IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARLOW HENRY, on behalf of the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated, Plaintiff, v. WILMINGTON TRUST, N.A., BRIAN C. SASS, and E. STOCKTON CROFT IV, Defendants.	**C.A. No. 19-1925-JLH**

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Plaintiff Marlow Henry ("Plaintiff"), individually and on behalf of the Settlement Class, hereby moves pursuant to Federal Rule of Civil Procedure 23 for an order approving a settlement agreement between Plaintiff and Defendants; certifying a Class for settlement purposes; approving notice to the Settlement Class; and setting a date for a fairness hearing.

The reasons supporting this motion are contained in Plaintiff's Opening Brief in Support of Preliminary Approval of Settlement and Certification of Settlement Class, which Plaintiff incorporates into this motion and is being filed contemporaneously. A proposed order granting this motion is attached hereto as Exhibit 1.

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IN THE UNITED STATES DISTRICT COURT
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MARLOW HENRY, on behalf of the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,

Plaintiff,

v.

WILMINGTON TRUST, N.A., BRIAN C. SASS, and E. STOCKTON CROFT IV,

Defendants.

C.A. No. 19-1925-JLH

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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Plaintiff Marlow Henry ("Plaintiff"), individually and on behalf of the Settlement Class, hereby moves for an order approving a settlement agreement between Plaintiff and Defendant Wilmington Trust, N.A. ("Wilmington Trust") and Individual Defendants Brian C. Sass and E. Stockton Croft IV (collectively, "Defendants" and together with Plaintiff, the "Parties"); certifying a Class for settlement purposes; approving notice to the Settlement Class; and setting a date for a fairness hearing.[1]

I. INTRODUCTION

Subject to the Court's approval, the Parties have settled this Employee Retirement Income Security Act, 29 U.S.C. § 1000, *et seq*., ("ERISA") matter for a cash payment of $8,000,000—an average recovery of nearly $15,000 per Class Member before accounting for fees, expenses and a Service Award. No portion of the settlement payment is a tax or penalty under ERISA or the Internal Revenue Code of 1986 as amended. Should the Court grant final approval, every eligible Settlement Class Member will receive their portion of the Net Settlement Fund according to a *pro rata* Plan of Allocation.

The proposed Settlement Class meets all the criteria for conditional certification, and the Settlement Agreement ("Settlement") satisfies all the criteria for preliminary approval and provides a good result for the Settlement Class Members. For these reasons, discussed in more detail below, Plaintiff requests that the Court grant this unopposed motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background

Plaintiff is a Plan participant, as defined by ERISA, who vested in his benefits. The Plan is sponsored by BSC Ventures Holding, Inc. ("BSC"). BSC adopted the BSC Ventures Holdings, Inc.

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

Profit Sharing Plan effective January 1, 2015. It was amended and restated as the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan ("ESOP" or "Plan") effective October 1, 2015. The Plan was to acquire BSC stock and provide retirement benefits to each participant equal to the value of stock and any other assets in the participant's individual accounts in the Plan. BSC appointed Wilmington Trust as trustee of the Plan. As trustee, Wilmington Trust had the duty to ensure that any transactions between the Plan and the selling shareholders—including loans to the Plan and acquisitions of stock by the Plan—were fair and reasonable, as well as the duty to ensure that the Plan paid no more than fair market value.

On January 14, 2016, Wilmington Trust caused the Plan to purchase 809,892 shares of BSC common stock for $50 million, from party in interest shareholders including Sass and Croft. Wilmington Trust caused the Plan to enter into a loan agreement with BSC for $46,545,758 at an annual nominal interest rate of 2.65% that was to be repaid over a period of 30 years.

Plaintiff alleges that Wilmington Trust caused the Plan to engage in transactions prohibited by ERISA § 406(a), 29 U.S.C. § 1106(a), by acquiring BSC stock from a party in interest, including directors and an officer, and by taking loans from a party in interest. Plaintiff alleges Wilmington Trust engaged in transactions prohibited by ERISA § 406(b), 29 U.S.C. § 1106(b), by receiving fees from BSC and acting for the benefit of sellers in the ESOP Transaction. Plaintiff also alleges Wilmington Trust breached its fiduciary duties by failing to undertake an appropriate and independent investigation of the fair market value of BSC stock and thereby caused the Plan to overpay when it purchased BSC stock in the ESOP Transaction. Plaintiff also alleges the Individual Defendants had knowledge of, and benefitted from, Wilmington Trust's violations of ERISA. Plaintiff seeks to recover losses caused to the Plan by Defendants' violations of ERISA, including disgorgement of all fees earned by Wilmington Trust in connection with serving as Plan trustee, and prejudgment interest, among other requests.

Defendants deny these allegations, deny any wrongdoing or liability, and have vigorously defended themselves in this Lawsuit. Defendants do not admit wrongdoing of any kind whatsoever regarding the ESOP Transaction or this Lawsuit.

B. Discovery

The Parties have vigorously prosecuted this Lawsuit and have engaged in robust discovery. Plaintiff's Counsel has conducted extensive discovery regarding the facts and claims in this Lawsuit, including propounding and responding to written discovery, and reviewing over 19,000 documents from the productions by Defendants and five non-parties. *See* Declaration of Gregory Y. Porter ("Porter Decl."), attached hereto as Exhibit 2, ¶ 7. Counsel for the Parties prepared for, took, and defended nine depositions of parties and non-parties. *Id*. Plaintiff's Counsel retained and consulted with two experts who prepared detailed reports and analyses on valuation and due diligence. *Id*. at ¶ 6. Defendants' counsel retained and worked with three expert consultants who prepared reports on similar topics. *Id*. The Parties also went through extensive briefing, as discussed in the motions practice section below. *Id*. The Parties agreed to settlement terms when only the expert depositions and trial remained.

C. Motion Practice

The Parties engaged in extensive motion practice that included the following: Defendants' Motion to Dismiss for Lack of Jurisdiction (D.I. 11), which was denied (D.I. 39). Plaintiff's Motion for Discovery on Arbitrability (D.I. 15, 21); Defendants' appeal of the Court's denial of the Motion to Dismiss (D.I. 40), which was denied by the Third Circuit Court of Appeals (D.I. 46); Defendants' Motion to Stay All Deadlines and Proceedings (D.I. 47), which was denied as moot

(D.I. 53); Plaintiff's Motion to Amend (D.I. 61) which was denied (D.I. 110); and Plaintiff's Motion to Certify Class (D.I. 115), which remains pending.

D. The Parties' Settlement Efforts

Plaintiff and Defendants held a mediation with JAMS mediator Stephen P. Lucke on December 3, 2024. Porter Decl. ¶ 9. In advance of the mediation, Plaintiff and Defendants submitted statements laying out their positions on the case. *Id*. Plaintiff and Defendants were unable to resolve the matter at the mediation on December 3, 2024, but continued their arms-length and good faith settlement discussions thereafter. *Id*. Those talks continued through March 12, 2025, at which time all Parties agreed to a settlement in principle. Id. On May 6, 2025, the Parties signed the Settlement Agreement discussed herein. *Id*.

III. Summary of the Proposed Settlement Terms

The material terms of the Settlement Agreement are summarized below.

A. The Proposed Settlement Class

The proposed Settlement will apply to all participants in the Plan and the beneficiaries of such participants during the Class Period. Defendant Sass is excluded from the Settlement Class, and his immediate family, legal representatives, successors, and assigns. The Class Period begins on January 14, 2016, and ends on December 31, 2024. Based on the ESOP's most recent Form 500, there are approximately 534 Settlement Class Members.

B. Benefits to the Settlement Class Members

Defendants have agreed to pay $500,000.00 into the Settlement Fund Account for purposes of payment of Administrative Expenses within fourteen days of entry of the Preliminary Approval Order. Settlement Agmt. ¶ 7.2. Within fourteen days after entry of the Final Order by the Court, Defendants shall deposit $7,500,000.00 into the Settlement Fund Account (the two payments collectively, along with any interest accrued, constitute the "Settlement Amount" and which shall be considered a common fund created as a result of the Lawsuit). *Id.* The funds remaining after deduction from the Settlement Amount for (i) taxes owed on the Settlement Fund Account, (ii) amounts for the reasonable expenses of administering the Settlement Fund Account, (iii) Court-approved attorneys' fees[2] and litigation expenses, and (iv) any Service Award to Plaintiff Marlow Henry, shall constitute the "Net Proceeds." *Id.* ¶¶ 8.1-8.2. The Net Proceeds will be distributed to the Plan participants pursuant to the Plan of Allocation. *Id.* ¶ 8.2.3. Before subtracting expenses and attorneys' fees, the Settlement Amount provides each of the 534 Settlement Class Members with vested account balances almost $15,000 on average.

C. Notice and Administration

Plaintiff's Counsel shall cause the proposed Settlement Administrator, RG/2 Claims Administration, LLC ("RG2"), to disseminate the Class Notice to the Settlement Class Members within thirty days after entry of the Preliminary Approval Order and post it on a website for case documents. Settlement Agmt. ¶ 2.2.3. Defendants shall direct BSC to provide, or cause to be provided by the recordkeeper or third-party administrator for the ESOP, to the Settlement Administrator and Class Counsel, the names and last known mailing addresses of the Class Members, to the extent available with reasonable effort in electronic format, at least twenty-one (21) days prior to the deadline for mailing notice. *Id*. Defendants shall also cause the recordkeeper or third-party administrator for the ESOP to provide to the Settlement Administrator, (1) the number of vested shares of BSC stock allocated to the ESOP accounts of Class Members as of December 31, 2024, and (2) if the Class Member received a prior distribution of all or a portion of the Class Member's account balance, the number of vested shares of BSC stock allocated to their

[2] Plaintiff's Counsel will seek attorneys' fees of no more than one-third of the Settlement Amount, plus expenses.

ESOP account as of the date prior to any distribution. *Id*. The information in the preceding sentence shall be provided to the Settlement Administrator to the extent available with reasonable effort in electronic form, no later than sixty (60) days after the Court issues the Preliminary Approval Order

If the Court grants final approval of the Settlement, the Settlement Administrator shall implement the Plan of Allocation and, thereby, determine how much of the Net Proceeds should be allocated to each Class Member in proportion to the vested company shares that he or she holds in the ESOP. Settlement Agmt. ¶ 8.2.3. A Class Member's share of the Net Proceeds will be based on the number of vested shares of BSC stock allocated to their ESOP account as of (1) December 31, 2024, or (2) if the Class Member received a prior distribution of the Class Member's account balance, the number of vested shares of BSC stock allocated to their ESOP account prior to the date of any distributions, divided by the sum total of all such vested shares of BSC stock of all Class Members, which shall constitute that Class Member's "Entitlement Percentage." The Settlement Class Member's settlement allocation shall be calculated by multiplying the total value of the Net Proceeds by his or her Entitlement Percentage. *Id.* The Settlement Administrator shall distribute the allocable portion of the Net Proceeds for each Class Member (based on his or her Entitlement Percentage) directly to that Class Member by check. If any checks remain uncashed after 120 days, and the Settlement Administrator has made reasonable efforts to notify the recipients of these checks, the total amount of any uncashed checks shall be re-distributed by the Settlement Administrator pro-rata to the remaining Class Members. *Id*. If there are any checks that remain uncashed 120 days after the second distribution, then the Parties will meet and confer to propose an appropriate cy pres beneficiary to the Court. *Id*.

D. Service Award to the Named Plaintiff and Attorneys' Fees and Expenses

Subject to Court Approval, Class Counsel's fees and litigation expenses, and the Service Award to Plaintiff Marlow Henry, shall be paid from the Settlement Fund Account. Settlement Agmt. ¶¶ 8.2.1-8.2.3, 9.1. Plaintiff shall petition the Court for a Service Award not to exceed $25,000 for the named Plaintiff, in recognition of his service to the Plan. *Id.* ¶ 8.2.2. Plaintiff's Counsel will also petition the Court for an award of attorneys' fees not to exceed one-third of the Settlement Amount and litigation expenses. *Id.* ¶¶ 8.2.1, 9.1.

E. Release of Claims

In exchange for payment of the Settlement Amount by Defendants and satisfaction of the conditions required by the Settlement Agreement, Plaintiff and the proposed Settlement Class will release the "Releasees" as defined in the Settlement Agreement[3] from any and all "Released Claims" as defined in the Settlement Agreement, which includes any claim that was or could have been asserted in the Lawsuit relating to the Plan's purchase of, or investment in, the stock of BSC during the Class Period, including but not limited to claims related to the Plan's acquisition of BSC stock or the sale of stock by any BSC shareholder. Settlement Agmt. ¶ 3. The Releasees, the Released Claims, and the covenant not to sue are set forth in full in the Settlement Agreement. *Id.* ¶¶ 3-4.

F. Notice and Proposed Schedule of Events

As noted above, the Settlement Administrator will receive the names and last known mailing addresses of the Class Members. Settlement Agmt. ¶ 2.2.3. The Settlement Administrator

[3] "Releasees" is defined as Defendants, BSC, the former shareholders of BSC, the named and functional fiduciaries of the Plan, and each of their respective present, former or future direct or indirect, parent companies, subsidiaries, affiliates, divisions, joint ventures, committees, predecessors, successors, successors-in-interest, directors, officers, employees, agents, attorneys, financial advisors, valuation advisors, relations, representatives, assigns, insurers and reinsurers. Settlement Agmt. ¶ 3.1.

will then mail the Class Notice to the Class Members and post it on a website. The proposed Class Notice (attached hereto as Exhibit 1) provides all the information necessary to inform Settlement Class Members about the nature of the Lawsuit, the terms of the Settlement, and the procedures for entering an appearance to be heard or to object to the Settlement. In addition, key court documents, including the Complaint, the Settlement Agreement, preliminary approval papers, Plaintiff's Motion for Award of Attorneys' Fees, and Plaintiff's Motion for Final Approval will be posted on the settlement website. The proposed schedule is set forth below:

Event	**Timing**
Motion for Preliminary Approval	May 7, 2025
CAFA Notices issued	Within ten (10) days of Plaintiff filing the Settlement Agreement with the Court
Preliminary Approval Hearing (if set by the Court)	At the Court's discretion, though the parties request that any hearing, if needed, be conducted within 30 days of the filing of this Preliminary Approval Motion
Settlement Administrator to receive Settlement Class Member list and contact information	At least twenty-one (21) days prior to the deadline for mailing Class Notice
Mail Class Notice	At least ninety (90) days before the Fairness Hearing
Motion for final approval of Settlement	No later than forty-five (45) days before the Fairness Hearing
Motion for award of attorneys' fees and expenses, and Service Award for Plaintiff	No later than forty-five (45) days before the Fairness Hearing
Objections to the Settlement, notice of intention to appear at Fairness Hearing	Must be received by the Court on or before twenty-one (21) days before the Fairness Hearing
Response to Objections	No later than ten (10) days before the Fairness Hearing
Fairness Hearing	TBD (at least 90 days after the mailing of the Class Notice to the Settlement Class Members)

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE

Rule 23(e) provides that a class action cannot be settled without court approval and notice to the class. Review of a proposed class action settlement for approval generally proceeds in two stages: (1) preliminary approval and notice to class members of the proposed settlement; and (2) final approval following a fairness hearing in which the Court determines whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); s*ee Myers v. Jani-King of Philadelphia, Inc.*, No. CV 09-1738, 2019 WL 2077719, at *2-*3 (E.D. Pa. May 10, 2019).

At preliminary approval, the court must determine whether the settlement justifies giving notice of the settlement to the class. Fed. R. Civ. P. 23(e)(1). The parties must provide the court with information sufficient to enable the court to determine whether to give such notice of the proposal to the class. *Id.* The court examines the information provided by the parties against a number of factors to determine whether notice should be given to the class. *Id.*

Rule 23, as amended in 2018, provides specific direction to federal courts considering whether to grant preliminary approval of a class action settlement and approve the issuance of notice. Fed. R. Civ. P. 23(e), Committee Notes. The factors that provide guidance regarding this determination are as follows:

(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 Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-CV-05135, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 5, 2019).

In tandem with Rule 23(e), courts within the Third Circuit evaluate class action settlements under the nine factors outlined in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975), which require a court to consider: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534–35 (3d Cir. 2004) (citing *Girsh*). In light of this, in addition to the 23(e)(2) factors, Plaintiff will address each of the *Girsh* factors to the extent they are applicable, many of which overlap.[4]

In reviewing these factors, there is a strong presumption in favor of voluntary settlement agreements that promote the amicable resolution of disputes, conserve judicial resources, and benefit the parties by avoiding the costs and risks of a lengthy and complex trial. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594–95 (3d Cir. 2010); *see also Doe I v. Int'l Fin. Corp.*, No. CV 17-1494-JFB-SRF, 2024 WL 4384970, at *6 (D. Del. Oct. 3, 2024) ("Courts generally favor settlements to avoid lengthy litigation.") "This presumption is especially strong in class actions." *Id*.

[4] Since Class Notice has not yet been sent, the reaction of the class to the settlement (*Girsh* factor #2), cannot be evaluated.

A. The Settlement Is The Result Of Good Faith, Arm's Length Negotiations By Well-Informed And Experienced Counsel

"Whether a settlement arises from arm's length negotiations is a key factor in deciding whether to grant preliminary approval." *In re Nat'l Football League Players' Concussion Inj. Litig.*, 301 F.R.D. 191, 198 (E.D. Pa. 2014); s*ee also* Rule 23(e)(2)(B) (proposal was negotiated at arm's length); *In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) (noting that a presumption of fairness exists where parties negotiate at arm's-length); *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 (E.D. Pa. 2008) (stressing the importance of arm's-length

negotiations"). "[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." *Int'l Fin. Corp.*, 2024 WL 4384970, at *7.

Here, the Parties engaged in a full-day mediation with experienced JAMS mediator Stephen Lucke. In advance of the mediation, the Parties provided position papers laying out the strengths and weaknesses of their cases. Although the Parties were unable to come to terms on December 3, 2024, they continued discussions in the following weeks. It was not until March 12, 2025 after weeks of back and forth communications, that the Parties agreed to the key terms contained in the Settlement Agreement. Porter Decl. ¶ 9. The Parties continued to negotiate over remaining terms until May 6, 2025 when they signed the Settlement Agreement. *Id*. Throughout the settlement discussion process, the Parties vigorously debated the merits of Plaintiff's claims and Defendants' theories of defense. Their negotiations ultimately spanned 3 months and were hard fought. *Id*. And, as discussed below, given the late stage of discovery, the Parties entered the negotiations with a thorough understanding of the issues that would be presented at trial. The proposed Settlement is the result of good faith, arm's-length negotiations by well-informed and experienced counsel. Rule 23(e)(2)(B), and the third *Girsh* factor are met.

B. The Complexity, Expense, And Likely Duration Of The Litigation

Addressing the first *Girsh* factor, as well as Rule 23(e)(2)(C)(1), the Parties have different views about Defendants' actions, their potential liability and the likely outcome of the litigation. Plaintiff's core allegations regarding the ESOP Transaction rested on facts that were strongly contested by Defendants. Defendants vigorously denied all of the allegations, asserted affirmative defenses and otherwise defended its actions with respect to the ESOP Transaction. Defendants retained experts to opine in rebuttal to all of Plaintiff's central critiques and theories of damages. Defendants pointed to evidence that countered Plaintiff's central critiques, including the Company's subsequent continued strong performance, which, in their view, supported the conclusion that Defendants have no liability. If the Lawsuit were to proceed, Plaintiff would have to overcome these and other defenses and arguments. These fact-intensive inquiries would have led to a battle of experts and conflicting evidence and testimony, which would have placed the ultimate outcome of the litigation in doubt, because no party could reasonably be certain that its expert or evidence would carry the day.

Proceeding to trial, which was set for June 2025, would have required several attorneys from Class Counsel to complete expert depositions, argue the pending motion for class certification, prepare trial exhibit and witness lists, draft a pre-trial brief, attend the final pre-trial conference, and spend at least two weeks preparing for and trying the case. Regardless of the outcome at trial, there likely would have been appeals that followed, further delaying resolution and causing more expense. Further, the estimated 534 Settlement Class Members will each receive on average approximately $15,000 before fees and expenses.

Thus, the proposed Settlement is a good result for the Settlement Class and presents no grounds "to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class . . . ." *Du on behalf of Enteromedics, Inc. v. Blackford*, No. 17-CV-194, 2018 WL 4691046, at *5 (D. Del. Sept. 28, 2018) (quoting *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2008)).

C. The Stage Of The Proceedings And The Amount of Discovery Completed

With regard to the third *Girsh* factor, as described in Section II.B above, the Parties have completed extensive fact discovery and exchanged expert reports. Only expert depositions remained at the time the Parties agreed to the Settlement. The Parties also litigated a motion to dismiss up to the Supreme Court of the United States.

The Parties conducted substantial fact discovery and Class counsel hired an expert to assess the potential value of the Class's claims. *See Pfeifer*, 2018 WL 2057466 at *7 (finding "substantial discovery" where documents related to the merits and the Class's potential recovery had been produced, and plaintiff had hired valuation experts). "Thus, the parties have conducted sufficient discovery to estimate the merit and value of the Plaintiffs' case against [Defendants] and reach a reasonable settlement." *Gates*, 248 F.R.D. at 444. The fact and expert discovery allowed the Parties to fully and fairly assess the allegations and strengths and weaknesses of their respective positions at an early stage, to the benefit of the Class.

Having obtained the necessary information to assess the strengths and weaknesses of their respective positions and with the best interests of the Plan in mind, the Parties reached a good settlement agreement. The third *Girsh* factor supports approval of the Settlement.

D. The Risks Of Establishing Liability, Damages, And Maintaining the Class Action Through Trial

The fourth, fifth, and sixth *Girsh* factors, and Rule 23(e)(2)(C)(i) account for the risks of establishing liability, establishing damages, and maintaining certification throughout the trial. These factors "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Wilmington Tr. Sec. Litig.*, No. 10-CV-0990-ER, 2018 WL 6046452, at *5 (D. Del. Nov. 19, 2018) (quoting *In re Prudential Ins. Co of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998)). As to the risks of establishing liability, this factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995). As to damages, this factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant Corp. Litig.*, 264 F.3d 201, 238–39 (3d Cir. 2001) (*quoting Gen. Motors*, 55 F.3d at 816). Finally, this factor takes into account the likelihood of maintaining a class certification if the action were to proceed to trial. *In re Warfarin*, 391 F.3d at 537.

Here the Plaintiff faced significant risks. As discussed above in Section IV.B, the Parties had different views about the likely outcome of the litigation and the proper calculation of fair market value of BSC stock at the time of the ESOP Transaction.

Defendants contend that the Plan and its participants were not harmed at all. Plaintiff, on the other hand, argued that the Plan incurred significant financial loss through its overpayment for BSC shares. That core dispute had not been resolved at the time the Parties reached the Settlement, and the uncertainty put all Parties at great risk. Counsel for the Parties, having litigated similar issues extensively in the past, were fully aware of these risks and the possible outcomes, and the Parties were able to reach a settlement that balanced those risks.

E. The Ability Of The Defendants To Withstand A Greater Judgment

The seventh *Girsh* factor regards the ability of the defendant to withstand a greater judgment. Plaintiff submits that this factor is not a significant concern in this case because it did not directly factor into the Parties' negotiations. Nonetheless, the balance of other factors still supports approval of this Settlement. *See In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-2002, 2016 WL 3584632, at *16 (E.D. Pa. June 30, 2016) ("Even if the Court were to presume that the defendants' resources far exceeded the settlement amount, in light of the balance of the other factors considered which indicate the fairness, reasonableness, and adequacy of the settlement, the ability of the defendants to pay more, does not weigh against approval of the settlement."); *Int'l Fin. Corp.*, 2024 WL 4384970, at *8 (D. Del. Oct. 3, 2024) ("the neutrality of this factor does not weigh against final approval of the settlement where, as here, the other *Girsh* factors support a conclusion that the settlement is fair, reasonable, and adequate.")

F. The Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And The Attended Risks Of Litigation

The eighth and ninth *Girsh* factors and Rule 23(e)(2)(C)(i)-(iv) assess the range of reasonableness of the settlement fund in light of the best possible recovery and the risks of litigation. These factors weigh "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, . . . compared with the amount of the proposed settlement." *Prudential*, 148 F.3d at 322.

As courts in this Circuit have noted, "in conducting the analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011). Indeed, even recoveries representing a very small percentage of the defendant's maximum exposure, which this is not, may be found to be fair, adequate and reasonable. *See, e.g.*, *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"); *Sullivan*, 667 F.3d at 323 (noting the importance of weighing "the realistic, rather than theoretical, potential for recovery after trial" in comparing the value of settlement versus trial); *O'Hern v. Vida Longevity Fund, LP*, No. CV 21-402-SRF, 2023 WL 3204044, at *6 (D. Del. May 2, 2023) (approving a settlement which would "result in recovery of about 5.4%" of potential losses without risk which was "in line with recoveries in comparable settlement agreements approved by courts.")

Considering the costs, risks and delay of trial and appeal, the immediate and certain recovery of $8 million outweighs the uncertain possibility of a greater amount in the future, particularly given the amount of time it would take through trial and appeals for any judgment to be reduced to actual payment to Plan participants.

In cases, such as this one, alleging that the trustee violated ERISA by causing an employee stock ownership plan to pay too much for the stock of a privately held company, Plaintiff maintains that the measure of loss is the difference between what the plan paid for the stock and what the stock was worth at the time of the transaction. *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 Trust Servs., Inc.*, No. 12-4450, 2017 WL 1232527, at *81 (D.N.J. Mar. 31, 2017). Applying that theory, Plaintiff's valuation expert opined that the Plan paid approximately $24 million in excess of fair market value in the ESOP Transaction. Plaintiff's expert reached this opinion by correcting what he saw as errors in the report provided by Wilmington Trust's financial advisor in the Transaction. However, as noted above, Plaintiff faced substantial challenges in litigation, and Defendants retained several experts that concluded there was no overpayment and that Plaintiff's valuation expert's opinions were unsound. Ultimately, these subsequent events made the outcome of further litigation uncertain at best. Certain recovery of $8 million—approximately 33% of the best possible potential recovery and an average of $15,000 per Settlement Class Member before fees and expenses–represents a good result for the Settlement Class.

This case is within range of reasonableness that other courts found in the limited number of cases Plaintiff has been able to find where there was a specific comparison of settlement value with the "best possible recovery." Here, Settlement Class Members will receive approximately 33% of the "best possible recovery." In *Pfeifer v. Wawa, Inc.*, an ESOP case, the court concluded that a settlement representing between 25% (under one damages theory) and 50% (under the other damages theory) fell within the permissible range. No. 16-497, 2018 WL 4203880, at *9 (E.D. Pa. Aug. 31, 2018). In *McDonough v. Toys R Us, Inc.*, cited by *Pfeifer,* the court concluded that a settlement that represented approximately 24% of estimated actual damages was reasonable and it had "upheld far smaller settlements." 80 F. Supp. 3d 626, 646 (E.D. Pa. 2015). In *O'Hern*, the court approved a settlement of 5.4% of the losses estimated by the plaintiff's damages expert. 2023 WL 3204044, at *6. Likewise, in *Hochstadt v. Boston Sciences Corp.*, the parties settled for $8.2 million in a case that was estimated at the high end by the plaintiffs' counsel to be $160 million and more conservatively by the court to be $30 million. 708 F. Supp. 2d 95, 108–09 (D. Mass. 2010). And in *Mehling*, the court found that a settlement of 20% of the "best possible" recovery was comparable to other class settlements approved in that district. 248 F.R.D. 455, 462 (E.D. Pa. 2008); *see also In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. 08-CV-285, 2010 WL 547613, at

*9 (D.N.J. Feb. 9, 2010) (approving settlement of $41.5 million where the damages would have been "substantial in light of the billions of dollars grossed from global sales").

The 33% recovery of the best possible result in this case is particularly appropriate in the ERISA context. *See Moon v. E.I. du Pont de Nemours & Co.*, No. 19-CV-1856-SB, 2023 WL 1765565, at *3 (D. Del. Feb. 3, 2023). In *Moon* the court concluded that the settlement recovery was "especially reasonable considering the risks of continuing litigation" because "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation;" plaintiff's legal theories were novel, fact-intensive, and relied on experts; and defendant raised several affirmative defenses which create expense and uncertainty. *Id.* Thus, as in *Moon* and *Vytorin Erisa Litigation*, the "benefit conferred by the Settlement in this case" is "substantial" and "represents a better option than little or no recovery at all." 2010 WL 547613, at *9. Given the potential defenses and uncertainty inherent in any dispute about business valuation and the attendant risk of recovering nothing for the Plan participants, Plaintiff believes the proposed Settlement represents a good result for the Settlement Class.

G. The Effectiveness Of The Proposed Method Of Distributing Relief To The Class

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 contemplates Defendants directing BSC to provide the Settlement Administrator with the names and last known addresses of the Settlement Class Members. Settlement Agmt. ¶ 2.2.3. Defendants shall also cause the recordkeeper or third-party administrator for the ESOP to provide to the Settlement Administrator (1) the number of vested shares of BSC stock allocated to the ESOP accounts of Class Members and (2) if the Class Member received a prior distribution of all or a portion of the Class Member's account balance, the number of vested shares of BSC stock allocated to their ESOP account as of the date prior to any distribution. *Id.* The Settlement Administrator will use that information to make distributions to Settlement Class Members in accordance with the Plan of Allocation. No claim forms are required. This method of distributing relief is both effective and efficient.

H. The Terms Of The Proposed Award Of Attorneys' Fees

Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. As described above in Section III.D, Plaintiff's counsel will file an application seeking an award of attorneys' fees, not to exceed one-third of the Settlement Amount, plus reimbursement of litigation expenses.

I. The Proposal 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 in Section II.C above, allocations to Settlement Class Members are based on the proportion to the company shares that he or she held in the Plan. Settlement Agmt. ¶ 8.2.3.

The proposed Settlement provides substantial relief to the Settlement Class and has no obvious deficiencies such as preferential treatment to a portion of the Class. See *Mehling*, 246 F.R.D. at 473 fn. 3 (granting preliminary approval to pension plan class action settlement allocating settlement payment on *pro rata* basis).

In sum, the proposed Settlement is a fair compromise of the Settlement Class's claims. Porter Decl. ¶ 18.

J. Agreements Made in Connection with the Settlement

Pursuant to Rule 23(e)(3), the Parties have entered an agreement in connection with the Settlement. Section 11.2 of the Settlement Agreement permits Plaintiff's Counsel and Defendants' Counsel to reach a separate agreement on any public comment that can be made by each of them on the Covered Topics. Pursuant to that provision, Plaintiff's Counsel and Defendants' Counsel have entered an agreement addressing what public comments they can make on the Covered Topics. A copy that agreement is available to the Court upon request.

K. The Court Should Approve The Class Notice And Schedule A Fairness Hearing

Pursuant to Rule 23(e)(1), 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]." Additionally, Rule 23(c) gives the district court discretion as to "appropriate notice" for a class certified under Rule 23(b)(1) or (b)(2). Fed. R. Civ. P. 23(c)(2)(A). In order to satisfy due process concerns, notice to class members must "apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *4 (quoting *Prudential*, 148 F.3d at 327). "To meet this standard, notice must inform class members of (1) the nature of the litigation; (2) the settlement's general terms; (3) where complete information can be located; and (4) the time and place of the fairness hearing and that objectors maybe heard." *Id.* at *3 (quotation omitted); *see also In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("Generally speaking," notice is sufficient if it "enable[s] class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement").

In addition, Rule 23(e) gives the district court discretion as to the manner of the notice. Fed. R. Civ. P. 23(e)(1). It is well-established that notice sent by first class mail to each member of the settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974).

As described in Sections III.C and III.F above, the Parties have agreed, subject to Court approval, to a Class Notice plan, which calls for individual notice to Settlement Class Members. The Class Notice, which is attached to this Motion for Preliminary Approval as Exhibit 1, will be sent by mail to each Class Member no later than 30 days after the Court' preliminary approval of the settlement. The proposed Class Notice describes in plain English: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the procedure and timing for objecting to the Settlement; and (iv) the date and place for the Fairness Hearing. This Class Notice and the manner in which it will be disseminated to the Settlement Class Members satisfy Rule 23(e)(1) and Constitutional due process and should be approved by the Court. Plaintiff requests that the Court approve RG2 as Settlement Administrator. RG2 has extensive experience in the administration of settlements of this type. *See* Exhibit B to Porter Decl.

Finally, the Parties request that the Court schedule a Fairness Hearing on Plaintiff's motion for final approval of the Settlement and motion for an award of reasonable attorneys' fees and expenses, and Service Award to Plaintiff, as set forth in the proposed Preliminary Approval Order, attached to the accompanying motion as Exhibit 1. This will establish a reasonable and efficient process for disseminating notice, providing the opportunity for Settlement Class Members to object, and considering final approval of the Settlement.

V. THE COURT SHOULD CERTIFY A RULE 23 SETTLEMENT CLASS

Plaintiff also moves for an order certifying this litigation for settlement purposes as a class action pursuant to Fed. R. Civ. P. 23. The proposed Class is defined as: "All participants in the BSC Venture Holdings, Inc. Employee Stock Ownership Plan and the beneficiaries of such participants as of the date of the 2016 ESOP Transaction through and including December 31, 2024." Plaintiff is a participant in the Plan and he brings this Lawsuit on behalf of the Plan and its participants.

Plaintiff's claims are tailor-made for class certification. Rule 23(a) is easily met as to all claims because the Class consists of at least 500 members; the questions of fact and law surrounding Defendants' conduct are the same for all Class members; Plaintiff's claims are typical of the Class, and Plaintiff and his counsel have and will adequately represent the Class. The Plan was established for the common benefit of all its participants and its assets are held in a common trust. All participants in the Plan hold the same investment—BSC common stock—in their individual Plan accounts. Defendants owed all participants the same duties under ERISA. As detailed in the Complaint and further described below, Defendants either breached their fiduciary duties or otherwise violated ERISA as to all Class members or to none, and all Class members suffered the same injuries as a result. As these claims are brought on behalf of the Plan pursuant to ERISA, any recovery and relief belongs to the Plan, all participants in or beneficiaries of the Plan have the same rights under the Plan and are afforded relief pursuant to the same rights under ERISA's remedial provisions set forth in ERISA § 502.

The Class satisfies all the requirements of Fed. R. Civ. P. 23(a) and 23(b)(1), and for the reasons stated below, this Court should appoint Bailey & Glasser LLP and Feinberg, Jackson, Worthman & Wasow LLP as Class Counsel.[5]

A. General Legal Standards

1. Class actions under Fed. R. Civ. P. 23

A plaintiff seeking certification of a class must show that the proposed class meets the four

[5] Major Khan, an attorney with MKLLC Law, was admitted *pro hac vice* and served as liaison counsel to Plaintiff. (D.I. 124, 125).

requirements of Fed. R. Civ. P. 23(a)—numerosity, commonality, typicality, and adequacy—and one of the subsections of Fed. R. Civ. P. 23(b). *See Marcus v. BMW of North America, LLC*, 687 F.3d 583, 590 (3d Cir. 2012). A plaintiff does not bear a burden of "absolute proof" but, rather, "the preponderance of the evidence standard governs." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 484-85 (3d Cir. 2015). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) (citation omitted) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

"By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Therefore, "Rule 23 unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Id.* at 406. ERISA § 502(a)(2) actions on behalf of defined contribution plans, like this action, are certifiable under Rule 23. *See Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 136 (3d Cir. 2022).

2. ERISA fiduciary claims are well-suited for class treatment

Courts recognize that ERISA fiduciary claims are generally well-suited for class treatment. *See Nistra v. Reliance Trust Co.*, 2018 WL 835341 (N.D. Ill. Feb. 13, 2018); *In re YRC Worldwide, Inc. ERISA Litig.*, 2011 WL 1303367, at *9 (D. Kan. Apr. 6, 2011) ("[T]he vast majority of courts faced with [ERISA claims against fiduciaries] conclude that [class] certification is appropriate"). That is because suits under ERISA § 502(a)(2) are derivative in nature and focus on the injury to the plan from the fiduciary's alleged violation, rather than on injury to the individual participants.

See Nistra, 2018 WL 835341, at *3; *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813-14 (7th Cir. 2013). Courts across the country thus regularly certify similar ESOP class actions alleging breaches of ERISA because such actions are "typical" and "paradigmatic" examples of cases appropriate for certification. *See, e.g., Guidry v. Wilmington Trust*, N.A., 333 F.R.D. 324 (D. Del. 2019) (certifying a class alleging breaches of fiduciary duty and prohibited transaction claims brought by ESOP participants); *Cunningham v. Wawa, Inc.*, 387 F. Supp. 3d 529 (E.D. Pa. 2019) (same); *Hurtado v. Rainbow Disposal Co.*, 2019 WL 1771797, at *11 (C.D. Cal. Apr. 22, 2019) (same)*; Douglin v. GreatBanc Trust Co.*, Inc., 115 F. Supp. 3d 404, 412 (S.D.N.Y. 2015) (finding an ESOP class alleging ERISA fiduciary claims to present a "paradigmatic" example of a Rule 23(b)(1) class); *Godfrey v. GreatBanc Trust Co.*, 2021 WL 679068 (N.D. Ill. Feb. 21, 2021); *Chesemore v. Alliance Holdings, Inc.*, 276 F.R.D. 506 (W.D. Wis. 2011) (certification under 23(b)(1)(A) & (B), (b)(2)). Indeed, the Third Circuit has held that ERISA "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." *Boley*, 36 F. 4th at 136 (quoting *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009)).

B. The Class Satisfies Rule 23(a)'s Requirements

Every class must satisfy the criteria of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a); *Marcus,* 687 F.3d at 590. As in numerous other ERISA class actions, those requirements are easily met here.

1. The class is so numerous that joinder of all members is impracticable.

Rule 23(a)(1) permits class treatment where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, this prong is met if the named plaintiff "demonstrates that the potential number of plaintiffs exceeds 40." *Ninivaggi v. Univ. of*

Delaware, 2023 WL 2734343, at *3 (D. Del. Mar. 31, 2023) (citing *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001)). Here, the Class far exceeds 40 members, as there were 423 participants in the Plan as of December 31, 2017, and 534 participants in the Plan as of December 31, 2023. *See* Compl. ¶ 97; 2017 and 2022 Form 5500s (D.I. 117-4 and 117-5) at Part II, 6(f). The numerosity requirement is satisfied. *See Cunningham*, 387 F. Supp. 3d at 539 (in ESOP case finding subclasses that included hundreds of participants satisfied numerosity requirement).

2. The commonality requirement of Rule 23(a) is satisfied.

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." "The bar is not high." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 393 (3d Cir. 2015). It "does not require identical claims or facts among class member[s]." *Marcus*, 687 F. 3d at 592-93. "[A] single [common] question" will satisfy Rule 23(a)(2). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Commonality exists if the plaintiff's claims "depend upon a common contention" that is "of such a nature that it 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." *Id.* at 350. "[A]s long as all putative class members were subjected to the same harmful conduct by defendant, Rule 23(a) will endure many legal and factual differences among the putative class members." *In re Cmty. Bank*, 795 F.3d at 397.

Claims that a stock was improperly valued or sold at an incorrect price, such as those at issue here, satisfy the commonality requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182–83 (3d Cir. 2001) (finding common questions of law and fact under Rule 23(a)(2) as to the sale of securities at the price offered on the central National Best Bid and Offer system without investigating other, potentially higher prices); *Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (finding common issues where plaintiff alleged that defendants sold ESOP stock for less than fair market value); *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 462–63 (E.D. Pa. 2000) (certifying claim that Ikon stock price had been artificially inflated).

Commonality requirements in ERISA cases are typically satisfied because a class of participants in the same benefit plan may assert identical legal claims arising from the same common nucleus of operative facts, without factual variations between class members. *See Cunningham*, 387 F. Supp. 3d at 539; *Guidry*, 333 F.R.D. at 329 (finding commonality because "[t]he class claims here all depend on the question of whether the ESOP paid an inflated price for" company stock); *see also Nistra*, 2018 WL 835341, at *2 (finding commonality in ERISA action against trustee arising from ESOP's purchase of private company stock); *Douglin*, 115 F. Supp. 3d at 410 (noting an ERISA breach of fiduciary duty that affects all participants and beneficiaries is a common issue of fact and law); *Neil*, 275 F.R.D. at 260-61(finding commonality satisfied where plaintiffs' claims stemmed from the ESOP's purchase of Tribune Company stock); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 74 (S.D.N.Y. 2006) (noting that in general, ERISA liability for breach of fiduciary duty is common to all class members).

This case is based on a single transaction involving a single security and involves multiple common questions of law and fact. Common questions include:

- Whether Wilmington Trust was a fiduciary under ERISA for the Plan;
- Whether Wilmington Trust's fiduciary duties under ERISA included serving as trustee for the Plan in the Plan's acquisition of BSC stock;
- Whether the Individual Defendants were parties in interest under ERISA;
- Whether Wilmington Trust breached its fiduciary duties and caused a prohibited transaction under ERISA by permitting the Plan to purchase BSC stock from the sellers;
- Whether Wilmington Trust caused the Plan to engage in a prohibited transaction under ERISA by causing the Plan to take a loan from parties in interest;
- Whether the Individual Defendants knew or should have known about the prohibited

transaction or Wilmington Trust's breaches of fiduciary duty;

- The amount of compensation, direct or indirect, received by the Trustee in connection with the ESOP Transaction;
- Whether any affirmative defenses apply to the ERISA claims asserted;
- The amount of losses suffered by the Plan and its participants as a result of Defendants' ERISA violations; and
- The amount of profits collected by the Individual Defendants and their earnings thereon.

Proof on each of these issues will necessarily be proof for the entire Class because the proof goes to Wilmington Trust's fiduciary obligations to the Plan and to prohibited transactions involving the Plan, not to individual class members. Put simply, commonality is evident because "Plaintiffs' claims do not focus on injuries caused to each individual [ESOP Participant], but rather on how the Defendants' conduct affected the pool of assets that make up the [ESOP]." *Hurtado*, 2019 WL 1771797, at *7 (citation omitted). The commonality requirement is met.

3. The typicality requirement is satisfied.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "[T]ypicality, as with commonality, does not require that all putative class members share identical claims." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531–32 (3d Cir. 2004). The typicality requirement ensures that "class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." *In re Schering Plough*, 589 F.3d at 597. This analysis "focuses on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *Id.* at 597–98. The Third Circuit has emphasized that this analysis sets a "'low threshold' for typicality." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016).

The similarity between claims of the representative and those of the class "does not have to be perfect." *In re Schering Plough*, 589 F.3d at 598. "[T]he named plaintiffs' claims must merely be 'typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.'" *Id.* (quoting *Beck v. Maximus,* 457 F.3d 291, 295–96 (3d Cir. 2006)). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 428 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 311 (3d Cir. 1998)) (internal quotations omitted). "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal for and by Kanter v. Casey,* 43 F.3d 48, 58 (3d Cir. 1994) (citation omitted).

In ERISA cases alleging breach of fiduciary duty, courts frequently find that ERISA claims meet the typicality requirement. *See Pfeifer v. Wawa, Inc.*, 2018 WL 2057466, at *4 (E.D. Pa. May 1, 2018) (finding typicality where "Class Representatives' stock was sold at the same price, after the same valuation process, and in the same circumstances as every other Class Member."); *Mehling*, 246 F.R.D. at 475 (improper investment into proprietary funds); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 167-68 (E.D. Pa. 2009) (certifying claims that defendants breached their fiduciary duties by making unauthorized sales of stock). By definition, a fiduciary duty action brought pursuant to ERISA §§ 409(a) and 502(a)(2) is brought on behalf of the plan and any recovery must be paid "to such plan." 29 U.S.C. §§ 1109(a), 1132(a)(2). Courts generally find that ERISA cases arising under § 502(a)(2) meet the typicality requirement because the "action is brought on behalf of the Plan, not the individual participants, so that Plaintiff's claims, of necessity, are typical of the claims of the members of the proposed class." *Lively*, 2007 WL 685861, at *10.

Here, the Plaintiff was a participant in the Plan during the relevant time period. *See* Declaration of Marlow Henry ("Henry Decl.") (D.I. 119) ¶ 5. The Plan's primary asset was the BSC stock it purchased in the ESOP Transaction. In *Neil v. Zell*, an ERISA case arising from ESOP transactions, the court held that the named plaintiffs satisfied the typicality requirement because they "held the same investment as did all other members of the . . . ESOP"–employer stock. 275 F.R.D. at 261; *see also Guidry*, 333 F.R.D. at 330 (finding typicality because plaintiff's "claim, like those of other class members, is that the [ESOP] transactions illegally diminished the value of his retirement account"); *Pfeifer*, 2018 WL 2057466 at *4.

Plaintiff seeks to recover the Plan's losses and other relief on behalf of the Plan as a whole. All losses arising from the allegedly faulty valuation of the stock and the prohibited transactions flow to Plan participants in proportion to the number of BSC shares allocated to their respective accounts. *See Perez v. Bruister*, 823 F.3d 250, 258 (5th Cir. 2016). Because of the harm common to all Plan participants from Plaintiff's well-pled allegations, Defendants cannot "distinguish Plaintiffs' circumstances from other ESOP Participants and beneficiaries." *Hurtado*, 2019 WL 1771797, at *8 (typicality established because allegations focus on the conduct of Defendants as to the ESOP as a whole and not on conduct specific to any particular Plaintiff). Moreover, the remedies pursued by Plaintiff for the Plan—including recovery of losses and other compensation arising from the breaches—benefit the Plan and ultimately will benefit all Class members in a like manner. Thus, as the claims of all Class members stem from a single event and are based on the same legal or remedial theory on behalf of the Plan, Plaintiff's claims are not merely "typical," but identical.[6]

4. Plaintiff is an adequate class representative.

Rule 23(a)(4) requires that plaintiffs "fairly and adequately protect the interests of the class," meaning that a plaintiff must have the same interests and suffer the same injury as the class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997). The Third Circuit has recognized that this inquiry serves two purposes: "to determine [1] that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, . . . and [2] that there is no conflict between the individual's claims and those asserted on behalf of the class." *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 132 (3d Cir. 2012). These requirements are met here.

First, a class representative need only possess "a minimal degree of knowledge necessary to meet the adequacy standard." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (reversing denial of class certification) (internal quotations omitted). The proposed Class Representative has been actively engaged in the litigation including steadfastly participating as a plaintiff for five years; sitting for a 1.5 hour deposition; and providing documents to counsel used to draft the Complaint and respond to discovery requests propounded by Defendants. Henry Decl. ¶ 9. Plaintiff is committed to advancing the Class members' rights in this lawsuit, believes that he can fairly and adequately represent the interests of the members of the Class, and has no known interest that would be adverse to or in conflict with those of the other Class members. *See id*. ¶ 8.

Second, there are no conflicts between Plaintiff and the interests of the Class. With respect

[6] While Defendants have asserted a number of affirmative defenses, these defenses overwhelmingly implicate facts related to Defendants, the Plan or the Class as a whole. *See*, *e.g.*, Sass and Croft Affirmative Defenses (D.I. 55 at 31-33) asserting affirmative defenses of, *inter alia*, ERISA § 408 exemption; lack of intent; lack of knowledge; prudent process; contribution; lack of damages; see also Wilmington Trust Affirmative Defenses (D.I. 56 at 25-26) asserting affirmative defenses of, inter alia, compliance with requirements of ERISA standards; payment at no more than fair market value, and § 408 exemption.

to any conflicts of interest, there are two questions to address: (1) whether an intra-class conflict exists, and if so, (2) whether the conflict is "fundamental." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) ("[N]ot all intra-class conflicts will defeat the adequacy requirement."). "A fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Id*. (internal quotations omitted). Here, the named Plaintiff asserts claims on the Plan's behalf and requests no individual relief. All members of the Class have identical claims and have suffered the same injury. There is no claim that any member of the Class benefited from the ESOP Transaction. Any possible factual distinctions between Plaintiff and Class members are insignificant. This case is not unique in that respect. In an ERISA action such as this, the proposed class representative and the class members share the same interests because each class member is bringing suit on the plan's behalf to recover plan losses caused by the defendants' alleged breaches of the statute. *See Lively*, 2007 WL 685861, at *13; *see also Abbott*, 725 F.3d at 813-14; *Bruister*, 823 F.3d at 258.

Third, for the reasons discussed below in Section III.D, Plaintiff's counsel is more than adequate. The adequacy requirement of Rule 23(a)(4) is met.

C. The Class May Be Maintained Under Rule 23(b).

In addition to Rule 23(a), a case must satisfy one of the three alternative requirements of Rule 23(b). This action meets the requirements of Rules 23(b)(1). "Most ERISA class actions are certified under Rule 23(b)(1)." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008). "[T]he unique and representative nature of an ERISA § 502(a)(2) suit" makes such claims particularly appropriate. *Stanford*, 263 F.R.D. at 174; *see also DiFelice*, 235 F.R.D. at 80 ("given the derivative nature of suits brought pursuant to § 502(a)(2) on behalf of the Plan, 'ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class.")

1. The class meets the requirements of Rule 23(b)(1)(B).

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 "the adjudication of the rights of all participants in a fund in which the participants have common rights." *Id.* at 834 n.14. Rule 23(b)(1)(B) is designed for "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 Notes to 1966 Amendment. That precisely describes the claims here.

Claims involving ERISA breaches of fiduciary duty and prohibited transactions must be brought in a representative capacity on behalf of the plan under § 502(a)(2) for § 409 relief. 29 U.S.C. §§ 1109, 1132(a)(2); *In re Schering Plough*, 589 F.3d at 594-95. Thus, courts recognize that ERISA cases are the classic examples of Rule 23(b)(1)(B) class actions. *See*, *e.g., Neil*, 275 F.R.D. at 267-68; *DiFelice*, 235 F.R.D. at 80.

> [G]iven the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief.... There is also risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether [defendant] had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions.

In re Ikon Office Solutions, 191 F.R.D. at 466 (citations omitted). This is particularly true for cases involving an ESOP. *See*, *e.g.*, *id.* at 466-67 (certifying 23(b)(1) class).

Because Rule 23(b)(1)(B) was designed for actions alleging breach of fiduciary duties by trustees or establishing the rights of participants in a fund, numerous courts have found that ERISA claims determining rights or benefits under a plan or claims involving breaches of fiduciary duty are suitable for certification under this Rule. "[T]he structure of ERISA favors the principles [of] Rule 23(b)(1)(B), since the statute creates a 'shared' set of rights among the plan participants by imposing duties on the fiduciaries relative to the plan" and it "structures relief in terms of the plan and its accounts, rather than directly for the individual participants." *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 2017 WL 5664850, at *17 (S.D.N.Y. Nov. 27, 2017) (quoting *Kindle*, 315 F.R.D. at 12); *see also Guidry*, 333 F.R.D. at 331 (D. Del. 2019) (certifying class under 23(b)(1)(B)); *Pfeifer*, 2018 WL 2057466, at *4 (certifying ERISA fiduciary duty claims under Rule 23(b)(1)); *Sessions v. Owens-Illinois, Inc.*, 267 F.R.D. 171, 179 (M.D. Pa. 2010) (certifying ERISA benefits claims under Rule 23(b)(1)(B)); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001) (certifying ERISA fiduciary claims under Rule 23(b)(1)(B)); *Ikon*, 191 F.R.D. at 466 (certifying claims for fiduciary duty under Rule 23(b)(1)).

This type of private company ESOP case is often certified under Rule 23(b)(1)(B). *See, e.g.*, *Nistra*, 2018 WL 835341, at *3; *Neil*, 275 F.R.D. at 267-68. Such certification is appropriate here where the central issue is whether Wilmington Trust caused the Plan to acquire BSC stock at more than fair market value and whether the selling shareholder knew or should have known. The key issues in the case thus focus on Defendants' conduct—principally, whether and how Wilmington Trust caused the complained of prohibited transactions and fiduciary breaches, the adequacy of its investigation into the value of BSC stock, the information used in its valuations, the conclusions drawn from that information, and the act of transacting certain business with the sellers. Thus, a judgment that Wilmington Trust breached ERISA would apply to the Plan as a whole and impact all Class members equally. Further, any money recovered will be paid to the Plan, meaning that resolution of these issues will affect *all* participants in the Plan.

2. The class meets the requirements of Rule 23(b)(1)(A).

Rule 23(b)(1)(A) provides that a class may be certified if prosecuting separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class. Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike . . . , or where the party must treat all alike as a matter of practical necessity." *Amchem*, 521 U.S. at 614 (quotation omitted). "ERISA requires plan administrators to treat all similarly situated participants in a consistent manner." *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008) (citations omitted). For this reason, courts have certified cases involving violations of ERISA under Rule 23(b)(1)(A). *See Moon v. E.I. du Pont de Nemours & Co.,* 2023 WL 1765565, at *2 (D. Del. Feb. 3, 2023); *Neil*, 275 F.R.D. at 267-68; *Knight v. Lavine*, 2013 WL 427880, at *4 (E.D. Va. Feb. 4, 2013); *Chesemore*, 276 F.R.D. at 517; *Buus v. WAMU Pension Plan,* 251 F.R.D. 578, 588 (W.D. Wash. 2008); *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 180 (S.D.N.Y. 2006); *Baker v. Comprehensive Emp. Sols.*, 227 F.R.D. 354, 360 (D. Utah 2005); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 425 (N.D. Okla. 2005). The Third Circuit has recognized that "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." *In re Schering Plough*, 589 F.3d at 604.

The risk of inconsistent adjudications is similarly apparent in this case. For example, the central issue in this case is whether the Plan acquired BSC stock at an appropriate valuation and pursuant to a good faith investigation. Separate lawsuits over these issues could result in different outcomes. Inconsistent adjudications on the true fair market value of BSC stock at the time of the Plan's stock purchases obtained by similarly-situated participants would make it impossible for the Plan administrator to treat similarly-situated participants alike. Accordingly, certification under

Rule 23(b)(1)(A) is also appropriate.

D. Plaintiff Is Represented By Qualified And Competent Counsel.

"Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) . . . those questions have, since 2003, been governed by Rule 23(g)." *Sheinberg v. Sorenson*, 606 F.3d 130, 132 (3d Cir. 2010). Rule 23(g) lays out factors such as (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g). Plaintiff's counsel in this case are well-qualified.

Gregory Porter is a partner with Bailey & Glasser LLP. He has specialized in employee benefits and ERISA litigation since 1998. Porter Decl. ¶¶ 10-14. He has served as class counsel or co- counsel in numerous ERISA class actions, including ESOP class actions that proceeded to and through trial such or resulted in settlements for the retirement plan. *See Brundle v. Wilmington Trust N.A.*, 241 F. Supp. 3d 610 (E.D. Va. 2017) ($29.7 million trial judgment); *Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016) (reversing trial court ruling on motion to dismiss in an ESOP class action; lawsuit settled for $2.3 million); *Jessop v. Larsen*, No. 14-cv-00916 (D. Utah) ($19.8 million settlement secured for ESOP plan participants in 2017); *Swain v. Wilmington Trust, N.A.*, No. 17-071-RGAMPT (D. Del.) ($5 million settlement); *Casey v. Reliance Trust Co.*, 18-cv-00424-ALM-CMC (E.D. Tex.) ($6.25 million settlement for ESOP plan participants); *Choate v. Wilmington Trust, N.A.*, 17-cv-250-RGA (D. Del.) ($19.5 million settlement); *Blackwell v. Bankers Trust Co.. South Dakota*, No. 18-cv-141-KHJ-FKB (S.D. Miss.) ($5 million settlement; *Fink v. Wilmington Trust, N.A.*, No. 19-cv-1193-CFC (D. Del.) ($5.5 million settlement); *Godfrey v.*

GreatBanc Trust Co., 18-cv-7918 (N.D. Ill.) ($16.5 million settlement); *Threadford v. Horizon Trust and Investment Management, N.A.*, No. 20-cv-750 ($4.1 million settlement); and *Nistra v. Reliance Trust Co.*, No. 16 C 4773 (N.D. Ill.) ($13.36 million settlement). Porter Decl. ¶ 11. He also has significant experience in cases involving ERISA fiduciary duties. *Id.* ¶¶ 13-14. Other attorneys involved in this action at Bailey & Glasser's team have also served as class counsel or co-counsel in numerous ERISA class actions, including ESOP class actions. *Id.* ¶¶ 15-17 and Exhibit A to Porter Decl.

Daniel Feinberg is a partner with Feinberg, Jackson, Worthman & Wasow LLP. He has specialized in employee benefits litigation since 1988. Declaration of Daniel Feinberg ("Feinberg Decl.") (D.I. 118) ¶ 7. He has served as class counsel or co-counsel in numerous ERISA class actions, including ESOP class actions such as *Neil v. Zell*, 275 F.R.D.256 (N.D. Ill. 2011) ($32 million settlement); *Smith v. GreatBanc Trust Co.*, 1:20-cv-02350 (N.D. Ill. 2023) ($14.8 million settlement); *Gamino v. KPC Healthcare Holdings, Inc.*, No. 5:20-CV-01126-SB-SHK, (C.D. Cal. 2023) ($9 million settlement); *Cunningham v. Wawa, Inc.*, 387 F. Supp. 3d 529 (E.D. Pa. 2019) ($21.6 million settlement); *Guidry v. Wilmington Trust, N.A.*, 333 F.R.D. 324 (D. Del. 2019) ($19.5 million settlement); *Kindle v. Dejana*, 238 F. Supp. 3d 353 (E.D.N.Y. 2017) ($2.5 million settlement following one day of trail); *Pfeifer v. Wawa, Inc.*, 214 F. Supp. 3d 366 (E.D. Pa. 2016) ($25 million settlement); *Fernandez v. K-M Indus. Holding Co., Inc.*, 646 F. Supp. 2d 1150 (N.D. Cal. 2009) ($55 million settlement). Feinberg Decl. ¶¶ 4-5. Not only do these attorneys and firms have extensive experience litigating class actions, including numerous ESOP cases, they have worked diligently to litigate the claims. Porter Decl. ¶¶ 6-9, 19; Feinberg Decl. ¶ 3. There should be no question that counsel have brought sufficient skill and resources to litigate this case. Thus, Plaintiff's counsel satisfy Rule 23(a)(4) and 23(g).

VI. CONCLUSION

The proposed Settlement meets the standard for preliminary approval. Accordingly, Plaintiff respectfully requests that the Court issue an Order: (a) certifying the Class for settlement purposes and granting preliminary approval of the Settlement Agreement, attached hereto as Exhibit 3; (b) approving the proposed Class Notice, attached hereto as Exhibit 1; (c) approving RG2 as the Settlement Administrator; (d) approving the Plan of Allocation, attached hereto as Exhibit 4; and (e) setting a date for a Fairness Hearing.