IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

James Smith and Jerry Honse, on behalf of themselves and all others similarly situated, and on behalf of the Triad Manufacturing, Inc. Employee Stock Ownership Plan,	)	Civil Action No.: 1:20-cv-02350-RAG
Plaintiffs,	)	JUDGE RONALD A. GUZMAN
v.	)	MAGISTRATE JUDGE YOUNG B. KIM
GreatBanc Trust Company, the Board of Directors of Triad Manufacturing, Inc., David Caito, Robert Hardie, Michael McCormick, Elizabeth J. McCormick, Elizabeth J. McCormick Second Amended and Restated Revocable Living Trust, Michael K. McCormick Second Amended and Restated Revocable Living Trust, David M. Caito Revocable Trust, and First Amended and Restated Robert Hardie Revocable Trust,	)	
Defendants.	)	

PLAINTIFFS' UNOPPOSED MOTION AND INCORPORATED MEMORANDUM OF LAW FOR PRELIMINARY APPROVAL OF SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

TABLE OF CONTENTS

Plaintiffs James Smith and Jerry Honse, individually and as proposed Class Representatives, hereby move for an order certifying a class for settlement purposes only, preliminarily approving a class action settlement agreement among Plaintiffs and Defendants GreatBanc Trust Company ("GreatBanc"), the Board of Directors of Triad Manufacturing, Inc., David Caito, Robert Hardie, Michael McCormick, Elizabeth J. McCormick, Elizabeth J. McCormick Second Amended and Restated Revocable Living Trust, Michael K. McCormick Second Amended and Restated Revocable Living Trust, David M. Caito Revocable Trust, and First Amended and Restated Robert Hardie Revocable Trust (collectively the "Defendants"), approving notice of the Settlement to the Class, and setting a date for a Fairness Hearing.[1]

INTRODUCTION

This ERISA class action has been pending for almost three years. Plaintiffs now seek preliminary approval of a settlement that provides substantial economic relief to the proposed Class Members and the ESOP, totaling $14.8 million; this is at the high end of the range of settlements resolving ESOP claims like the ones asserted here. The Settlement was reached after completing fact discovery and was negotiated at arm's length with the assistance of an experienced mediator. The extensive discovery and settlement negotiations allowed the Parties to fully understand the risks of litigation and the potential recovery for the Class.

Plaintiffs respectfully ask the Court to: (1) certify the proposed class for settlement purposes; (2) grant preliminary approval of the Settlement; (3) direct the Settlement Administrator to send notice to Class Members; (4) set deadlines for the motion for final approval and the motion for attorneys' fees, expense reimbursements, and service awards; (5) set the deadline for objections; and (6) set the date/time for the Fairness Hearing.

[1] Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

FACTUAL AND PROCEDURAL BACKGROUND

I. Nature of the Claims

This class action is brought on behalf of participants and beneficiaries of the Triad Manufacturing, Inc. Employee Stock Ownership Plan (the "ESOP" or the "Plan"). On December 28, 2015, the ESOP's trustee—GreatBanc Trust Company ("GreatBanc")—caused the ESOP to purchase 100% of Triad Manufacturing, Inc. ("Triad" or the "Company") from Defendants David Caito, Robert Hardie, Michael McCormick, and revocable trusts to which they or their spouses are beneficiaries (the "Selling Shareholders") for $106.2 million. First Amended Complaint ("FAC"), ECF 99 ¶¶ 4, 43. The Transaction was financed by a $72.8 million loan made by the Selling Shareholders that carried a 10.5% annual interest rate (the "Seller Notes"). ECF 130-4 at TRIAD-GREATBANC-0000186 - 187. The Seller Notes were issued with warrants that granted the Selling Shareholders the right to purchase 1,029,375 shares of Company common stock for $2 per share (the "Warrants"). *Id.*

Plaintiffs allege that Defendants violated ERISA in connection with the ESOP's purchase of Company stock ("ESOP Transaction" or "Transaction") because, *inter alia* , the agreement to pay the Selling Shareholders $106.2 million and other consideration for Triad did not account for the contraction within the market for the Company's retail displays—brick and mortar retail stores—and improperly included a control premium even though the Selling Shareholders retained control over the Company after the Transaction. FAC ¶¶ 3-4, 13-14, 47, 113.

In Counts I and III of the FAC, Plaintiffs asserted that Defendant GreatBanc violated ERISA in connection with the Transaction by, *inter alia*, causing the ESOP to pay more than fair market value for Triad stock. *Id*. ¶¶ 156-67, 173-82. In Count II, Plaintiffs alleged that Defendants Caito, Hardie, and McCormick (the "Board Defendants") violated ERISA by failing to monitor

GreatBanc. *Id.* at ¶¶ 168-72. In Count IV, Plaintiffs asserted, pursuant to ERISA § 406(a), 29 U.S.C. § 1106(a), that the Selling Shareholders engaged in prohibited transactions. *Id*. ¶¶ 183-96. In Count V, Plaintiffs asserted, pursuant to ERISA § 405(a), 29 U.S.C. §§ 1105(a)(1) and (a)(3), that the Board Defendants are liable as co-fiduciaries for GreatBanc's fiduciary breaches. *Id.* ¶¶ 183-206. In Count VI, Plaintiffs asserted, pursuant to ERISA § 410(a), 29 U.S.C.§ 1110(a), that agreements by the Company to indemnify GreatBanc are void under ERISA. *Id.* ¶¶ 207-20.

Defendants deny these allegations and deny any wrongdoing or liability.

II. Litigation History

A. Initial Motions Practice and Seventh Circuit Appeal

Plaintiff James Smith filed the original Complaint on April 15, 2020. ECF 1. On June 1, 2020, the Board Defendants filed a motion to compel arbitration or, in the alternative, dismiss the Complaint, and on August 21, 2020, the Court denied this motion. ECFs 49, 51. On June 29, 2020, GreatBanc answered the Complaint. On September 3, 2020, the Triad Defendants filed a notice of appeal and a motion to stay the litigation pending appeal and, on September 21, 2020, the Court granted this motion over Plaintiff Smith's opposition. ECFs 55-56, 61, 62.

After full briefing, including several amicus briefs filed on behalf of both sides, and oral argument, the Seventh Circuit affirmed this Court's denial of the Triad Defendants' motion to compel arbitration. *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021). The Court reasoned that the Plan's arbitration provision prohibited certain plan-wide remedies available under ERISA and thus constituted an impermissible prospective waiver of a party's right to pursue statutory remedies. *Id.* at 621 (internal quotations omitted). District and circuit courts across the country have relied upon this decision's analysis, making it a landmark arbitration decision. *See, e.g.*, *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090 (10th Cir.

2023); *Burnett v. Prudent Fiduciary Servs. LLC*, 2023 WL 387586 (D. Del. Jan. 25, 2023), *report & recommendation adopted* 2023 WL 2401707 (D. Del. Mar. 8, 2023), *appeal filed* No. 23-1527 (3d Cir. Apr. 3, 2023).

B. Discovery

On October 4, 2021, the Seventh Circuit issued its mandate, and this Action returned to the District Court. ECF 72. Shortly thereafter, Plaintiffs propounded 79 requests for production on the Triad Defendants and GreatBanc and served 13 document subpoenas on third-parties. Declaration of Michelle C. Yau ("Yau Decl.") ¶ 18; Declaration of Daniel Feinberg ("Feinberg Decl.") ¶ 15. Plaintiffs also responded to written discovery requests from Defendants and produced documents in response to such requests. Yau Decl. ¶ 19; Feinberg Decl. ¶ 16. In total, Plaintiffs received and reviewed 32,476 documents spanning nearly 250,000 pages, along with more than 14 hours of audio recordings. Yau Decl. ¶ 18; Feinberg Decl. ¶ 15. Working with a valuation expert, Plaintiffs utilized the information received through discovery to obtain an analysis of potential damages, consisting of the difference between what the ESOP paid for Triad stock and the fair market value of those shares (according to Plaintiffs' expert). Feinberg Decl. ¶ 24.

During discovery, Plaintiffs took fact depositions and defended the depositions of both Named Plaintiffs. Feinberg *Id.* ¶ 15. They engaged in numerous meet and confer conferences with Defendants and third parties to resolve discovery disputes wherein they resolved the vast majority of disputes without motions practice. *Id.* ¶ 17. However, the parties reached an impasse on post-Transaction documents, and Plaintiffs thus moved to compel this discovery. ECF 113. GreatBanc and the Triad Defendants jointly opposed the motion to compel. ECF 114. On May 2, 2022, Magistrate Judge Kim granted Plaintiffs' motion. ECF 115. Fact discovery closed on September 30, 2022 and, on January 17, 2023, Plaintiffs moved for class certification. ECF 128. Subsequently,

the Parties agreed to the primary settlement terms, and this Court stayed Plaintiffs' motion for class certification to allow the parties to seek approval of the settlement. ECF 134.

III. Settlement Discussions

The Parties first engaged in mediation in the fall of 2020 through the Seventh Circuit mandatory mediation program, which was unsuccessful. Yau Decl. ¶ 16. After the case returned to district court and Fact Discovery was completed, the Parties engaged in a full day of mediation with JAMS mediator Michael Young on December 8, 2022. Feinberg Decl. ¶ 20. The Parties made considerable progress but were not able to resolve the case that day. *Id.* From December 9, 2022 until February 8, 2023, the Parties continued to exchange settlement offers with the assistance of JAMS mediator Michael Young. *Id.* ¶ 21. The Parties then continued negotiating until April 11, 2023 when they reached at an executed term sheet. *Id*.

SUMMARY OF THE PROPOSED SETTLEMENT TERMS

I. The Proposed Settlement Class

The proposed Settlement Class consists of all participants in the Triad ESOP from December 17, 2015 through December 31, 2022 who vested under the terms of the Plan, and those participants' beneficiaries. Class Action Settlement Agreement ("Set Agmt") at 4. Excluded from the Settlement Class are the individual Triad Defendants and their legal representatives, successors, and assigns. *Id*. at 5. Based on class data obtained in discovery, there are approximately 450 participants who qualify as Settlement Class members. *See* Feinberg Decl. ¶ 38.

II. Settlement Terms and Benefits to the Class

The Settlement provides substantial economic benefit to the Class. The Settlement provides approximately $14.8 million of economic value to the ESOP by increasing the value of the ESOP's Triad stock – and thereby the value of Class Members' individual accounts in the ESOP. *Id.* ¶ 34.

The Settlement provides this economic value through five different components. *First*, the Selling Shareholders will forfeit $15 million of interest (debt) that Triad owes them from the ESOP Transaction. Set Agmt at 12. Without this concession, Triad would be obligated to pay the Selling Shareholders this $15 million. Eliminating this debt substantially increases the value of the Triad stock owned by the ESOP by $9,735,600. Feinberg Decl. ¶ 35.

Second, the Selling Shareholders will forfeit 150,000 Warrants they received as part of the Transaction, and Defendants have agreed that no new warrants will be issued within twenty-four months of Final Approval of the Settlement. *Id.* Like the reduction of accrued interest, eliminating 150,000 Warrants increases Triad 's equity value, which totals approximately $2,340,000 in value for ESOP participants. Feinberg Decl. ¶¶ 35-36. Because Triad's stock is the sole asset that Class Members have in their ESOP accounts, this Settlement will cause the value of their retirement accounts to increase by a commensurate amount. *See id.*

Third, some Class Members have terminated employment and sold their shares of Triad during the Class Period. To ensure these Class Members also receive an economic benefit from the Settlement, Defendants will pay Class Members $8.20 per share cashed out during the Class Period. *Id.* ¶ 37. In total, Defendants will pay $263,769 to these Class Members, which is more than double what they previously received for their ESOP stock. *Id.*

Fourth, the Settlement ensures that the Selling Shareholders do not benefit from the increase in Triad's stock price. Without this term, the remaining Warrants owned by the Selling Shareholders would increase from the increased Triad stock price resulting from forfeiture of debt and elimination of 150,000 Warrants. To prevent any "windfall," the Settlement provides that the strike price on the Selling Shareholders' remaining Warrants will substantially increase from $2.00 to $9.45. Set Agmt at 12.

Finally, Defendants will deposit $2.5 million into an escrow account for the payment of any court-awarded attorneys' fees and expenses, class representative service awards, and settlement administration expenses. *Id.* at 10. Any amount not awarded by the Court for fees, expenses, or service awards will be paid to the Class rather than revert to Defendants. *Id.* at 18.

These Settlements' components in the aggregate provide approximately $14.8 million of economic value to the ESOP and its participants.

III. Notice and Administration

The Settlement Administrator shall be responsible for (1) mailing the Class Notice to Class Members and (2) posting the Class Notice on a website for the Settlement Class. Set Agmt at 9. In addition, the Settlement Administrator will set up an email address and toll-free telephone number, staffed with live agents, to answer questions and respond to Class Member inquiries. The email address and toll-free number will be included in the Class Notice.

IV. Motion for Attorneys' Fees, Expense Reimbursements, and Service Awards

Plaintiffs' Counsel will file a motion for attorneys' fees, the reimbursement of litigation expenses incurred to date, and service awards to the Named Plaintiffs. If any such awards are granted by the Court, they shall be paid from an escrow account funded by the Defendants. Set Agmt at 14. The service awards, which will not exceed $15,000, are sought because the value achieved through the Settlement would be impossible without the Named Plaintiffs who spent time and effort prosecuting the Action. *See* Feinberg Decl. ¶ 33 The amount of attorneys' fees and reimbursement of litigation expenses (together) will not exceed $2.5 million. Set Agmt at 10-11. As provided for in the Settlement Agreement, the Settlement is not contingent on whether the Court awards any attorneys' fees, expenses, or service awards. *See id*. at 22-23. Any sum remaining

in the Settlement Fund after the payment of taxes, settlement administration expenses, Court-awarded attorneys' fees, expenses, and service awards will not revert to Defendants. *Id.* at 18.

V. Review by an Independent Fiduciary

The Settlement is contingent upon approval by an Independent Fiduciary whom the Parties will retain in accordance with Department of Labor Regulations. Set Agmt at 22; *see also* PTE 2003-39, 68 Fed. Reg. 75,632 (Dec. 31, 2003), *as amended*, 75 Fed. Reg. 33,830 (June 15, 2010). This regulation applies to ERISA settlements that release claims brought on behalf of an ERISA-governed plan and requires that an independent fiduciary evaluate the settlement's terms and determine that it is "reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone." PTE 2003-39 at 33,836. The Independent Fiduciary will review the Final Approval and Fee Petitions and may interview Counsel. *See* Set Agmt at 22. If the Independent Fiduciary does not believe the Settlement's terms are reasonable, it will explain why in its written report, and the Parties must attempt to resolve the concerns of the Independent Fiduciary. *Id*. at 22-23. If the concern cannot be resolved, then a material condition of the Settlement fails. The report will be filed with the Court and posted on the Settlement website before the deadline for Class Members to object.

Even if the Independent Fiduciary's written report finds that the Settlement is reasonable based on the factors set forth in the applicable DOL regulation, the ultimate decision of whether to approve the Class Action Settlement and a Final Judgement resolving this Action is within the sole discretion of the Court.

VI. Release of Claims

In exchange for the Settlement Benefits from Defendants and satisfaction of the conditions required by the Settlement Agreement, Plaintiffs and the Class will release any claims which were

or could have been asserted in the Lawsuit that arise from the facts and claims alleged in the FAC. Set Agmt at 23-24. The Released Claims are set forth in full in the Settlement Agreement. *Id*.

ARGUMENT

I. The Court Should Certify the Settlement Class.

As part of the Settlement, Plaintiffs request that the Court certify the proposed Settlement Class, defined in Section I above, for purposes of settlement only. "In those instances where a class has yet to be certified, the court [] has the discretion at the preliminary approval stage to certify the class on a conditional basis for purposes of providing notice to putative class members." *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 588 n.6 (N.D. Ill. 2016) (citing Manual for Complex Litig. (Fourth) § 21.632 (2004)). As in numerous other ERISA class actions, the requirements of Rule 23 are easily met here.

A. The Proposed Settlement Class Satisfies the Requirements of Rule 23(a).

1. The Class Is Sufficiently Numerous.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The Seventh Circuit has held that "a forty-member class is often regarded as sufficient to meet the numerosity requirement." *Orr v. Shicker*, 953 F.3d 490, 498 (7th Cir. 2020) (quoting *Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir. 2017)). According to Defendants' records of plan participation, there are approximately 450 Class Members. Feinberg Decl. ¶ 38. The proposed class therefore easily meets the numerosity requirement.

2. There Are Common Questions of Law and Fact.

Commonality is satisfied where "there are questions of law or fact common to the class." Fed R. Civ. P. 23(a)(2). Courts in this Circuit have characterized the commonality requirement "as a 'low hurdle' [that is] easily surmounted," *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill.

1996). The Supreme Court has defined a common question of law or fact as one that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

The central questions in ESOP cases like this one are capable of class-wide resolution: whether the ESOP paid more than fair market value for Company stock, whether the ESOP Trustee engaged in a prudent and loyal due diligence process before approving the ESOP Transaction, whether the Board Defendants breached their fiduciary duties by failing to adequately monitor the Trustee, and how much the ESOP overpaid for Company stock. *See* FAC ¶¶ 56, 146. Not surprisingly, courts routinely find commonality satisfied in ESOP cases because "Plaintiffs' allegations all unquestionably stem from the same occurrence—the [ESOP] transaction." *Neil v. Zell*, 275 F.R.D. 256, 261 (N.D. Ill. 2011).[2] The commonality requirement is easily met here.

3. The Proposed Class Representatives Are Typical of the Class.

Typicality under Rule 23(a)(3) complements the question of commonality. *See Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). The distinction between them is that "the commonality inquiry focuses on what characteristics are shared among the whole class while the typicality inquiry focuses on the desired attributes of the class representative." *Newberg and Rubenstein on Class Actions* § 3:31 (6th ed. 2022); *accord Wal-Mart*, 564 U.S. at 349 n.5. Typicality is met if the "plaintiff's claim . . . arises from the same event or practice . . . that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 605 (7th Cir. 2021) quoting *Keele*, 149 F.3d at 595).

[2] *See also, e.g.*, *Smith v. Aon Corp.*, 238 F.R.D. 609, 617 (N.D. Ill. 2006) (commonality found in ESOP case); *Godfrey*, 2021 WL 679068, at *7 (same); *Chesemore v. Alliance Holdings, Inc.*, 276 F.R.D. 506, 518 (N.D. Ill 2006) (same); *Rogers v. Baxter Int'l Inc.*, 2006 WL 794734, at *3 (N.D. Ill. Mar. 22, 2006) (finding commonality satisfied by the following common questions: "(1) whether defendants were plan fiduciaries; (2) whether the defendants breached one or more fiduciary duties . . . .; and (3) whether the alleged breaches of fiduciary duty resulted in damage to the Plan").

By definition, a fiduciary claim brought under 29 U.S.C § 1132(a)(2) is a representational claim that any ESOP participant may assert on behalf of the ESOP as a whole. *See Harrison*, 59 F.4th at 1106. Accordingly, courts generally find such claims meet the typicality requirement because the "action is brought on behalf of the Plan," and plaintiffs' claims, "of necessity, are typical of the claims" of class members. *Lively v. Dynegy, Inc.*, 2007 WL 685861, at *10 (S.D. Ill. Mar. 2, 2007); *Neil*, 275 F.R.D. at 261. In short, here "defendants' conduct regarding the[] [ESOP] transaction[] could have formed the basis of identical ERISA claims brought by any [ESOP] participant," and thus the typicality requirement is satisfied. *Godfrey*, 2021 WL 679068, at *5.

4. The Proposed Class Representatives and Their Counsel Have and Will Fairly and Adequately Protect the Interests of the Class.

Adequacy involves two inquiries: "(1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), *as modified* (Sept. 22, 2011); *Nistra v. Reliance Tr. Co.*, 2018 WL 835341, at *3 (N.D. Ill. Feb. 13, 2018); *see also* Rule 23(g). Further, the plaintiff's interests cannot be "antagonistic or conflicting" with those of the absent class members. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Aon Corp.*, 238 F.R.D. at 615.

The Named Plaintiffs have previously filed affidavits showing that they meet the adequacy requirement because they have demonstrated their willingness and ability to vigorously prosecute this action by reviewing the pleadings in the case, sitting for depositions, and responding to discovery. ECF 128-12 (Smith Decl.) ¶ 5; ECF 128-11 (Honse Decl.) ¶ 5. Neither Plaintiffs nor their Counsel are aware of any conflicts of interest between Plaintiffs and other Class Members. *Id*. at ¶ 8; Feinberg Decl. ¶ 39; Yau Decl. ¶ 24. Accordingly, the adequacy requirement is met.

In addition, Plaintiffs' Counsel in this case is well-qualified. Feinberg Decl. ¶¶ 3-12; Yau Decl. ¶¶ 1-13. Not only do Plaintiffs' Counsel have extensive experience litigating class actions, including numerous ESOP class actions. Here, they have committed significant time and resources to litigate the claims. Feinberg Decl. ¶¶ 13-24; Yau Decl. ¶¶ 14-23. Based on their track record in this and prior cases, Plaintiffs' Counsel satisfy Rule 23(a)(4) and Rule 23(g)(1)(A).

B. The Requirements for Certification under Rule 23(b)(1) Are Met.

In addition to meeting the requirements of Rule 23(a), the action must meet at least one of the three provisions of Rule 23(b). "Most ERISA class action cases are certified under Rule 23(b)(1)." *Caufield v. Colgate-Palmolive Co.*, 2017 WL 3206339, at *6 (S.D.N.Y. July 27, 2017).[3] Consistent with decisions across the country, courts in this Circuit routinely certify ERISA claims brought by individual participants on behalf of the ESOP under Rule 23(b)(1). *See, e.g.*, *Rush v. GreatBanc Tr. Co.*, 2021 WL 2453070, at *9 (N.D. Ill. June 16, 2021) (certifying ERISA claims brought on behalf of ESOP under 23(b)(1)); *Godfrey*, 2021 WL 679068, at *7 (certifying ERISA claims brought on behalf of ESOP under both 23(b)(1)(A) and (b)(1)(B)); *Chesemore*, 276 F.R.D. at 518 (same); *Neil*, 275 F.R.D. at 267-68 (certifying ESOP claims under Rule 23(b)(1)(B)).

1. Class Certification under Rule 23(b)(1)(A) Is Appropriate

Courts have repeatedly recognized that ERISA fiduciary claims, such as those raised here, are representative claims brought on behalf of the ESOP, and that certification under Rule 23(b)(1)(A) is necessary to avoid inconsistent judgments. *Rogers v. Baxter Int'l Inc.*, 2006 WL 794734, at *10 (N.D. Ill. Mar. 22, 2006) (collecting ERISA cases certifying classes under Rule 23(b)(1)). In similar ESOP cases, this Court observed that "[i]nconsistent judgments concerning

[3] "In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough Corp.*, 589 F.3d 585, 604 (3d Cir. 2009).

how the Plans should have been interpreted or applied would result in prejudice." *Aon Corp*., 238 F.R.D. at 617. This case is no different and should be certified under 23(b)(1)(A). *Neil*, 275 F.R.D. at 267-68.

2. Class Certification under Rule 23(b)(1)(B) Is Appropriate

Certification under Rule 23(b)(1)(B) is appropriate where "any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (emphasis added). One example of an action ideally suited for certification under Rule 23(b)(1) is "an action which charges a breach of trust by a[ ] . . . trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23, advisory committee's note to 1966 Amendment. This type of action is precisely the type of claims asserted here under 29 U.S.C. § 1132(a)(2) because the relief sought will necessarily affect all ESOP participants in the same way.

Claims involving a fiduciary's breach of duty or violation of prohibited transaction rules must be brought in a representative capacity on behalf of the plan under § 502(a)(2) for relief under § 409. 29 U.S.C. §§ 1132(a)(2) and 1109; *Nistra*, 2018 WL 835341, at *3. Further, because Plaintiffs' § 1132(a)(2) claims are representative by their very nature, any "decision with respect to one Plan participant's claim necessarily implicates issues relevant to the adjudication of other participants' claims." *Rogers*, 2006 WL 794734, at *10; *Newberg and Rubenstein on Class Actions* § 4:21 (6th ed. 2022) ("because [a]ny decision regarding whether the defendants breached their fiduciary duties would necessarily affect the interests of other participants . . . , courts regularly certify ERISA cases under Rule 23(b)(1)(B).") (internal quotations omitted).

II. The Court Should Grant Preliminary Approval of the Settlement Because It Is Fair, Reasonable, and Adequate.

There is an overriding public interest in the settlement of labor-intensive litigation; this is particularly true in complex class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."). Moreover, at preliminary approval, there is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. *See Newburg and Rubenstein on Class Actions* § 13:45 (6th ed. 2022); *Kleen Prods. LLC v. Int'l Paper Co.*, 2017 WL 5247928, at *3 (N.D. Ill. Oct. 17, 2017). The initial presumption in favor of such settlements reflects courts' understanding that vigorous negotiations between experienced counsel advance the fairness concerns embodied in Rule 23(e). In 2018, Rule 23(e) was amended to make express the relevant factors for the determination of whether a proposed class action settlement is fair and reasonable:

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

Fed. R. Civ. P. 23(e)(2); *see also Nistra v. Reliance Tr. Co.*, 2020 WL 13645290, at *1.

A. Class Representatives and Their Counsel Have Adequately Represented the Class.

Consistent with Fed. R. Civ. P. 23(a)(4), the Settlement Class was adequately represented in this case. Named Plaintiffs Smith and Honse took their roles very seriously and directly participated in the discovery process by turning over their own financial documents and sitting for depositions. ECF 128-12 (Smith Decl.) ¶¶ 5–8; ECF 128-11 (Honse Decl.) ¶¶ 5–8. Class Counsel

also vigorously represented the Settlement Class throughout the litigation, and both firms are well-respected for their ERISA class action expertise. Feinberg Decl. ¶¶ 3-12, Ex. C; Yau Decl. ¶¶ 3-13, Ex. D. Finally, as discussed in detail above, Named Plaintiffs and their Counsel readily meet the adequacy requirements of Rule 23(a). *See supra* pp. 11-12. Where, as here, the named plaintiffs participate in the case diligently, including being subjected to discovery, and class counsel engaged in hard-fought litigation, Rule 23(e)(2)(A) is satisfied. *Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019).

B. The Proposed Settlement Is the Product of Arm's Length Negotiations.

Rule 23(e)(2)(B) requires that the Settlement is borne of an arm's-length and non-collusive process. This Settlement was reached after prolonged and adversarial litigation among sophisticated counsel. *Supra* pp. 3-5. Plaintiffs' Counsel is fully aware of the strengths and weaknesses of the case after completing fact discovery and testing Defendants' legal positions. *Supra* pp. 4-5. Moreover, the Parties' negotiations were facilitated by a JAMS neutral and spanned a four-month period. Feinberg Decl. ¶¶ 20-21. These are all the hallmarks of arm's-length negotiations. *Newberg and Rubenstein on Class Actions* § 13:14 (6th ed. 2022); *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014). Plaintiffs therefore satisfy Rule 23(e)(2)(B).

C. The Relief Provided Is Adequate, Taking into Account the Costs, Risks, and Delay of Trial and Appeal.

In ERISA cases challenging an ESOP's purchase of privately held stock, the measure of loss is the difference between what the ESOP paid for the stock and the stock's true fair market value. *See Perez v. Bruister*, 823 F.3d 250, 270-72 (5th Cir. 2016); *Chao v. Hall Holding Co, Inc.*, 285 F.3d 415, 423, 444 (6th Cir. 2002); *Perez v. First Bankers Tr. Servs., Inc.*, 2017 WL 1232527, at *81 (D.N.J. Mar. 31, 2017); *Neil v. Zell*, 767 F. Supp. 2d 933, 944-45 (N.D. Ill. 2011). Applying this well-established principle, Plaintiffs' valuation expert estimated that the ESOP's overpayment

ranged between $3 million to $35 million. Comparing the value of the settlement consideration (approximately $14.8 million, as discussed further *supra* pp. 5-7) to the Class's potential range of recovery shows that the Settlement is an excellent outcome for the class.

The $14.8 million in economic value created by the Settlement comes from four different components. *First*, the $15 million reduction in the debt owed to the Selling Shareholders results in $9.7 million in increased value for the ESOP because Triad's equity (i.e., the Triad stock owned by the ESOP) increases in value when Triad's debt to the Selling Shareholders is reduced by $15 million, as the proposed Settlement provides.[4] *Second*, the elimination of 150,000 of the Warrants owned by the Selling Shareholder will increase the value of Company stock by approximately $2,340,000. *Third*, the proposed Settlement provides that Defendants will pay all former participants $8.20 per share for the shares of Company stock those participants cashed out on or before December 31, 2022, which totals $263,769. *Fourth*, the strike price of all the Selling Shareholders' warrants is increased by $7.45 which ensures that Defendants do not benefit from the reduction in debt and elimination of warrants discussed above. *Fifth*, Defendants will pay $2.5 million into escrow to fund settlement administration expenses and any court-awarded attorneys' fees, expense reimbursements, service awards, and settlement administration expenses. The total estimated value of the Settlement for the ESOP and the Class is $14.8 million.

Although much of this Settlement consideration is not cash, the economic value gained by Class Members is equivalent. This Settlement causes the value of Class Members' retirement accounts to increase. When they retire or leave Triad, they will convert this value into cash. This result is identical to cash payments to the plan made in other ERISA settlements involving retirement plans. In many ERISA class action settlements, cash is transferred into the 401(k) plan

[4] GreatBanc's financial advisor valued the $15 million debt reduction as worth $5.32/share. Set Agmt at 13.

accounts of class members and invested in the investments available within the plan, which increases the value of class members' 401(k) accounts. *E.g., Baird v. BlackRock Institutional Tr. Co.*, 2021 WL 5991060, at *2 (N.D. Cal. July 12, 2021); *Becker v. Wells Fargo & Co*., 2022 WL 1210948, at *6 (D. Minn. Apr. 25, 2022).

Further, Department of Labor settlements of ESOP cases, similar to this one, often involve non-cash relief such as loan reductions and elimination of warrants or other forms of synthetic equity. *See, e.g., Scalia v. The Farmers Nat'l Bank of Danville*, 1:20-cv-00674, ECF 5 at 3 (S.D. Ind. April 3, 2020) (DOL settlement with loan reductions in exchange for release of ESOP claims); *Acosta v. Mueller*, 2:13-cv-01302, ECF 226-1 at 8 (E.D. Wis. Dec. 20, 2017) (same); *Walsh v. Reliance Tr. Co. et al*, 17-cv-04540, ECF 313 at 4 (D. Minn. Jan. 5, 2022) (DOL settlement with non-cash relief, including the reduction of synthetic equity).[5]

The Settlement is an excellent outcome for the Class when compared to the value of other ESOP settlements inside and outside this Circuit. *See, e.g., Allen v. GreatBanc Tr. Co.*, No. 1:15-cv-03053 (N.D. Ill. May 6, 2019), ECF 108 (final approval of $2.25 million ESOP settlement); *Nistra v. Reliance Tr. Co*., No. 16-04773 (N.D. Ill. Jan. 2020), ECF 290 (final approval of $13.4 million ESOP settlement); *Foster v. Adams & Assoc., Inc.*, No. 18-02723 (N.D. Cal. Feb. 11, 2022), ECF 244 (final approval of $3.0 million ESOP settlement), *Scalia v. Prof. Fid. Servs.*, No. 19-07874 (S.D.N.Y. Jan 12, 2021), ECF 29 (entry of DOL consent order/settlement providing for $0.75 million in cash to ESOP); *Walsh v. Saakvitne*, No. 18-00155 (April 22, 2021), ECF 453 (entry of DOL consent order/settlement for $1.46 million to ESOP).

Moreover, Defendants vigorously denied all of Plaintiffs' allegations, asserted affirmative defenses, and otherwise defended their actions with respect to the Transaction. Defendants also

[5] These DOL Settlements are attached as Exhibit E to the Yau Declaration.

would have sought an offset for any monetary recovery the Class obtained after trial because they have already returned over $13.8 million to the ESOP through a loan reduction before the Action was filed. Absent settlement, "protracted litigation would likely ensue," leading to greater expenses for the Parties as "[t]he costs associated with discovery in complex class actions can be significant." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). Here, both sides would need to complete costly expert discovery and, given the factual issues, likely proceed to trial. Any monetary recovery would be uncertain (especially given the $13.8 million offset) and would require a battle of experts where no party could be certain that its expert would carry the day. *See Trs. of Chi. Plastering Inst. Pension Fund v. R.G. Constr. Servs., Inc.*, 2009 WL 1733036, at *17 (N.D. Ill. 2009) (damages depends on expert calculations).

Regardless of the outcome, there likely would have been appeals that followed, further delaying resolution and causing more expense. A settlement avoids the risks and delays attendant with continued litigation and ensures that the estimated 450 Class Members will each receive a substantial increase in retirement savings while curtailing the Selling Shareholders' profits from the Transaction. As courts in this Circuit have noted, "[w]hen analyzing whether a proposed settlement is fair, reasonable, and adequate, courts 'should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights.'" *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)). Indeed, even recoveries representing a very small percentage of the defendant's maximum exposure—which is not the case here—may be found to be fair, adequate, and reasonable. *See, e.g.*, *Schulte*, 805 F. Supp. 2d at 583 (reasoning that numerous courts have approved class settlements with recoveries around or below the class's recovery of approximately 10% and citing cases); *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").

Plaintiffs and their Counsel believe the proposed Settlement provides substantial economic value to the Class in light of the risks and uncertainty of ongoing litigation and prevailing at trial.

D. Additional Rule 23(e)(2) Factors Support Preliminary Approval.

In addition to the above, Rule 23(e)(2)(C) requires the Court to consider whether the relief provided for the Class is adequate, taking into account (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). Finally, Rule 23(e)(2)(D) requires that courts consider whether the proposal treats class members equitably relative to each other.

First, the proposed method of distributing relief to the Class is effective. Rule 23(e)(2)(C)(ii) examines the effectiveness of any proposed method of distributing relief to the class, including the method of processing any class member claims. Here, the Settlement Agreement provides that (1) Class Members that still hold Triad stock in their retirement account will automatically receive the Settlement benefits through an increase in their Triad stock, which they will monetize when they leave Triad or retire, and (2) Class Members who have already sold their Triad stock will receive a cash payment of $8.20 per share. Set Agmt at 12. No claim forms are required. Because all Class Members automatically receive the benefit of the Settlement, the 23(e)(2)(C)(ii) factor weighs strongly in favor of approval.

Second, the proposed award of attorneys' fees is reasonable. Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. Plaintiffs' Counsel will file a motion for attorneys' fees, expense reimbursement, and service awards, which

together shall not exceed $2.5 million. Set Agmt at 10-11. The combined attorneys' fees and expenses amount (at most) will represent just 17% of the Settlement's value, which is well below the average contingency fee commonly granted in ERISA class actions, which is over 25%. *See Mezyk v. U.S. Bank Pension Plan*, 2012 WL 13028659, at *2 (S.D. Ill. Nov. 5, 2012). Because the proposed award of attorneys' fees is reasonable, Rule 23(e)(2)(C)(iii) weighs in favor of approval.

Third, there are no side agreements. Because no side agreements exist, Rule 23(e)(2)(C)(iv) weighs strongly in favor of approval.

Finally, the proposed Settlement treats Class Members equitably relative to each other. Under Rule 23(e)(2)(D), the Court must consider whether the proposal treats Class Members equitably relative to each other. As noted *supra* p. 6, the Settlement payments to former participants will be based on the number of shares each participant held at the time they cashed out their Triad stock. For current participants, the value of the Settlement increases proportionally based on the number of shares they hold in their ESOP accounts. As a result, this allocation method ensures that Class Members' recoveries are proportional to their exposure to the challenged Transaction and is therefore fair. *Kaplan v. Houlihan Smith & Co., Inc*., 2014 WL 2808801, at *3 (N.D. Ill. June 20, 2014) (approving ESOP settlement that allocates recovery "based on the number of shares each class member held"); *Chesemore v. Alliance Holdings, Inc.*, 2014 WL 4415919, at *1 (W.D. Wis. Sept. 5, 2014), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016) (similar). In sum, the proposed Settlement is a fair compromise of the Class's claims.

CONCLUSION

Plaintiffs respectfully request that the Court enter the Proposed Order.

Dated: April 20, 2023

Respectfully submitted,

/s/ Michelle C. Yau
COHEN MILSTEIN SELLERS & TOLL PLLC
Michelle C. Yau (admitted *pro hac vice*)
Daniel R. Sutter (admitted *pro hac vice*)
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699
myau@cohenmilstein.com
dsutter@cohenmilstein.com

Caroline E. Bressman (admitted *pro hac vice*)
400 South Fourth Street ● #401-26
Minneapolis, MN 55415
(612) 807-1575
cbressman@cohenmilstein.com

Carol V. Gilden, Illinois Bar: 6185530
190 South LaSalle Street ● Suite 1705
Chicago, IL 60603
Tel: (312) 357-0370
Fax: (312) 357-0369
cgilden@cohenmilstein.com

FEINBERG, JACKSON, WORTHMAN & WASOW, LLP
Nina Wasow (admitted *pro hac vice*)
Dan Feinberg (admitted *pro hac vice*)
2030 Addison Street ● Suite 500
Berkeley, CA 94704
Tel: (510) 269-7998
Fax: (510) 269-7994
nina@feinbergjackson.com
dan@feinbergjackson.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2023, I served this document and associated exhibits through this Court's ECF/CM and electronic mail on all attorneys of record.

Dated: April 20, 2023

/s/ Daniel R. Sutter

Daniel R. Sutter
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW ● Fifth Floor
Washington, D.C. 20005
Telephone: (202) 408-4600
Fax: (202) 408-4699
dsutter@cohenmilstein.com