claims or defenses of the party or parties representing the class are typical of the claims or defenses of the other class members.¹³ *See Amchem*, 521 U.S. at 625 (common issues test readily met in securities fraud cases). “[A]s with the commonality requirement, the typicality requirement does not mandate that the claims of the class representative be identical to those of the absent class members.” *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 260 (D. Mass. 2005). “Moreover, in a breach of fiduciary duty

¹³ The Supreme Court has recognized that the commonality and typicality analyses “tend to merge.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

case seeking recovery for the Plan as a whole, the focus is the conduct of the Defendants-not the conduct of the Plan participants.” *Tatum v. R.J. Reynolds*, 254 F.R.D. 59, 66 (M.D.N.C. 2008) (citing *In re Ikon Office Solutions*, 191 F.R.D. 457, 465 (E.D. Pa. 2000) and *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 78 (E.D. Va. 2006)); *Brieger*, 245 F.R.D. at 350 (N.D. Ill. 2007) (“The Court is persuaded that plaintiffs’ claims are typical of those of the putative class, principally because they seek relief on behalf of the Plan under section 502(a)(2) of ERISA for alleged fiduciary violations as to the Plan.”).

Plaintiffs sued under ERISA for Defendants’ breach of fiduciary duties to obtain Plan-wide relief. Typicality is therefore often met in putative class actions brought for breaches of fiduciary duty under ERISA. *See* ERISA § 409(a), 29 U.S.C. § 1109 (liability for breach of fiduciary duty is “to the plan”); ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (authorizing a plan participant to sue for breach of fiduciary duty under § 409(a)).¹⁴

Plaintiffs’ claims against Defendants are clearly, in fact, by definition, typical of those of the proposed Class. Each was a participant of the Plan during the class period and had part of their individual Plan investment portfolio (consisting of participant directed and/or Company matching contributions) invested in Grace stock during that time. Each Plaintiff, like the absent class members, sustained injury caused by Defendants’ same wrongful conduct in managing the Plan investments in Grace stock during the Class Period. *See In re Boston Sci. Corp. Sec. Litig.*, 604 F. Supp. 2d 275, 282 (D. Mass. 2009) (The plaintiff can meet this requirement [Rule 23(a)(3)] by showing that its injuries arise from the same events or course of conduct as do the

¹⁴ *See also, In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005) (plan participants may properly bring a suit on behalf of an ERISA employee benefits plan where the fiduciaries’ alleged breach affects the assets of the plan as a whole; *In re WorldCom Inc. ERISA Litig.*, No. 02-CV-4816, 2004 U.S. Dist. LEXIS 19786, at *7-*8 (S.D.N.Y. Oct. 5, 2004).

injuries of the class, and that its claims are based on the same theory as those of the class.”) (citation omitted). Therefore, the typicality requirement of Rule 23(a)(3) is easily met.

4. Adequacy

Fourth, the representative parties must demonstrate that they will fairly and adequately protect the interests of the class to satisfy Rule 23(a)(4). “[T]he moving party must show first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.” *Swack*, 230 F.R.D. at 265 (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).

First, Plaintiffs’ interests do not conflict with the interests of the absent Settlement Class members. To the contrary, their interests are unified with those of the class, because Plaintiffs must prove the same wrongdoing by Defendants as the absent Settlement Class members to establish Defendants’ liability. Plaintiffs, like the putative Settlement Class members, were Plan participants during the Class Period and seek Plan-wide relief for identical alleged breaches of fiduciary duty by Defendants. Moreover, Plaintiffs Evans, Whipps and Siamis are ready, willing, and able to fulfill the duties required of class representatives. They will adequately represent and protect the interest of the absent Class members.

Second, Plaintiffs have retained qualified, experienced attorneys with broad-based, multi-jurisdictional experience in complex class action litigation, especially in the context of breach of fiduciary duty cases under ERISA. The law firm of BTKMC, as Class Counsel along with Gilman and Pastor, LLP as its liaison counsel, has vigorously prosecuted this action on behalf of the Named Plaintiffs and the Settlement Class as a whole to obtain the best possible recovery for the Plan. *See also*, discussion of Rule 23(g) pertaining to Plaintiffs’ Counsel’s adequacy, below.

Thus, Named Plaintiffs are adequate representatives of the Settlement Class, and their counsel is qualified, experienced and capable of prosecuting this Action, in satisfaction of Rule 23(a)(4).

B. The Class Should Also Be Certified Under FED. R. CIV. P. 23(b)

1. The Proposed Class Satisfies the Requirements of Rule 23(b)(1)

Finally, in addition to the four requirements of Rule 23(a), a class must also satisfy one of the three subparts of Rule 23(b). It is often observed that the Rule 23(b) requirements overlap considerably with those of Rule 23(a), and with each other. Herbert B. Newberg and Alba Conte, *NEWBERG ON CLASS ACTIONS* § 4.01 (4th ed. 2008). While only one of the conditions of Rule 23(b) must be satisfied to merit class certification, if the class meets more than one of the alternatives, the court may certify the action under each section satisfied. *See e.g., Babcock v. Computer Assocs. Int'l.*, 212 F.R.D. 126, 133 (E.D.N.Y. 2003) (granting class certification under subsections 23(b)(1), (b)(2) and (b)(3) for breach of fiduciary duty claims).

Certification under Rule 23(b)(1) is Proper

Under Rule 23(b)(1), a class may be certified if:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests

FED. R. CIV. P. 23(b)(1). Rule 23(b)(1)(A) “considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members.” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004), quoting *Ikon*, 191 F.R.D. at 466.¹⁵

a. Subsection (b)(1)(B)

Subsection (b)(1)(B) is the provision upon which many courts have relied in certifying a class in similar cases, and it is appropriate for allegations of a breach of defendants’ fiduciary obligations to plaintiffs. As stated in the Advisory Committee Notes accompanying the 1966 amendments to Rule 23:

This [(b)(1)(B)] clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding[] the other members, might do so as a practical matter. . . . ***[This] reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust.***

FED. R. CIV. P. 23(b)(1)(B) Advisory Committee’s Note (1966 Amendment) (emphasis added); *see also, In re Merck & Co., Inc. Securities, Derivative & ERISA Litig.*, No. 05-CV-1151, 2009 WL 331426, at *10 (D.N.J. Feb. 10, 2009); *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 346 (C.D. Cal. 2005).

Indeed, a number of courts have accepted this reasoning in certifying a class in ERISA cases alleging a breach of defendants’ fiduciary obligations. *See e.g., Zhu v. Schering Plough Corp.*, No. 03-CV-1204, 2008 WL 4510039, at *5 (D.N.J. Sept. 30, 2008) (certifying ERISA class under Rule 23(b)(1)(B)); *Shirk v. Fifth Third Bancorp*, No. 05-CV-0049, 2008 WL 4425535, at *5 (S.D. Ohio Sept. 30, 2008) (same); *see also Kane v. United Indep. Union Welfare*

¹⁵ It is not uncommon for courts to certify an ERISA breach of fiduciary duty class under Rule 23(b)(1), without specifying which section it is under, specifically. *See e.g., Beesley v. Int’l Paper Co.*, No. 06-CV-00703, 2008 WL 4450319, at *9 (S.D. Ill. Sept. 30, 2008); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 78 (S.D.N.Y. 2006).

Fund, No. 97-CV-1505, 1998 WL 78985, at *9 (E.D. Pa. Feb. 24, 1998). *See also*, *Rogers v. Baxter Int'l Inc.*, No. 04-CV-6476, 2006 WL 794734, at *9 (N.D. Ill. Mar. 22, 2006) (“[A]ctions under ERISA section 502(a)(2) are entirely different [from mass tort suits], since such suits are representative by their very nature and the claim of any plan participant will necessarily dispose of other participants’ claims, irrespective of whether or not a class is formally certified); *Syncor*, 227 F.R.D. at 346-347 (“If the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would ‘as a practical matter’ alter the interests of other members of the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements from the Plan”); *WorldCom*, 2004 U.S. Dist. LEXIS 19786, at *8. Because of ERISA’s distinctive “representative capacity” and remedial provisions, this action is a paradigmatic case for class treatment under Rule 23(b)(1)(B).

b. Subsection (b)(1)(A)

After determining that a class of participants and beneficiaries seeking recovery from an ERISA fiduciary satisfies subsection (b)(1)(B) of Rule 23, some courts deem it unnecessary to reach the other potentially-applicable subsections of Rule 23(b). *See, e.g.*, *Koch v. Dwyer*, No. 98-CV-5519, 2001 U.S. Dist. LEXIS 4085, at *15 n.2 (S.D.N.Y. Mar. 23, 2001); *Gruby v. Brady*, 838 F. Supp. 820, 828 (S.D.N.Y. 1993).

However, certification of this action is also appropriate under Rule 23(b)(1)(A). *See e.g.*, *Kanwai v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008); *In re Aquila ERISA Litig.*, 237 F.R.D. 202, (W.D. Mo. 2006) (certifying class of analogous claims and finding: “Overall, the Court finds that prosecution of separate actions in this case would create the risk of inconsistent or varying adjudications with respect to individual members of the proposed Class and that certification under 23(b)(1)(A) is therefore appropriate.”). Other courts certify ERISA class

actions under both subsections (b)(1)(B) and (b)(1)(A). *See, e.g., Abbott v. Lockheed Martin Corp.*, No. 06-CV-0701, 2009 WL 969713, at *9 (S.D. Ill. Apr. 3, 2009); *Rankin v. Rots*, 220 F.R.D. 511, 522(E.D. Mich. 2004); *Kolar v. Rite Aid Corp.*, No. 01-CV-1209, 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003) (finding that “a (b)(1) class is a perfect vehicle for resolving complex ERISA issues such as these involved here.”); *see also, Ikon*, 191 F.R.D. at 461 (finding that “[t]here is also risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material and would create difficulties in implementing such decisions.”). Therefore, if necessary, it is clear that the proposed Class could be certified under Rule 23(b)(1)(A).

C. BTKMC Should Be Appointed Class Counsel Pursuant to Rule 23(g)

BTKMC should be appointed Class Counsel. Rule 23(g) complements Rule 23(a)(4)’s requirement that class representatives will adequately represent the interests of class members by focusing on the qualifications of class counsel. *See In re Aquila ERISA Litig.*, 237 F.R.D. 202, 213 (W.D. Mo. 2006). Rule 23(g)(1)(C) instructs that a court consider: (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; (3) claims of the type asserted in the action; (4) counsel’s knowledge of the applicable law; and (5) the resources counsel will commit to representing the class, as well as any other matter pertaining to counsel’s ability to fairly and adequately represent the interests of the class.

Here, each of these considerations weighs in favor of Plaintiffs’ Counsel’s adequacy as Class Counsel. Proposed Class Counsel is very experienced in successfully handling class actions, and specifically class actions in relation to ERISA 401(k) plans. *See Exhibit C*, and

discussion at section IV.B.3, above. Likewise, the other factors, including the commitment and the work counsel has done in this Action, militate in favor of appointing BTKMC as Class Counsel.

VI. Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date for Hearing on Final Approval of Settlement.

Dated: June 5, 2009

Respectfully submitted,

/s/ Edward W. Ciolko
Joseph H. Meltzer
Edward W. Ciolko
Katherine B. Bornstein
BARROWAY TOPAZ KESSLER
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

*Lead Counsel for Named Plaintiffs and Proposed
Class Counsel*

David Pastor (BBO # 391000)
GILMAN AND PASTOR, LLP
63 Atlantic Avenue, 3rd Floor
Boston, Massachusetts 02110
Telephone: (617) 742-9700
Facsimile: (617) 742-9701

Local Counsel for Plaintiffs