

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ANDREW SNITZER, et al.,

4 Plaintiffs,

5 v.

17-cv-05361 (VEC)

6 THE BOARD OF TRUSTEES OF THE
7 AMERICAN FEDERATION OF
8 MUSICIANS AND EMPLOYERS'
9 PENSION FUND, et al,

Defendants.

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10 New York, N.Y.
11 August 26, 2020
12 10:00 a.m.

Before:

13 HON. VALERIE E. CAPRONI,

14 District Judge

15 APPEARANCES

16 CHIMICLES & TIKELLIS LLP (DE)
Attorneys for Plaintiffs
17 BY: STEVEN A. SCHWARTZ
ROBERT J. KRINER, JR.

18 PROSKAUER ROSE LLP
19 Attorneys for Defendants
20 BY: MYRON D. RUMELD
JANI RACHELSON
DEIDRE GROSSMAN

21 DANIEL WALFISH
22 Attorney for Ad Hoc Coalition Objectors

1 (Case called)

2 THE COURT: Okay. Good morning, everybody. Welcome
3 to my dark courtroom. Here is what I'm going to do.

4 For the plaintiff, what lawyer is talking for the
5 plaintiff?

6 MR. SCHWARTZ: Good morning, your Honor. It's Steve
7 Schwartz. I'm here with my partner, Bob Kriner, but I will be
8 presenting for plaintiff.

9 THE COURT: Who is going to be speaking for defendant?

10 MR. RUMELD: Good morning, your Honor. This is Myron
11 Rumeld. I do have Jani Rachelson and Deidre Grossman if there
12 are questions appropriate for them to answer.

13 THE COURT: Are you having any difficulty hearing me?

14 MR. RUMELD: We can hear you, your Honor.

15 THE COURT: And for -- somebody does not have their
16 phone muted, and that means I am getting feedback. Please mute
17 your phone.

18 For the ad hoc coalition of objectors, do I have
19 Mr. Walfish?

20 MR. WALFISH: Good morning, your Honor. This is
21 Daniel Walfish.

22 Is the Court able to hear me?

23 THE COURT: I am. Good morning.

24 MR. WALFISH: Good morning.

25 THE COURT: I'm just trying to get people penned on to

1 the screen that I know are going to be speaking.

2 Okay. We've already talked about the fact that you
3 need to keep your phone muted when you're not speaking. I will
4 try to call on people so that we have a rational transcript of
5 what's going on.

6 I know someone is not muted because I just heard you
7 talking to someone. This is a warning to everyone who is a
8 guest on this phone. If you do not mute your phone, I'm going
9 to knock you off the call. So please mute your phones. Thank
10 you.

11 Here is going to be the order of today's argument.
12 We're going to start with plaintiffs' counsel, which will be
13 Mr. Schwartz. Then I'll hear anything that defense counsel
14 wants to say. I'll then hear from Mr. Walfish on behalf of the
15 objectors.

16 I then have three pro se objectors who want to be
17 heard. I will hear from them in the following order: First,
18 Ms. Bryant, then Mr. Stoner, and then is it Hosticka?

19 MR. HOSTICKA: Your Honor, it's Hosticka. Thank you.

20 THE COURT: If I mispronounce it when it comes back
21 around, I apologize.

22 MR. HOSTICKA: No problem.

23 THE COURT: And then we'll come back to Mr. Schwartz
24 to respond to anything he wants to respond to. So that's the
25 order of today's proceeding.

1 So with that, Mr. Schwartz, I'm going to turn the
2 floor over to you.

3 MR. SCHWARTZ: Thank you, your Honor. I appreciate
4 that we put a lot of paper in front of your Honor. So we
5 didn't want to be repetitive.

6 THE COURT: Hold on just a second.

7 This is my final warning on muting phones. Mute your
8 phone if you are not speaking. Only Mr. Schwartz's phone right
9 now should not be muted.

10 All right. Go ahead, Mr. Schwartz.

11 MR. SCHWARTZ: Thank you.

12 As I was saying, I'm happy to just answer questions
13 because I don't want to repeat what's in the papers. I know we
14 put a lot of paper in front of you. So if that's the way you
15 want to proceed, I'm happy to do it that way.

16 I'm prepared to just have on overall overview of why I
17 believe the settlement should be approved. And I'll start with
18 that, unless your Honor wishes to proceed in a different
19 manner.

20 THE COURT: Go ahead.

21 MR. SCHWARTZ: Thank you.

22 So with respect to objections, there are,
23 percentage-wise, a very small number of objections, less than
24 .1 percent. All of the organizations or locals that have
25 spoken up have supported the settlement.

1 Other organizations like the Musicians for Pension
2 Security -- they have not objected. While my clients,
3 Mr. Snitzer and Mr. Livant, appreciate and understand the
4 objectors' legitimate concerns and general concerns about the
5 Benefit cuts that could potentially reduce their pension, about
6 their concerns about the trustees' disclosures on fiduciary
7 breaches. We appreciate that.

8 But at the end of the day, it was Mr. Snitzer and
9 Mr. Livant who decided to step up and become class
10 representatives, and it was my firm that became the
11 court-appointed interim class counsel and then the class
12 counsel.

13 We maximized recovery in this case. We litigated as
14 hard as it could be litigated, negotiated as hard as it could
15 be negotiated. It is class representatives and class counsel
16 who get to make the initial judgment call whether we should
17 pocket the best possible settlement we're able to negotiate or
18 just simply go to trial and hope years down the road we can
19 maybe get more.

20 Our judgment call was that the plan needs the \$17
21 million now and it needs the governance provisions now, not
22 years from now. Under Rule 23(e), courts just generally don't
23 reject a settlement simply because a small minority of class
24 members want a slightly better or different settlement or think
25 they can better evaluate the risk and reward of proceeding to

1 trial or even if they just prefer to go to trial regardless of
2 any settlement.

3 At the end of the day, I think Mr. Walfish stated it
4 nicely in his brief that the standard is that the Court should
5 make an intelligent comparison between the settlement recovery
6 and the probable recovery at trial.

7 The objections really don't stick to that standard
8 because it appears to me that the objectors are just going to
9 be dissatisfied with any settlement short of placing the plan
10 in receivership. We don't think that maximalist position is
11 rooted in reality and did not warrant going to trial to try to
12 achieve that.

13 While the standard for approval is that the settlement
14 has to be fair, reasonable, and adequate -- and we think we
15 meet that minimum standard hands down -- this settlement was
16 much better than that.

17 It was our assessment and our expert's assessment that
18 this was the best that could be done, given the fact that we
19 have the leverage that we gained with the effective litigation
20 that we did which that created the leverage that we did.
21 Therefore, we think the settlement should be approved under the
22 Rule 23 standard and even if there was a tougher standard.

23 With regard to the arguments regarding the standard
24 for a release of claims for a case that someone said they want
25 to bring for the period of October 2017 through the present,

1 we've been through this in our papers.

2 The release that we drafted and submitted for
3 preliminary approval of the settlement agreement does not
4 release those claims. It was very clear. To the extent there
5 was any lack of clarity on that -- we don't think there was --
6 the defendants at ECF 189 made crystal clear in filing the
7 judicial admission. That's exactly what it means. These
8 people can file the 2017 to 2021 case if they want to. Let me
9 make very clear that release of those claims --

10 THE COURT: Mr. Schwartz, let me interrupt you for a
11 second. On the issue of release, the way you have drafted
12 this -- this is in the proposed final judgment. The release
13 appears on page 9 of that.

14 I don't like the way you drafted it. And I think,
15 based on the parties' submissions, I understand what the
16 parties have said. I think I understand it. I am proposing
17 that the final order be amended as follows. So if you could
18 all get it in front of you so you can follow me. This is page
19 9 of the proposed order. It's ECF document 195-1, page 9.

20 Mr. Schwartz, do you have it?

21 MR. SCHWARTZ: Yes, I do.

22 THE COURT: Mr. Rumeld, do you have it?

23 MR. RUMELD: I do. Sorry. I was on mute. Thank you.

24 THE COURT: That's okay.

25 Mr. Walfish, do you have it? You can just nod

1 vigorously. Okay. Everybody's got it in front of you.

2 Here is the proposed change. I don't like referencing
3 another document, document number ECF 189, in my order. So I'm
4 proposing the following, which, again, I believe is consistent
5 with the parties' intent.

6 On the third line, delete that phrase that begins
7 "consistent with" down through "release." So we will delete
8 "consistent with the condition imposed by the independent
9 settlement evaluation fiduciary regarding the scope of the
10 release --"

11 Someone does not have their phone muted because I am
12 hearing a side conversation.

13 The following phrase is deleted: "Consistent with the
14 condition imposed by the independent settlement evaluation
15 fiduciary regarding the scope of the release." Begin the
16 sentence as follows:" For the avoidance of doubt about the
17 scope of the release, the Court finds" then delete "hereby
18 incorporate the explanation of the release offered by
19 defendants in ECF number 189 and agrees that." I didn't use
20 the word "find."

21 So "The Court finds that the release is limited to the
22 period before the OCIO management date with respect to
23 decisions regarding, one, the plan's asset allocation,
24 investment return targets." And then the balance of your
25 language remains.

1 So let me read that to you one more time. The order
2 would provide as follows. Starting after the word "settlement
3 agreement" on the third line: "For the avoidance of doubt
4 about the scope of release, the Court finds that the release is
5 limited to the period before the OCIO management date with
6 respect to decisions regarding, one, the plan's asset
7 allocation, investment return targets, and the selection
8 (including the plan's OCIO), retention, monitoring," etc. So
9 that is my proposal.

10 Mr. Schwartz, is that consistent with the parties'
11 agreement regarding the scope of the release?

12 MR. SCHWARTZ: Yes, your Honor. I believe it's
13 100 percent consistent --

14 THE COURT: Hang on.

15 Mr. Schwartz, I can't hear you at all because someone
16 else is talking. That means a phone is not muted.

17 Hang on just a second.

18 (Pause)

19 THE COURT: Mr. Schwartz, is that consistent with your
20 understanding of the release?

21 MR. SCHWARTZ: Yes. I believe it's 100 percent
22 consistent with the release in the settlement agreement and
23 what we've tried to do in our proposed final order. I think
24 you may have done it better, but that's 100 percent consistent.

25 THE COURT: Mr. Rumeld, is that also your

1 understanding of the scope of the release?

2 MR. RUMELD: It is consistent with the scope of the
3 release. I am a little concerned, your Honor, that the
4 explanation we wrote in the brief as to why it's consistent
5 with the scope of the release is important for us for the
6 reasons that we said in the brief.

7 I do think it's important for the purposes of an
8 eventual claim, based on what we're hearing, that it be
9 understood, at least on the record, that the reason those items
10 are carved out is because they would be considered new claims.

11 THE COURT: I'm sorry. Say that again.

12 MR. RUMELD: I think it's important that it be clear
13 that the reason these items are carved out is because they
14 would probably be considered new claims and that's why they're
15 not released.

16 We made that point in our brief. I understand
17 your Honor's reluctance to incorporate that document. But if,
18 regrettably, there is a new case, it would be important that
19 that be the understanding.

20 THE COURT: So the order cross-references to the
21 release, and the order is discussing what is and is not in the
22 release.

23 So it all goes back to the release. Right?

24 MR. RUMELD: That's true. But we have accusations
25 that the claims postdating 2017 are a continuation of the

1 claims predating 2017. We've explained why we view any claims
2 postdating 2017 to be new claims, and that's why we believe
3 it's appropriate to carve them out.

4 THE COURT: They're not carved out. They're just not
5 released. That's my problem. The problem with the language
6 that you guys are using is it's confusing. There is a release.
7 If the claim was released, it was released. If it's not within
8 the release, it wasn't released, period.

9 I think you're making this more complicated than it is
10 because of arguments that were raised that, frankly, I didn't
11 buy. But I understand that they have concerns.

12 So the order makes it absolutely clear where the line
13 is drawn for purposes of the release. If it's not released,
14 whether you call it a new claim or anything else, it doesn't
15 matter. It wasn't released. Right?

16 MR. RUMELD: There needs to be insurance coverage for
17 a new claim.

18 THE COURT: I understand that.

19 MR. RUMELD: So our intention is not to release new
20 claims.

21 THE COURT: Meaning claims --

22 MR. RUMELD: Our intention is to release old claims.

23 THE COURT: That is very clear on the record of what
24 the intent of the release is.

25 MR. RUMELD: All right. Thank you. I appreciate your

1 making that statement, your Honor.

2 THE COURT: Understood.

3 Mr. Walfish, does that resolve your problem with the
4 scope of the release?

5 MR. WALFISH: Initially, yes, your Honor. And I
6 appreciate the Court's edits because they are precisely what I
7 would have suggested with one slight tweak. The settlement
8 agreement in 8.1.4 expressly retains as the trustee's
9 responsibility investment returns and risk objectives. So in
10 an ideal world --

11 THE COURT: Hold on one second.

12 Mr. Rumeld and Mr. Schwartz, please mute your phones.

13 MR. SCHWARTZ: Apologies.

14 THE COURT: Go ahead, Mr. Walfish.

15 MR. WALFISH: Your Honor, I was saying that the
16 settlement agreement makes very clear that going forward, the
17 setting of both investment return and risk objectives are the
18 trustee's responsibility.

19 So I would say that the Court's language goes almost
20 all of the way towards addressing the issue we raised. But the
21 language that the Court inserted after (i), the plan asset
22 allocation, should say "investment return and risk targets" or
23 "investment return and risk objectives."

24 THE COURT: Doesn't investment return targets
25 encompass within it risk?

1 MR. WALFISH: Yes, your Honor. It does. But the
2 settlement agreement, I presume, is worded the way it is
3 because the parties viewed those things as somehow different or
4 distinguishable. In fact, there was a dispute on the merits in
5 this case about exactly that.

6 So I am mostly quite comfortable with the Court's
7 edits but would say that if the goal is really to avoid any
8 ambiguity here, a reference to risk should be added to a
9 reference to return.

10 THE COURT: So what were you proposing? Investment
11 return and risk targets?

12 MR. WALFISH: I would say "objectives" because that's
13 the language in the settlement agreement as to what is the
14 trustee's ongoing responsibility.

15 THE COURT: Say that again.

16 MR. WALFISH: Your Honor, "investment return and risk
17 objective."

18 THE COURT: All right. Is there any objection to that
19 edit, Mr. Schwartz?

20 MR. RUMELD: No, your Honor.

21 THE COURT: Mr. Schwartz?

22 MR. SCHWARTZ: I don't have any objection to it. I
23 think it's duplicative, but I don't have any objection to it
24 because it's the same thing.

25 THE COURT: That's fine. Done.

1 Mr. Schwartz, I interrupted you because we were on the
2 release. So go ahead with your prepared remarks.

3 MR. SCHWARTZ: Thank you, your Honor.

4 With regard to the substance of the settlement, I
5 don't think anyone has objected to the amount of money that we
6 got from the trustees. I can say that we left nothing on the
7 table. I do believe Mr. Stoner has raised an objection that we
8 should have tried to get more money by suing other people like
9 Meketa and maybe other people.

10 We briefed that. Our view of the case is that the
11 focus should be on the trustees, which I also believe is the
12 focus of all of the objectors. And it was our assessment, not
13 just when we first started the case but throughout when
14 Mr. Kriner and I repeatedly's evaluated and re-evaluated this
15 issue that suing Meketa would have been counterproductive and
16 would have undermined the claims against the trustees and would
17 have undermined the ability to get and max out as much as we
18 could from the insurance providers for the trustees to pony up
19 as much as we got because it was the trustees' defense, oh,
20 let's blame Meketa. We relied on Meketa.

21 As we've said in our papers and as we've said in
22 evidence the reality is for the 2011 and 2015 asset
23 allocations, Meketa didn't say, rah, rah. We think you should
24 do this. We think you should take this much risk.

25 What Meketa said was if you want to have a target

1 investment return of 8 percent or 9 percent, which is really
2 high, this is the best way we can think of how you could do
3 that. But you, trustees, have to decide how much risk you
4 take.

5 So everything we would have done if we brought suit
6 against Meketa to prove that claim would have undermined the
7 claim against the trustees. And we thought that the claim
8 against the trustees was the primary one.

9 So that's why we did that, and we don't think that the
10 settlement should be disapproved simply because a single
11 objector thinks we should have sued someone else as part of the
12 mix, whoever that may be, whether it was Meketa or someone
13 else.

14 With respect to the governance provisions, which
15 appears to be the primary substantive objection, our view is we
16 got everything we could. It was a separate negotiation after
17 the money.

18 We literally risked the money portion of the
19 settlement by negotiating hard for several months on the
20 governance provisions. And the provisions that we got compare
21 favorably to all the other recent ERISA cases. We think that
22 Mr. Irving has very substantial and effective provisions and
23 powers to help prevent the trustees from misstepping again.

24 Again, under Rule 23, since we had provisions that are
25 more stringent, more comprehensive, more tailored to the

1 specific facts of the case, compared to all the other ERISA
2 settlements that have been approved in recent pension cases,
3 the easy answer is that easily satisfies the fair, reasonable,
4 and adequate standard under Rule 23. And we of course think it
5 goes much, much further above that.

6 Just a couple points. Mr. Walfish and the ad hoc
7 objectors' brief makes the point that if you don't have voting
8 power, you don't have any power. But the settlement says that
9 Mr. Irving must state his opinion on any matter on which
10 there's either a deliberation or a vote of the investment
11 committee. So he is actually going to be weighing in on every
12 single issue that will come before the investment committee for
13 deliberation or for a vote.

14 And he's made very clear in his supplemental
15 declaration that he is not going to sit like a wallflower in
16 the back and stay mute if he sees something that he doesn't
17 like.

18 He will speak up, and he will document. And he said
19 he will play it right down the middle. He's not going to favor
20 us; he's not going to favor defendants. He's just going to
21 call it as he sees it.

22 Second, on the issue of whether Mr. Irving or someone
23 else should have been a communications fiduciary, our view is
24 that it is class representative and class counsel who actually
25 litigate this case and actually know this case, it is our job

1 to prioritize settlement demands and asks.

2 THE COURT: Hang on. You sort of clicked out.

3 It's your job to prioritize settlement demands and
4 what?

5 MR. SCHWARTZ: And asks.

6 THE COURT: And asks. Okay.

7 MR. SCHWARTZ: Yes. Because many portions of
8 settlements like this end up in a zero-sum game where if you're
9 going to get something on this side, you're going to have to
10 give up something on the other side.

11 On the communications end, we first prioritized
12 disclosure regarding asset allocation and a comparison of the
13 results of actively managed funds to passively managed funds
14 because that was a goal not just in disclosures to class
15 members, the plan participants, but also, in our view, as a
16 goal for what the trustees had in front of them and understood
17 during board meetings. We wanted those two things to be
18 crystal clear.

19 If it had been disclosed from 2010 through 2016 that
20 the plan had the allocations, the emerging markets equities and
21 private equities that it did, it would have been very easy to
22 figure out, uh-oh, this is aggressive, way over the top.
23 Something must be wrong.

24 So first of all, we think that those disclosures on
25 those investment allocations and investment performance are

1 very important. And we got that. The objections about well,
2 what about having some fiduciary deal with disclosures about
3 the plan's funded status, I kind of feel like it's kind of like
4 the meme when I was a kid of after World War II, the proverbial
5 Japanese sailor who was on an island cut off from
6 communications and was fighting the war decades after it was
7 over, we have resolved the complaint about the disclosures
8 about the funded status from 2010 through 2017.

9 We have laid out what we believe the trustees did
10 wrong in the goriest detail, and there is no doubt about that.
11 And everyone knows now what they disclosed versus what the
12 reality was.

13 The MPRA ongoing process necessarily discloses the
14 funded status issues. Right now I understand that the MPRA
15 application has been at least provisionally denied. I won't
16 get into that.

17 But the ongoing MPRA application discloses the funded
18 status. We think that the deterrent effect of calling out
19 Milliman the way we did with the recent hide-the-ball documents
20 is a deterrent effect. The Moriarity deposition that my
21 partner, Mr. Kriner, took where we just went and, with the
22 skillful precision, laid out, this is what you disclosed. This
23 is what you knew. Why wasn't it there.

24 We think, plan counsel -- we think that the actuaries,
25 we think that the trustees, having gone through this process,

1 will be very hesitant to make the kinds of disclosures that
2 they did before.

3 And to the extent that there are class members who
4 still want more disclosure about the funded status, all they
5 have to do is send a Section 1021 ERISA request asking for the
6 quarterly report of the actuaries which you can get going back
7 years and obviously get going forward. And that will provide
8 the underlying details on that.

9 So if anyone thinks they don't have enough disclosure
10 on that, they have a handy tool under ERISA. They get it for
11 virtually free. And it made no sense for us to expend our
12 negotiating capital to have another layer of another
13 independent fiduciary on disclosure when we already got the
14 most important part of the disclosure and everything else we
15 that could get we could just get by sending a letter. So that
16 is our response to that objection.

17 THE COURT: Okay. Anything further?

18 MR. SCHWARTZ: I can respond to the other details of
19 objections after I hear what the objectors say. I won't repeat
20 what I said in my brief. Just briefly, service awards and the
21 relief for my clients, I'm happy to address that now or wait,
22 depending on your preference.

23 THE COURT: You can wait.

24 MR. SCHWARTZ: Okay. That's all I have for now, and I
25 appreciate your Honor giving me the time.

1 THE COURT: Okay. Thank you. Please mute your phone.

2 Mr. Rumfeld.

3 MR. RUMELD: Thank you, your Honor. Also, it's Rumeld
4 by the way.

5 THE COURT: I'm sorry. I'm totally sorry.

6 MR. RUMELD: This is my last chance to try and get it
7 right for you.

8 THE COURT: Have I consistently mispronounced it over
9 the entire case?

10 MR. RUMELD: No. It happens often.

11 THE COURT: I'm sorry.

12 MR. RUMELD: Thank you for giving me the opportunity
13 to speak.

14 I would like to comment on plaintiff's attorney fee
15 application and also just add a couple of thoughts about the
16 settlement itself. Plaintiffs have requested fees equal to
17 33 percent of the settlement pot, and that would be in addition
18 to the costs that they are seeking to recoup.

19 In response, among other things, we cited to some
20 surveys that have guided numerous courts, including this Court,
21 in determining the appropriate fee award. Those surveys, as we
22 explain, point towards an award of approximately 25 percent
23 rather than 33 percent. And I don't think we read any response
24 to why those surveys shouldn't be considered and followed here.

25 The adjustment to 25 percent would be rather

1 significant as it would leave this fund with another \$2 million
2 or so in net recovery. So we just wanted to reiterate that
3 point.

4 We also argued that any upward adjustment to the
5 25 percent on account of the success that plaintiffs claim to
6 have achieved was something that we disagreed with strongly.
7 Toward that end, we highlighted some of what we considered to
8 be the principal reasons plaintiff did not really present a
9 very strong case.

10 I don't intend to rehash all of these arguments right
11 now, but I would like to just identify a few key points that we
12 made that we don't feel plaintiffs were able or are able to
13 refute.

14 First of all, although the trustees are accused of
15 taking on too much investment risk following the financial
16 crisis, plaintiffs cannot identify any alternative strategy
17 that would have been calculated at the time to fare better than
18 the one that the trustees chose. We know this because
19 plaintiffs' own experts have admitted that they were not
20 prepared to do that.

21 Secondly, plaintiffs are unable to identify any
22 investment-related advice that was rendered by the plan
23 professionals and that the trustees ignored to the detriment of
24 the plan.

25 Plaintiffs cited to evidence of statements made by

1 other professionals, Mercer or the firms who applied for the
2 OCIO position. None of these firms were retained to provide
3 advice to the trustees, and none of them possessed the
4 requisite information to provide such advice, something that
5 plaintiffs' own experts eventually acknowledged.

6 Although plaintiffs' experts at one point accused the
7 trustees of acting contrary to the advice of the plan's
8 professionals, they eventually walked back those statements
9 when we confronted them with the record evidence at their
10 depositions as we showed in our papers.

11 Third point, in contending that the trustees hid the
12 ball on the plan's financial conditions, plaintiffs repeatedly
13 make the obvious error that helps to illustrate why their
14 communication claims, which really weren't freestanding claims
15 to begin with -- why these communication claims are much more
16 complex than they would have the Court believe.

17 On page 25 of their most recently filed brief, just by
18 way of example, they equate the trustees' awareness of the plan
19 being in critical status with an awareness of a looming
20 insolvency that they say we should have been disclosing years
21 before 2016 when we sent that letter.

22 The same accusation appears in their first brief, and
23 the same accusation also appears in the report of their expert,
24 Mr. Witz. In his supplemental report in response to Mr. Witz's
25 report, our expert, Cary Franklin, took Mr. Witz to task on

1 this issue.

2 He explained while critical status is a serious
3 condition that requires, among other things, that the plan
4 develop this rehabilitation plan, it does not signify an
5 impending or looming insolvency. In fact, the plan can be in
6 critical status indefinitely without ever heading to
7 insolvency.

8 The fact that our plan was entrenched in critical
9 status for several years beginning in 2011 and was not expected
10 to emerge unless it outperformed its assumptions did not mean
11 that the plan was on the brink of insolvency. And in fact, it
12 wasn't at that time, as Mr. Franklin explained in his report.

13 By equating critical status with impending insolvency,
14 plaintiffs are apparently conflating the concepts of critical
15 status with another status known as critical and declining
16 status. Critical and declining status means that the plan is
17 projected to be insolvent in 20 years, something we might all
18 consider to be a looming insolvency.

19 It is a term that first came into existence when MPRA
20 was passed in December of 2014. And in 2016 when the plan
21 suffered some poor investment returns, as did the rest of the
22 market that year, the plan nearly went into critical and
23 declining status for the first time.

24 That led to the disclosures, first in the summer in
25 the annual statement, and then in the September letter that

1 insolventcy was something that could happen and that the plan
2 could enter into critical and declining status as early as the
3 following year.

4 As it turned out, the plan did not enter into critical
5 and declining status the following year and didn't until 2019,
6 which is just an indication as to how movable these parts
7 really are.

8 Now, look. I don't mean to suggest that the plan's
9 financial condition was not of great concern well before 2016.
10 since the time of the financial crisis and the plan's entry
11 into critical status, there were ongoing discussions over the
12 fact that the funded status of this plan was declining and what
13 this could mean in the longterm for the plan.

14 As Mr. Franklin observed, there was no risk at that
15 time of an imminent insolventcy, and it would have been
16 inaccurate to communicate that the plan was at risk of an
17 imminent insolventcy.

18 Nevertheless, the trustees wrestled with the relative
19 merits of sticking to the facts on the ground and reporting
20 what the actual projections that ERISA required were as opposed
21 to volunteering more far-reaching statements about what might
22 happen in the future.

23 They were being told by their actuaries that long-term
24 projections past 20 years are not particularly reliable and the
25 situation could change materially in the interim even from year

1 to year.

2 And since the trustees' responsibility is to protect
3 the fund, some of them questioned the merits of unduly
4 frightening participants to the point of causing them to exit
5 the fund and thereby changing this risk of insolvency from a
6 mere possibility to a mere certainty because if everybody
7 leaves and no contributions come in, that's a problem too.

8 Now, in making this point, I'm not looking to generate
9 any conclusions from this Court. We are hopefully settling
10 today. I'm simply trying to point out that the communication
11 issues that plaintiffs have cited were much more nuanced than
12 plaintiffs would have the Court and the plan participants
13 believe.

14 If this case were tried, your Honor would have the
15 opportunity to review a voluminous record of back-and-forth
16 discussions among the trustees and their professionals over
17 these very issues.

18 Like these trustees, your Honor would be confronted
19 with the dilemma that there is no existing legal framework to
20 guide the decisions as to what disclosures, if any, should be
21 required in these circumstances beyond those that are
22 statutorily mandated and that the trustees made.

23 Final point. No matter how the Court evaluates these
24 decisions or the various other decisions that were challenged
25 in this case, there will be no disputing that they were all the

1 product of extensive deliberations, that they were engaged in
2 in good faith.

3 Second-guessing decisions is one thing. Finding that
4 the trustees breached their fiduciary duties is something very
5 different. This leads to one final point, which relates to
6 what has been accomplished by these protracted proceedings and
7 what will be accomplished if the Court approves the settlement.

8 We agreed to settle this case because we thought it
9 would be best for all concerned to put this litigation behind
10 us and shift everyone's focus back to the very difficult issues
11 at hand.

12 Unfortunately, that objective has been threatened by
13 events that have transpired since we first agreed to the
14 settlement. As Your Honor knows, a number of the objectors are
15 poised now to commence a new lawsuit immediately after this one
16 resolved.

17 even if they don't carry out that threat, the
18 trustees' ability to do their job effectively has already been
19 substantially hampered by the reputational mudslinging while
20 this case is being litigated and that has continued right
21 through the settlement process.

22 It has even extended to innocent third parties like
23 union attorneys who have nothing to do with the plan or this
24 lawsuit but who at the 11th hour are being accused of holding
25 positions or receiving compensation that they don't deserve.

1 This reputational damage that has occurred is the
2 product of litigation tactics that we submit were not necessary
3 to advance this case and that certainly have not been helpful
4 in advancing the resolution.

5 There are now, frankly, many among my clients who,
6 having seen what transpired since the settlement was first
7 agreed to, who now question the wisdom of the decision to
8 accept this settlement, which we advised them to do.

9 But a deal is a deal. And I think when all is said
10 and done, this Court has been left with persuasive arguments
11 for approving this deal. If the Court agrees, the only thing
12 that remains is how the Court describes its reasons for
13 approving the settlement.

14 We ask that in doing so, the Court try to find a way
15 to assure these doubting participants that notwithstanding the
16 unfounded allegations made in this lawsuit, the fund is in
17 capable hands. Thank you, your Honor.

18 THE COURT: I'm sorry. The fund is what?

19 MR. RUMELD: In capable hands. Thank you.

20 THE COURT: Mr. Rumeld, let me ask you one question.
21 One of the themes in the defendants' brief in opposition to the
22 attorney's fees -- let me say the plaintiffs' lawyer gets some
23 credit for not insisting on a clear-sailing agreement.

24 I appreciate hearing from the defendants regarding
25 attorney's fees because it's one of the things that's very

1 difficult as the neutral watching the litigation to really get
2 a feel for, although in this case I had a pretty good sense as
3 to what was going on.

4 One of the defendants' objections was the argument
5 that the plaintiff should have settled this case far earlier
6 and that a lot of money was wasted in pursuing discovery that
7 was unnecessary.

8 What do I have in the record to look at that would say
9 to me that in fact the plaintiffs could have gotten net of fees
10 a better deal had they settled earlier?

11 MR. RUMELD: Let me say three things on that: First,
12 I think that's a really good question. Secondly, as you can
13 see from both sides' responses, it is difficult to provide
14 information that doesn't compromise issues of confidentiality.

15 And I have to say that I'm a little bit constrained
16 because, as your Honor can appreciate, throughout these
17 settlement discussions, I was offering up other peoples' money.
18 It wasn't us. It was the insurance carriers, and I'm not sure
19 it's appropriate to go into the back-and-forth of offers and
20 rejections.

21 I will also say I think there are a couple of truths
22 that can be said. We know that the first layer of coverage was
23 \$25 million.

24 We understand the difficulty associated with getting
25 into a second or third layer of coverage until the first layer

1 of coverage is exhausted. It's pretty clear from plaintiffs'
2 papers that from the start, they wanted to get into those
3 additional layers of coverage as a condition of settlement.

4 Where we ended up -- plaintiffs, by the way, made a
5 point about what offers they received and didn't receive. I
6 will just say that anybody who is in this business knows that
7 if the carriers aren't hearing anything from the plaintiff that
8 suggests they're in the neighborhood they're going to settle
9 at, they never really get to hear what the carrier's number is,
10 which was definitely a problem since the beginning of this
11 case.

12 What we can see if we look at the math is there is \$25
13 million in the first layer. We've spent about \$9 million out
14 of defense costs out of that layer. Plaintiffs are seeking
15 approximately \$10 million.

16 And if you sort of reverse engineer the math, you can
17 appreciate how we might have been able to settle within the
18 first layer and generated a net recovery that isn't much
19 different than the net recovery we're seeking right now.

20 Admittedly, this is not specific enough for your Honor
21 to really trade on. And admittedly, with confidentiality
22 constraints, it makes it very difficult. But I also would
23 say -- this is why I made the point about what we view to be
24 the collateral damage that's been done here.

25 From our standpoint, if this case settled for a net of

1 \$1 million or \$2 million, more or less, earlier than later, we
2 could have avoided a lot of the collateral damage that we think
3 is material to the current operation of the plan.

4 And the fact that lots of ideas have been put in the
5 heads of participants so much to the point that they're ready
6 to file a lawsuit all over again, which we think would be
7 completely meritless, if it is in the OCIO period, is an
8 indication of issues that we think are relevant to that
9 discussion.

10 THE COURT: Understood. Thank you.

11 I think I said I was going to next call on
12 Mr. Walfish.

13 Mr. Rumeld, let me remind you to mute your phone,
14 please.

15 Mr. Walfish.

16 MR. WALFISH: Thank you, your Honor.

17 With the Court's leave, I'd like to start by reading
18 from a letter submitted by Objector Steven Nathan to the
19 Treasury Department earlier this year in connection with the
20 defendant trustees' request for permission to cut vested
21 benefits.

22 THE COURT: For permission to cut?

23 MR. WALFISH: Vested benefits.

24 "I'll be 69 in a couple months, and I'm one of the
25 less than 200 victims of a 40 percent cut to the primary

1 component of my life's savings. There are no new jobs for
2 musicians my age. I can't just double up on a Roth IRA or buy
3 some T-bills. It's too late now.

4 "My union promised me that if I let them defer a small
5 percentage of my wages to this fund, they would grow them for
6 me. And they guaranteed that when I got too old to work, I
7 would be able to draw a defined benefit in order to pay bills,
8 keep food on the table, cover medical expenses, and stay in my
9 home. I planned for my retirement based on that guarantee."

10 The letter goes on: "It might be different if the
11 AFMEPF had fallen into the same factors that hurt many other
12 troubled funds, but they did not. Our fund's demographics are
13 actually better than most. Our ratio of actives to retirees is
14 in fact closer to typical green zone funds than to critical and
15 declining. Our fund does not suffer the orphaned employer
16 problem so many legitimately troubled funds do. Our trustees
17 just failed miserably at stewardship of this fund."

18 Now, Mr. Nathan is not alone in his situation. And
19 much of what he says about the mismanagement of the plan, when
20 all is said and done, is not seriously disputed or disputable.
21 No one has been able to point to another Taft-Hartley plan
22 whose investments looked anything the way this one's did.

23 On top of that, the deception regarding fund condition
24 is irrefutable as the trustees reassured the participants year
25 in/year out that the actuaries are not projecting insolvency

1 under current assumptions.

2 Even as the core defense on the merits here was that
3 the trustees were seeing projected insolvency under current
4 assumptions supposedly making it justified to swing for the
5 fences and try to get higher returns than that.

6 As another commenter to Treasury, Ken Gibas (phonetic)
7 from Eastchester New York put it, referring to these annual
8 assurances: "It is very hard to plan for a retirement with
9 advice like that which turns out to be completely wrong.

10 THE COURT: Mr. Walfish, let me interrupt you for a
11 second because I'm not sure exactly where you're going with
12 this. The issue is whether I should approve the settlement or
13 not.

14 MR. WALFISH: Sure. Your Honor, Mr. Rumeld says that
15 these issues of communications are complicated. It's not
16 complicated. It is impossible to read the trustees'
17 communications in plain English to their membership and not
18 conclude that they contained serious misrepresentations.

19 Or as the lead actuary for the fund put it in evidence
20 just two weeks ago: "We have been hiding the ball, but we
21 don't need to put that out. In other words, on top of
22 catastrophic mismanagement, a serious fraud, which is a breach
23 of the duty of loyalty, occurred here. and even though the
24 same people are still in charge of the fund with the same
25 leadership structure devised by the same conflicted counsel,

1 this settlement contains not a single measure designed to
2 prevent future deception about the condition of the fund," as
3 opposed to simply requiring additional disclosures on
4 investment performance, which is separate.

5 Now class counsel says their settlement compares
6 favorably to other ERISA pension settlements. Basically every
7 one of their cited cases was a lawyer-driven challenge for
8 record-keeping expenses and menu selection in the 401-k and the
9 403(b) defined contribution context.

10 Those things are a very far cry from fiduciary's
11 destruction of a defined benefit pension plan, coupled with the
12 coverup of that destruction. So those other settlements that
13 counsel was talking about are not necessarily relevant to the
14 comparison, but let's talk about them anyway.

15 Class counsel asserted in his August 12 approval
16 papers that the most recent 401-k settlement was *Karpik* out of
17 Ohio with no injunctive relief. And we explained in our letter
18 last week that two days before class counsel made that
19 representation, there was a more recent settlement submitted in
20 this court, Judge Gregory Woods, *Bhatia v. McKinsey*,
21 19 cv 1466.

22 And the settlement there, sure enough, involved the
23 appointment of independent neutrals with decision-making power
24 and a role in participant communications, the two things must
25 sorely missing from the relief here.

1 And *Bhatia* is not an outlier. Plenty of other settled
2 cases have culminated in, A, the appointment of an independent
3 with decision-making power and/or, B, the adoption of other
4 measures designed to ensure truthful communications.

5 And in fact, those things are the norm when, as here,
6 there is a credible showing of deception or other breaches of
7 the duty of loyalty and no assurance against a recurrence.

8 Now, Mr. Schwartz says that I'm fighting the last war.
9 But I'm not fighting the last war because the same people are
10 in place with the same conflicted counsel, and there is nothing
11 preventing them from continuing to make, as they've done right
12 up until the present moment -- I'm not sure the Court wants me
13 to get into details, although I could -- nothing preventing
14 them from continuing to make what are clearly
15 misrepresentations to their financially unsophisticated
16 membership.

17 Now, unless the Court has additional questions about
18 that, I'd like to go into a little bit more detail about some
19 of the problems with the specific governance provisions.

20 THE COURT: I have a question. You are an objector.

21 MR. WALFISH: Yes.

22 THE COURT: Do you think I should decline to approve
23 the settlement? That is, that it's in the best interest of the
24 beneficiaries to litigate this case.

25 MR. WALFISH: Your Honor, I think that it is in the

1 best interests of the beneficiaries that there be a better
2 settlement or, failing that, that this case be litigated. Yes,
3 because what's been agreed on here is just not all that
4 meaningful.

5 And one can see that in the defense papers talking
6 about how the governance provisions are not only weak but
7 literally they have no monetary value and are, in the literal
8 sense, worthless.

9 I don't think that this settlement is fair and not
10 adequate relative to the underlying facts as were shown in this
11 case. Mr. Schwartz said that only .1 percent --

12 THE COURT: I'm sorry. Mr. Walfish, let me just
13 correct something. I'm doing this for the benefit of the
14 beneficiaries who are on the phone.

15 When you say what has been shown, understand this case
16 has not been litigated. Nothing has been shown. What you had
17 is raw discovery. That may or may not have persuaded a trier
18 of fact, which is me.

19 So you can say that there's evidence, and there is.
20 But as is typically the case in cases like this, parties have a
21 tendency to cherrypick information that may or may not have
22 valid rebuttal from the other side. So just to be clear,
23 nothing has been proven in this case.

24 Go ahead.

25 MR. WALFISH: Thank you, your Honor. I understand

1 that was for the benefit of the listeners.

2 THE COURT: Well, it's for your benefit too. I don't
3 want you making arguments that you as an attorney know are not
4 supported by where we are in this case.

5 MR. WALFISH: Right. Your Honor, I appreciate the
6 Court's point. I would not do that. The legal standards
7 require that the Court make a comparison between what could or
8 would have been awarded after trial and what's actually being
9 proposed here in light of, to some extent, the evidence.

10 Of course the Court is not required to conduct a full
11 trial on the merits. That would obviously defeat the purpose
12 of this type of procedure. But I believe that the precedents
13 do call upon the Court of course to familiarize itself, as the
14 Court has done, with the issues in the case.

15 And I don't think that one can look at these
16 disclosures that have been released recently, as well as some
17 other things. I don't think that one can look at these
18 communications that were made to plan participants submitted by
19 both sides in the case and not conclude anything other than
20 they contained a very serious misrepresentation. I am not
21 asking the Court to make that finding. I apologize if anything
22 I said suggested otherwise.

23 I want to say something on Mr. Schwartz's point that
24 mathematically if you add up the approximately 100 individuals
25 who have objected here -- and that includes the 68 that I

1 represent and another approximately 28 -- mathematically,
2 that's still a tiny percentage of the class members.

3 By the way, let me just say that class counsel claims
4 ad nauseam in their final approval papers that many of these
5 same objectors couldn't find a lawyer for this case or decided
6 not to bring it. That's just not at all true, and we tried to
7 address that in our letter last week.

8 I think the Court appreciates that having almost 100
9 individual objectors is an extraordinarily large number for
10 almost any genre of class action settlement. And this actually
11 represents a huge percentage of the people disproportionately
12 impacted by the defendants' misconduct.

13 In this union, you're accrued pension benefits for a
14 function of how active or successful a musician you were in
15 your working years. Those benefits are based on contributions,
16 and the contributions, in turn, are based on the amount of work
17 actually performed, live performances, recording sessions, etc.

18 Now, having presumptively ruined this fund, the
19 trustees now are looking to cut benefits under the MPRA
20 legislation. And there are only a few hundred families, only a
21 few families, out of the 51,000 participants in this fund who
22 would bear the overwhelming brunt of the cuts the trustees are
23 proposing and may again propose.

24 So actually a sizable, a very plurality of the
25 families who are most at risk are objectors here. I know that

1 the Court -- these are, generally, by the way, musicians who
2 both are, one, in or approaching retirement age; and two, were
3 full-time, successful musicians in their working years as
4 opposed to part-timers, etc. who are generally not at much risk
5 here and also have other employment and other sources of
6 retirement income.

7 The Court of course certified this for settlement
8 purposes as a mandatory class action. But all class members
9 are absolutely not similarly situated in the usual sense.

10 So the legal precedents that talk about low
11 percentages and Mr. Schwartz using the 0.1 percent number --
12 those precedents don't apply here, and that percentage is
13 illusory. If anything, I think the large number is what should
14 give the Court pause. Hopefully I haven't belabored that point
15 too much.

16 If it's okay with the Court, I do want to say some
17 things about the neutral that's being proposed here. I've
18 tried to explain why I think it's a fatal defect that the
19 neutral has no role in participant communication.

20 THE COURT: Has no role in participant communication.
21 I'm sorry. Please don't let your voice trail off.

22 Go ahead.

23 MR. WALFISH: Class counsel has represented along the
24 way that the fund has somehow turned over a new leaf because
25 there's been some kind of changing of the guard in terms of who

1 is serving as regular outside counsel to the fund.

2 That doesn't work. The law firms that serve as
3 regular outside counsel to this plan are conflicted because
4 they also represent the trustees in this breach of fiduciary
5 duty lawsuit. We tried to explain in our objection and in last
6 week's letter why the conflicts are so problematic and there is
7 no authority for them.

8 But the point is that there is no one, other than sort
9 of these incumbents and their conflicted counsel and the
10 actuaries of hide-the-ball notoriety, who is going to have any
11 role going forward and no role now in participant
12 communications.

13 And that's fundamentally unfair and inadequate, given
14 both the allegations and what I would contend as the strength
15 of the evidence here. I won't use the word "shown."

16 More generally, it's unclear what the whole point of
17 install this figure, the NIF, the neutral independent
18 fiduciary, what the whole point of installing this figure is if
19 he can't vote. With this fund, all decisions are made by vote
20 and only by vote of the trustees.

21 so this NIF is akin to a U.S. representative from the
22 District of Columbia. He can offer his 2 cents, but that's
23 about the extent of his power. No one has explained why the
24 NIF has not been given a vote.

25 The Taft-Hartley legislation expressly contemplates

1 neutrals with voting power. class counsel's expert has written
2 that a NIF needs to be empowered with genuine authority and
3 should be given a role in participant communications. Other
4 settlements have this. The defense, meanwhile, has made
5 various statements to the effect that all the governance relief
6 here is window dressing.

7 We have zero reservations about Andrew Irving's
8 qualifications, capabilities, or good intentions and no reason
9 to question his integrity. But his role is constituted in such
10 a way that he has no actual power.

11 Contrary to class counsel's characterization, we never
12 asked for receivership or anything close. We just asked that
13 the NIF have the decision-making power that Congress
14 contemplated and that share roles could be assigned.

15 Class counsel argues well, that the NIF will still be
16 a watchdog. That doesn't withstand scrutiny either. The true
17 mechanism for ERISA fiduciaries to police one another is not,
18 as they say in their papers, ERISA Section 405. It's 29 U.S.
19 Code, Section 1132(a) it's which gives any ERISA fiduciary duty
20 the ability to go into court and bring an action against other
21 breaching fiduciaries.

22 Here, the neutral, the NIF, has no budget and no
23 ability to do that, unlike the other trustees who of course
24 control the purse. Ridiculous as this may sound, it would be
25 much easier for him to sue them than the other way around. So

1 the idea that he would be a watchdog doesn't hold water.

2 THE COURT: Counsel, why isn't the value of the
3 independent fiduciary someone who, as the discussions were
4 going along and this board was going down a route of, in his
5 view, putting the fund in investments that pose undue risk,
6 that his role is to say, guys, that's way too risky for a
7 Taft-Hartley plan.

8 That is, you're not dealing here or I have seen not a
9 shred of evidence that these trustees were not endeavoring to
10 operate in the best interests of the beneficiaries. There is
11 no evidence of self-dealing, none.

12 MR. WALFISH: Deception towards that end but no
13 self-dealing. I agree with your Honor. Yes.

14 THE COURT: That being the case, if there is no
15 self-dealing, someone who says, guys, you're like a toad in
16 water when it's slowly getting hotter and you're not jumping
17 out. It's time to jump out. This level of risk for a
18 Taft-Hartley plan makes no sense.

19 Why do you view that as worthless, again, given a
20 board that there is not a shred of evidence was not trying to
21 do the right thing for its beneficiaries.

22 MR. WALFISH: Yes, your Honor. Just to be clear, I
23 don't see that as worthless, but it's certainly not enough. In
24 the toad in hot water situation, the other trustees could
25 simply ignore him.

1 THE COURT: Of course. That's always a possibility.
2 It's also a possibility that he would be outvoted if he had a
3 vote. The question is, given the record in this case, which,
4 again, is not a board that's engaged in self-dealing -- it's a
5 board that's engaged in trying to do the right thing for its
6 beneficiaries, that is, that throwing a flag -- in my
7 experience, that's exactly what will sort of stop people who
8 have gotten sort of caught up in irrational exuberance is
9 someone throwing cold water into the pot and saying, guys,
10 let's be real here. And that's Mr. Irving's role.

11 MR. WALFISH: Yes, your Honor, but with no ability to
12 ensure that his views are documented, a topic I'll get to in a
13 second. That may be his role, but that's insufficient because
14 it could just be the tree that fell in the forest and no one
15 knew that he gave that advice.

16 Class counsel's point here is that the existence of
17 the NIF is quote a "litigation trap" that creates a documentary
18 record that will either deter the trustees from breaching
19 conduct or subject them to liability. That doesn't work
20 because of the board minutes issue that we identified in our
21 letter last week. That I can get into.

22 THE COURT: I understand your point on that. I'm
23 going to give you about five more minutes.

24 MR. WALFISH: Okay. Again, your Honor, I just have
25 already said this. But the participant communications -- this

1 NIF was excluded from those discussions. He's not in the room
2 when they decide how to communicate with their membership.

3 I think I have two more points, your Honor. And I
4 really appreciate the Court's patience.

5 THE COURT: Okay.

6 MR. WALFISH: First, the class should not have to pay
7 for the NIF. In other cases that we know of where a NIF was to
8 be installed, it was the plan's lawyers, the employers, that
9 paid for the NIF, not the class members' retirement money.

10 I can tell you, having looked at the transcript of the
11 conference that Judge Gregory Woods held to consider
12 preliminary approval in the *Bhatia v. McKinsey* case,
13 Judge Woods was extremely focused on ensuring that the money
14 that McKinsey was paying for the NIF here was separate and
15 apart from the cash settlement payment that McKinsey was making
16 into the plan.

17 The judge clearly did not want that money raided or
18 eroded to pay for the NIF, and the same is true here. The more
19 money the plan spends on the NIF, the less goes out to class
20 members. Admittedly, it's a drop in the overall bucket, but
21 it's just an issue of fairness.

22 By the way, there's an irony here for whatever it's
23 worth because the defense said in opposing the fee request for
24 Mr. Schwartz that the NIF provisions have zero monetary value
25 for the class. If that's the case, why are they submitting

1 plan assets to pay for it.

2 THE COURT: I'm sorry, Mr. Walfish. Your last point
3 is entirely inconsistent with your entire argument. So you
4 view the governance procedures as having value. The fact that
5 there is not a dollars-and-cents value that can be attributed
6 to them doesn't mean that they don't have value. And if they
7 have value, that's the reason why the plan pays for them.

8 MR. WALFISH: Yes, your Honor. But he's being
9 installed because of concerns surrounding the events at issue
10 in this case. So it really should be, in fairness, the insurer
11 of the fiduciaries that pays for this, particularly in
12 circumstances where we're not remotely close to the policy
13 limits.

14 I understand the point that the Court is making. I
15 just think that to parallel this with other case that's have
16 involved NIFs, the money really shouldn't be coming from the
17 class members' retirement money.

18 The Court has been exceptionally patient with me. I
19 really appreciate this attention to this matter. The only
20 other thing I'd like to do, to the extent necessary as a
21 formality, is to renew or reiterate our request for fees for
22 objectors' counsel as set forth in our letter last week. I
23 don't know if the Court needs --

24 THE COURT: Yes. That letter was thin, in fact,
25 probably non-existent, on authority. And it was not an

1 adequate fee request. I have absolutely no backup for what
2 your fees are, nor any explanation of why funds should be used
3 to pay your fee.

4 MR. WALFISH: Yes, your Honor. There is a lot of
5 authority in this circuit, starting with *White v. Auerbach*, 500
6 F.2d 822 (2d Cir. 1974). Another case is *Park v. Thomson*
7 *Corp.*, 633 F. Supp. 2d 8 (S.D.N.Y. 2009). That one collects
8 authorities.

9 There is a lot of authority for awarding fees to
10 counsel for objectors because of the role, the important role,
11 that objectors place in policing settlements that have been
12 hashed out between class counsel and defense counsel.

13 In fact, in this particular case, I think our efforts
14 have already borne fruit in the form of a release that cannot
15 be -- was not subject to sort of dispute and litigation the way
16 the parties had originally proposed. So I think we've already
17 added value.

18 If the Court requires backup in the form of time spent
19 on tasks and things of that nature, we'd be pleased to provide
20 it. But there is a lot of support for awarding these to
21 objectors' counsel when they bring about improvements to the
22 settlement.

23 THE COURT: Okay, Mr. Walfish. I would suggest in the
24 future, if there is a lot of authority for your position, maybe
25 one or two cases should be cited in your submission.

1 MR. WALFISH: Understood, your Honor.

2 THE COURT: Anything further?

3 MR. WALFISH: No, your Honor. Thank you.

4 THE COURT: Thank you. Please mute your phone again.

5 All right. Ms. Bryant, I have unmuted you.

6 MS. BRYANT: Thank you. And thank you for the
7 opportunity to speak here today, which was impossible for me
8 because I'm in Florida. So thank you for this.

9 I want to introduce myself a little bit, if it please
10 the Court, to tell you that I've had several music businesses.
11 I'm an arranger, orchestrator, conductor. I've had a very busy
12 career since the early '70s.

13 As a signatory producer, I really understand how the
14 contracts work, the practices, how we work with contributions
15 to the pension plan. To say that I hired the very most
16 wonderful and greatest musicians in the world -- they're
17 New York musicians and other musicians around the country when
18 I worked with them.

19 We all worked like crazy. I'll just call us the
20 baby-boomer musicians because we're a real working crowd and
21 earn high pensions which are, of course, threatened right now.

22 THE COURT: So what kind of music did you make?

23 MS. BRYANT: As an arranger, I wrote in every style.
24 For the first 20 years of my career, I was an orchestral
25 arranger, and then electronics started to come in. But they

1 were very primitive. So we started to work them into the
2 sessions to the point where it was all electronic most of the
3 time.

4 THE COURT: Okay.

5 MS. BRYANT: I wrote music for television shows,
6 advertising, film, scoring -- all kinds of music.

7 THE COURT: Okay.

8 MS. BRYANT: I worked with all of these wonderful
9 musicians, and I know how responsibilities changed for master
10 recordings works. No one has really brought this up I don't
11 think. So I feel pretty good. I thought everybody was going
12 to bring up my points and I wouldn't have anything to say.

13 THE COURT: When that happens with lawyers, they just
14 say them anyway.

15 MS. BRYANT: Okay. If the lawyers can do it, then
16 maybe I can too.

17 When I first read this case and heard about it, I
18 certainly felt Mr. Snitzer and Mr. Livant had good intentions
19 and did everything on good faith. And I thought they had a
20 point there that I agreed with but felt would be a heavy lift
21 to bring to a close in a good way.

22 Now when I look at what's been brought here is a
23 settlement in which it's being settled on the back of
24 musicians. We are corralled into a class action without an
25 opportunity to opt out -- and I want to discuss that

1 separately -- and made to give up every right and every
2 fraction of every right that we would have, including future
3 governance over these improvements that are said to be made in
4 this financial situation.

5 And I want to go to the wording as drafted in released
6 parties and released claims. I found it in DI 139-1, page 67.
7 They're overbroad, and they're all encompassing.

8 I think, as written, released parties and released
9 claims -- that's Section 2.21 and 2.22 of the settlement
10 agreement -- I think that they are disrespectful, cruel,
11 cynical, and without appreciation for the fact that our work
12 built the plan by and large.

13 There was maybe a generation before us, and we boomers
14 who worked so hard built this plan. The managers didn't build
15 this plan. Our contributions from our work built the wealth of
16 this plan.

17 As such, I'm looking at the released parties first.
18 It means, A, each defendant and the plan. No one has explained
19 to me yet why I'm releasing the plan. I'm expecting to release
20 the plan when the plan is the major beneficiary and I thought
21 was on the plaintiffs' side.

22 B, it goes on with a very long list, a wish list -- I
23 won't say it all -- each defendant's predecessors, successors,
24 assigned, past and present and future employers.

25 Now let me go to assigned. When a master recording is

1 assigned to a new entity, for example -- I don't like the word
2 "assigned" -- that person, that company has distribution
3 agreements to sign that benefit musicians and benefit our
4 pensions. Why am I releasing them.

5 Future employers. Employers are distributors and, in
6 some situations, producers and clients who have a liability
7 which is to make contributions. They have an obligation to
8 make contributions to our pension plan which is, you know,
9 failing.

10 Affiliates. That would mean the unions and the locals
11 around the country would be released as the released parties.
12 My feeling is it's really upsetting. They also say -- one more
13 thing I want to say.

14 The defendants' spouses, dependents, beneficiaries,
15 and marital community, heirs -- there is an unsavory practice
16 in the industry among some producers and their clients of
17 adding themselves to music contracts so that they get salary
18 and they get eventually contributions to their pensions. This
19 is wrong.

20 THE COURT: Whoever is telling your honey that you're
21 on a conference call, you need to mute your phone.

22 MS. BRYANT: So this has happened many times, and it
23 happened to me. And it's one of the reasons I don't want to
24 give up and excuse everybody for everything they've ever done
25 and give a clean slate to misdeeds in the past, the present,

1 and for the future and give up any governance over these
2 improvements. Are they really going to work for us. We're
3 giving up everything here.

4 If you would remove the musicians, the class members,
5 from this or in large portion, there would be no settlement,
6 because the way this is drafted, would release parties and
7 release claims, is so damaging to musicians.

8 It means we don't even know what the actual and
9 potential claims are in released claims. It has us giving up
10 statutory rights and contract rights in equity. So we're
11 giving up so much for the drafting of this. My feeling is
12 released parties should mean each defendant, and I don't know
13 why everybody else. Why are spouses in there.

14 It's releasing claims for obligations. I'm looking at
15 this and saying, okay. We're really supposed to be talking
16 about this financial problem and the investment and the issues
17 surrounding it, but these words are so dangerous.

18 I've worked with lawyers, and I've been pro se myself.
19 I know that an experienced litigator can, you know, that kind
20 of linguistic prosody-- take any one of these words and say,
21 you gave up all of your rights.

22 I don't know why this is not seen as we're giving up
23 all of our rights. we're also giving up statutory rights.
24 There's the LMRDA, the Labor Management Reporting and
25 Disclosure Act of 1959, 29 U.S. Code, Section 411 --

1 THE COURT: Hang on a second.

2 Whoever has got the walkie-talkie, shut it off. Thank
3 you.

4 Go ahead.

5 MS. BRYANT: The LMRDA it's called gives union members
6 the right to sue in the district court; protection of the right
7 to sue; retention of existing rights; and the right to copies
8 of collective bargaining agreements, which includes recording
9 agreements which are merged with the collective bargaining
10 agreements.

11 How is this compatible with the language in released
12 claims. Yes. Giving up statutory rights.

13 THE COURT: I'm sorry, Ms. Bryant. Let me just
14 interrupt you for a second.

15 Released claims deal with claims that are asserted in
16 the complaint. So the only thing that's encompassed within
17 released claims are these fiduciary claims under ERISA that
18 were raised against the trustees. Your recording contract --
19 none of that's part of this case.

20 MS. BRYANT: The LMRDA rights are preserved? Do I
21 have a right to go into the district court and sue the plan?
22 Do I have a right to do that?

23 THE COURT: Based on what?

24 MS. BRYANT: I'll give you my own story. My
25 hundred-thousand-dollar-plus pension is \$17,000 having to do

1 with people replacing me on my contracts. That's a serious
2 matter that I have.

3 Instead of more than a six-figure pension, my pension
4 has been raided. I have every right to go in and sue these
5 people and get these contracts and go right to the people who
6 have done that to me. And it may have happened to other
7 people. I hope not.

8 THE COURT: Okay.

9 MS. BRYANT: That's why these LMRDA rights need to be
10 preserved, your Honor.

11 THE COURT: I'm going to ask you to wrap up in the
12 next couple of minutes.

13 MS. BRYANT: They need to be preserved. That's my
14 main thing. I don't know why we should release everybody. It
15 seems like a wish list that makes a clean slate for everyone
16 else, including the unions, who say that they've lost all my
17 contracts.

18 THE COURT: Okay.

19 MS. BRYANT: Now, we have constitutional rights, and
20 we have also rights under ERISA, 502.83. I want to opt out.
21 The notice that they've told us, the notice to the members of
22 the proposed settlement, says at paragraph 14 that we have no
23 right to opt-out because you certified that this is a class
24 action under 23(b)(1). But in 23(c), we do have rights that
25 deal with 23(b)(1) actions: "The Court will exclude from the

1 class any member who requests exclusion."

2 THE COURT: This is not an opt-out class.

3 MS. BRYANT: Does 23(c) not govern?

4 THE COURT: No.

5 MS. BRYANT: You're a judge. So I'll just appeal.

6 THE COURT: Okay. I'll give you one more minute,
7 Ms. Bryant.

8 MS. BRYANT: Okay. My last minute is I'd like to be
9 excluded from this class action. I was not told I was going to
10 be a part of it as drafted. I oppose the writing and the
11 drafting of the release claims and the released parties.

12 THE COURT: Thank you very much.

13 MS. BRYANT: And I intend to go forward with my own
14 issues and be able to do that. Thank you.

15 THE COURT: You'll be able to do that if the claims
16 are not released under the release that's been provided and
17 that's available to you. I'm not ruling on that right now.
18 The only thing I'm ruling on is whether I'm going to approve
19 the settlement. So thank you for your time. I'm going to mute
20 you as well.

21 Mr. Stoner, you are next. Let me unmute you.

22 Mr. Stoner, again, you've got five minutes.

23 Mr. Stoner, my constant letter writer, you're not here?

24 Mr. Stoner?

25 MR. STONER: I'm here.

1 THE COURT: You're here. Okay. All right.

2 Mr. Stoner, you've got the floor.

3 MR. STONER: May it please the Court. Defendant
4 trustees have violated ERISA by issuing materially false and
5 misleading statements in their communications with plan
6 participants.

7 Yet the proposed settlement fails to contain adequate
8 measures to prevent future deception and dishonesty. Thus, the
9 settlement is unfair, unreasonable, and inadequate.

10 I note that Mr. Rumeld agrees with me on the need for
11 truthful plan communications. In his online article in the
12 first quarter ERISA newsletter dated April 23, 2020, he writes:
13 "Plan fiduciaries should pay particular attention to developing
14 a clear record of the rationale for maintaining these
15 investments and that this rationale is clearly reflected in
16 participant communications.

17 "Plan participant communications also should be
18 reviewed to make certain that they fully inform participants of
19 the rewards and risks presented by their investment options in
20 a volitive market."

21 Mr. Rumeld, why don't you share that article with the
22 trustees? Because it may be news to them. In fact, according
23 to the November 2018 deposition of trustees's co-chair Raymond
24 Hair at page 44 when asked the question: Do you believe you
25 have a fiduciary duty to speak truthfully to plan participants,

1 he answered, I don't know whether that's a fiduciary duty or
2 not. I don't know.

3 So Mr. Hair didn't know that he had a fiduciary duty
4 to speak truthfully in November 2018, one year after the new
5 OCIO was brought in. And clearly the ongoing practice of the
6 trustees failing to communicate honestly and openly with plan
7 participants has continued beyond 2017.

8 Thus, there must be no release for any continuing
9 claim relating to plan communications from 2010 to the present.
10 Clearly, class counsel has failed to hold the trustees
11 accountable by employing the one recourse clearly stated in
12 ERISA, the removal of plan trustees.

13 Mr. Rumeld argues that Mr. Hair cannot be removed
14 because the plan requires that the AFM president must be the
15 union side co-chair. That is false because the plan must
16 conform to ERISA requirements first as a matter of law. And
17 therefore, the plan must be modified through plan reformation
18 as I've previously stated.

19 Class counsel also likes to say that his firm was the
20 only one willing to take this case because there were so many
21 risks involved. However, according to *Goldberger v. Integrated*
22 *Resources*, a landmark 1991 Second Circuit case, the principal
23 analytical flaw in counsel's argument lies in the assumption
24 that there is a substantial contingency risk in every common
25 fund case.

1 At least one empirical study has concluded that there
2 appears to be no appreciable risk of non-recovering securities
3 class actions because virtually all cases are settled. Even
4 when there is some contingency risk, recovery remains virtually
5 certain. Thus, Mr. Schwartz's fees are too high for what he
6 accomplished.

7 The Supreme Court in *Harris Trust & Savings Bank v.*
8 *Salomon Smith Barney* has held that ERISA allows claims against
9 non-fiduciaries who knowingly participate in prohibited
10 transactions.

11 The proposed settlement therefor lacks any equitable
12 redress for any non-fiduciaries in prudent contact and leaves
13 all the current service providers in place. Thus the proposed
14 settlement is unfair, inadequate, and unreasonable.

15 The problem here is that class counsel has put his
16 self-interests above the interests of his client, the class
17 members. Similarly, defendants' attorneys have also put their
18 self-interest above their fiduciary duty as plan counsel. As
19 such, they are hopelessly conflicted and should be removed from
20 this case.

21 I hereby ask the Court to hold a separate hearing on
22 the issue of conflicts to determine if plan counsel and any
23 service providers are required to be replaced.

24 Of course the Court itself has a self-interest in this
25 case. According to the article Reviving Judicial Gatekeeping

1 of Aggregation in the George Washington Law Review,
2 February 2011, no matter how virtuous the judge, the fact
3 remains that courts are overworked, they have limited access to
4 quality information, and they have an overwhelming incentive to
5 clear their docket.

6 Thus, the Court also has a choice between its own
7 self-interest and its fiduciary duties to class members. Will
8 the Court reject a settlement that's unfair, inadequate, and
9 unreasonable as required under ERISA? Or will the Court choose
10 its own self-interest, like the other lawyers here, and issue a
11 pro forma approval.

12 The failure of this Court to reject the settlement
13 will be an abuse of discretion, as well as an arbitrary and
14 capricious decision. Please reject this settlement, your
15 Honor. Thank you.

16 THE COURT: Thank you, Mr. Stoner.

17 Mr. Hosticka.

18 MR. HOSTICKA: Thank you. Thank you. Can you hear
19 me, your Honor?

20 THE COURT: I can.

21 MR. HOSTICKA: Okay. Great. I thank you for this
22 opportunity very much. Besides the free press being able to
23 participate in this judicial process, it is amazing to me. I'm
24 grateful to you.

25 THE COURT: Come to court any time after COVID. Our

1 courthouses are always open. We love to have people come. I
2 hope when you get your jury summons that you will respond and
3 not try to get off of jury service.

4 MR. HOSTICKA: I have many times. It's been my duty
5 and privilege too. I appreciate your comments. So I've
6 learned a lot in this hour and a half already. So thank you
7 very much, your Honor.

8 THE COURT: You're welcome.

9 MR. HOSTICKA: Quite quickly, my biography is that I'm
10 71 years old. I've been a performing professional trumpet
11 player since the age of 18. I've supported myself and a family
12 in that manner. I've had a lot of various, various places I've
13 performed. Living in New York City, I'm available to a lot of
14 different venues, let's put it that way, mostly in the
15 classical field.

16 I have more than a passing interest in my pension.
17 I've been very fortunate at this age as a boomer has been
18 mentioned. I have the three-legged stool. I'm not here
19 objecting on my own behalf. I am here concerned about my
20 colleagues, my union, my pension fund, their pensions, and the
21 governance of that.

22 My request that you consider my objection is based
23 simply on the fact that the same people who have run us into
24 this position remain. I understand the governance has been
25 addressed. I understand there's a financial settlement which

1 to me seems negligible, if not insignificant, to the losses.
2 And I would like to support that view with just three quick
3 points, if I may.

4 First of all, the remedy that I'm seeking is we have
5 competent and educated people who have a lot more ability to
6 assess their roles. These guys just don't seem to have figured
7 this out.

8 Let's start with all these illiquid assets that they
9 pushed into, for want of their own thinking, whenever that was
10 they decided to go that route. these are the worst investments
11 for a person like myself.

12 These are investments clearly -- I know this from past
13 experience -- for wealthy people, billionaires, hedge fund
14 guys, millionaires. And even though these trustees might think
15 that they're billionaires because they're in charge of a
16 \$2 billion fund, that's my money. That's not theirs to risk.

17 That really -- I'll tell you this also as a fact I
18 believe -- please correct me if I'm incorrect -- that the sale
19 of these -- what are they called? Products -- is very
20 profitable to the people selling them. That's for sure.
21 That's known. You ask any financial advisor. They love to
22 sell this stuff because they make a lot of money up front.
23 That's a governance.

24 Did they know what they were doing? I have to assume
25 they were. I'm not going to even begin to say I know anything

1 about criminality or anything. I'm just talking about general
2 competence. These individuals remain.

3 In the midst of this recovery since 2008, there was an
4 unprecedented bull market. Now, I know I'm speaking like I
5 know what I'm talking about, but I'm not a lawyer. I'm not an
6 investor. It was a bull market for ten years. It's still
7 going actually in spite of everything. It's quite remarkable
8 actually. I'm fortunate to witness it with some of my savings.

9 In the midst of this, if you look at the actuarial
10 reports, in '15 and '16 they lost money. They lost money. The
11 value of the fund went down. Yes. I could have gone to
12 Charles Schwab ten years ago and started like ten years ago and
13 made money all throughout this.

14 And these guys -- forgive me. I'm sorry. These
15 trustees -- they lost money for us. They were motivated to
16 recover. There were all kinds of justifications. I'm sure
17 their intentions were this and that, but this is what actually
18 happened. And they're still there.

19 They're now presenting clients to everybody to fix
20 this and go forward. In 20 or 30 years, it's all going to work
21 out. The fund will be fixed. These are the folks that are now
22 going to present to us how to fix it. I'm very, very
23 suspicious of that.

24 Now, I'm sorry to say that I agree with other people
25 that -- I have colleagues in other forms of our business, not

1 musicians. They're in multi-employer pension plans. None of
2 them are like this plan in this strait. We've all been hit.

3 There are a lot of reasons for investing and not
4 investing and losing and gaining. But I have no faith in their
5 judgments. Forget about the governance and they have advisers
6 and this and that. Their governance has been appalling.

7 I have no way to accuse them of criminal behavior. I
8 have no way to do that. I also have no illusion that I'm going
9 to turn this ocean liner around, your Honor.

10 I'm in favor of settlements. I've been involved with
11 my union as a rank and file and trustee of my Local 802. I
12 understand the need for settlement. I understand the value of
13 that.

14 But I'm looking for a remedy for my fund, for my
15 future, for my colleagues. Myself, I will survive. I was
16 expecting a haircut. I'm looking at more like an amputation.
17 That's my own expression.

18 I don't think anything that's going on in this case is
19 going to change any of that I don't believe. But the
20 settlement bothers me in that the same people that have created
21 the situation are still there.

22 THE COURT: Understood.

23 MR. HOSTICKA: There does not seem to be a great
24 addressing of that, and this may not be the forum to do that.
25 But I do value the opportunity to speak to them through their

1 counsel and to use your court for that purpose. For that, I
2 thank you very much.

3 THE COURT: Thank you, Mr. Hosticka.

4 We're going to take a five-minute break. I'm going to
5 leave the Skype link open so you can stay on. And then I'm
6 going to come back to Mr. Schwartz to give.

7 In addition to giving you an opportunity to respond if
8 you want to, and Mr. Rumeld as well, I have specific questions
9 about some specific issues. Five minutes. So I'm going to
10 bring you back at 11:46.

11 (Recess)

12 THE COURT: Okay. Mr. Schwartz.

13 MR. SCHWARTZ: Obviously, your Honor, there's a lot
14 that I could respond to. But I'm perfectly happy, if
15 your Honor wants to -- you mentioned you have some questions.
16 Maybe it makes sense to address your questions first.

17 THE COURT: Fair enough. So one of the questions that
18 I don't think Mr. Walfish really harped on today but I noted it
19 in his papers is that the way that the settlement is set up,
20 the union trustees -- their credentials are going to be
21 disclosed four weeks before the effective date of the
22 appointment, which makes it sound like it's after the person
23 has been selected but before they actually take office.

24 Why is that the case? Why can't the union disclose
25 the proposed trustee's credentials before they're actually

1 appointed?

2 MR. SCHWARTZ: So that provision I will, frankly, say
3 is not the most important portion of the governance provisions.
4 That was at the end of the negotiation. What we got on that
5 issue is what various people, including some of the objectors,
6 had asked for during I believe it was the 2019 convention. We
7 put that into my declaration on preliminary approval.

8 What it does is to the extent that someone picks
9 someone who is just outrageously defective as a trustee,
10 interested people can raise their objections and do what I'll
11 call a PR campaign to see whether it could change the trustees'
12 view as to whether they should be appointed or not.

13 As I said before, we prioritized what our asks were
14 for the negotiation, the governance provision. And we also
15 didn't get everything we asked for when we started, which is
16 obvious.

17 What we were not candidly going to be able to get in
18 this negotiation was, for example, us as class counsel to have
19 the ability to say, we're going to appoint this person or that
20 person.

21 THE COURT: I realize that that question was really
22 better directed to Mr. Rumeld, and I'll come to him in a
23 second.

24 For you, I'm not going to go through chapter and verse
25 of your fee application.

1 Isn't your office in Haverford, Pennsylvania?

2 MR. SCHWARTZ: Yes. We have a Haverford,
3 Pennsylvania, office and a Wilmington, Delaware, office.

4 THE COURT: Both of them are a train ride to New York.
5 I don't understand. Like for every court appearance you've got
6 massive expenses. It's a train ride.

7 MR. SCHWARTZ: Right. Your Honor, first of all, in
8 order to avoid situations which have happened in the past for
9 court appearances, we have to stay the night before.

10 I understand that Amtrak seems like it should be solid
11 enough so you can just hop on a train and get there, but that's
12 not always been true in my general experience.

13 The one deposition when I tried to do it, I got there
14 15 minutes late. Even there I probably should have gotten
15 there 45 minutes or an hour early. It's just not reliable
16 enough for us not to stay over.

17 The costs of the Amtrak, while I did take -- I can
18 tell you I took Keystone trains and Northeast Regional trains
19 when I could. So I tried to avoid the Acela expresses, which
20 are much more expensive, every single time we could.

21 But there are some times, in order to get there at the
22 right time to get out of the city, you have to take the Acela.
23 Most of the trips I know for sure were not Acelas because I
24 know what I did.

25 THE COURT: Also in your hours, you have two

1 categories that sort of caught my attention. One was court
2 hearings and conferences which weighed in at a whopping 244
3 hours, and I am confident I have not seen you for anywhere
4 close to 244 hours.

5 And lastly was your fact analysis, which in that
6 category does not include depositions, discovery requests, or
7 experts, was close to 5,000 hours.

8 Do you want to address either of those?

9 MR. SCHWARTZ: Yes. With respect to our category
10 number 2 for court appearances, that also includes all of the
11 pretrial stipulations.

12 So we're talking about confidentiality, ESI. We're
13 talking about the reports, preparation for the meetings. We're
14 talking about the bimonthly discovery report that we had for
15 your Honor.

16 So it is not just like the time in court or the travel
17 time to get to court. It encompasses a bunch of other things,
18 and those things just take time.

19 THE COURT: Mr. Rumeld, I'm going to address my other
20 two questions then to you because I realize that's really what
21 could be negotiated with you.

22 So the same question that I asked Mr. Schwartz. Why
23 not disclose the credentials of the people that the union is
24 considering naming to the board before they're actually
25 appointed as opposed to after they're appointed but before they

1 take office?

2 Second, if you can help me understand what is the
3 thought process behind having an independent fiduciary trustee
4 but not giving them a vote.

5 MR. RUMELD: Well, I'm going to try and respond while
6 also recognizing that I'm a little constrained in trying to
7 unpeel/unpack what the reasons were, particularly since they
8 are really the product of a lot of internal attorney-client
9 privileged discussions with my trustees about what they would
10 be prepared to agree to or not. But I think there are certain
11 objective statements that can be made here.

12 One is, consistent with really the practice of all
13 Taft-Hartley funds that I think I'm familiar with, it is
14 normally the prerogative of the union leadership to designate
15 their trustees.

16 If we tried this case and we had a bad day, your Honor
17 would make whatever rulings your Honor made. But in the form
18 of a settlement, I think it's fair to say that the union
19 leadership's prerogative was really an issue for us.

20 I will also point out, because I think it's
21 relevant -- and we made some points about this in our papers,
22 and so did Mr. Schwartz -- that this is a little bit of an
23 unusual class action in the sense that this is not a class of
24 random people.

25 This is a class of union members who have their own

1 democratic process, pursuant to which, if they want changes to
2 be made in the union leadership or the union leadership's role
3 in this fund, they have an opportunity to do so pursuant to
4 that process.

5 THE COURT: I understand that. That point I fully
6 understand.

7 MR. RUMELD: And it's also worth noting that while
8 there are many of us on our side of the ledger who think it was
9 very unfair, pursuant to that process, one of the union
10 trustees ceased to be the leader of Local 802, and that was a
11 significant event for them.

12 I'm sorry. What was the second question again? I
13 lost my train of thought.

14 THE COURT: Giving the independent fiduciary a vote.

15 MR. RUMELD: So there too, it's a little hard to sort
16 of explain why something didn't happen. I can tell you our
17 firm represents many Taft-Hartley funds. There's unit voting
18 on a fund like this.

19 THE COURT: I'm sorry. There is what on a fund like
20 this?

21 MR. RUMELD: Unit voting, which means all the employee
22 trustees are one vote. All the union trustees are one vote.
23 They caucus separately when there are issues that require that.

24 If we made Mr. Irving a union-designated trustee or an
25 employer-designated trustee, as a practical matter, his vote

1 would have no more consequence than his gravitas has as an
2 independent fiduciary.

3 THE COURT: But his vote would give him a unit.

4 MR. RUMELD: Right. I can't tell you that that's a
5 terrible result. It's not the result we negotiated for. It's
6 not the result that our clients have agreed to. But I will
7 tell you -- and this is really responsive to I think a lot of
8 the points that Mr. Walfish was trying to make.

9 On the one hand, everybody is communicating confidence
10 in Mr. Irving's background and ability and his sincerity and
11 his desire to do the right thing. On the other hand, none of
12 the objectors seem to be giving Mr. Irving credit for having
13 been around the block for many years with Taft-Hartley funds
14 and knowing how to get things done.

15 On this fund and on most of our funds, if there was an
16 immediate third vote to break the tie, it would actually
17 interfere with the type of deliberative process that has served
18 very well.

19 This fund almost never goes to deadlock arbitration
20 because somehow, notwithstanding the different agendas of the
21 union trustees or the employer trustees, they hash it out and
22 they come to a solution. Sometimes sooner; sometimes later.
23 If you suddenly have the equivalent of an immediate neutral
24 arbitrator, it actually could be dis-serving to that process.

25 THE COURT: Fair enough.

1 MR. RUMELD: So while it is true that my people would
2 not have agreed to it, I actually really do feel that it would
3 have been a negative event. We need to trust Mr. Irving to use
4 his experience, to use his good interactions with trustees that
5 he has spent many years honing to get to the result that
6 everybody will want so there won't be any deadlocks here.
7 That's the way it gets done, your Honor.

8 THE COURT: Okay. Understood.

9 Mr. Schwartz, I'm going to give you the last word but
10 not for very long.

11 Anything further you want to say?

12 MR. SCHWARTZ: Sure. I do want to echo what
13 Mr. Rumeld just said, that the idea of giving Mr. Irving what
14 I'll call the rubber vote, Taft-Hartley plans are designed
15 equal number, equal votes of employer and union side trustees.

16 I think people should be careful what they wish for.
17 That could really, in some dangerous ways, change the dynamic.
18 That is something that I don't have an answer for, whether it
19 would be good or bad. I know enough to know that it could be
20 dangerous. That was a consideration that we took into account
21 for this issue of giving him a third vote.

22 One problem is that once he casts one vote, say,
23 for example, for the union side, he's going to lose his
24 credibility with the other side. And it's going to mess up
25 what I'll call the duration of what he's there to do, which is

1 to help guide these trustees to do better.

2 A couple of other points. I think there is a little
3 bit of a lack of appreciation that coming out of the 2008
4 recession that the plan got clobbered. It lost hundreds of
5 millions of dollars.

6 All the objectors agree with us that the plan-funded
7 status and expected future solvency was in deep trouble in
8 those early years. And yet they're equating that with the
9 actual money damages that were lost within the statute of
10 limitations for the case that we brought.

11 One of the points we tried to make in our papers is
12 that given the limits of insurance policy and even given the
13 limits of actual damages that our experts would testify to
14 within the statute of limitations, that was not going to change
15 the fundamental funded status problem of this plan, given where
16 it was, given where the music industry was.

17 I think Ms. Bryant said quite eloquently, because my
18 client, Mr. Snitzer, was involved with this, when he graduated
19 NYU Business School with his MBA, he was making a lot of his
20 money. And he went to the music instead of the MBA stuff.

21 A lot of his money was being made doing the studio
22 gigs. And now some computer geek does it and takes the jobs of
23 many, many musicians like my client, Mr. Snitzer, for example,
24 my client, Mr. Livant, and obviously a lot of the people who
25 are on the line today.

1 And those jobs disappeared in favor of maybe one or
2 two computer geeks which is great for them. My daughter is
3 doing that right now, but it caused some fundamental problems
4 with the music industry for jobs.

5 So there is a disconnect between what the objectors
6 believe, that the plan was really looming and insolvent in
7 those very early years, then their complaint that we haven't
8 solved that problem in this lawsuit is just looking at the
9 wrong thing because that's not what our case was, and we carved
10 out any claims regarding the MPRA process.

11 But we just did not have the power, and it just wasn't
12 our case. Maybe someone needed to bring a case back in 2010,
13 but that was not done for a variety of reasons, again,
14 including -- and I can say this because I know this --
15 including lawyers who didn't think that there was a case to be
16 brought.

17 On that point, I said it in my declaration, and I'll
18 say it again. Lawyers, good lawyers, really good ERISA
19 lawyers, passed on this case. When I hear people on this
20 phonecall saying there was no risk to this case, I know
21 your Honor knows better about that. It's just not true.

22 There was a lot of risk. We have very competent,
23 skilled counsel on the other side. They know how to do their
24 job very well. The *NYU* case is a perfect example where you had
25 a really good plaintiffs' firm. They did a trial. They had

1 some really good evidence. They didn't like the result that
2 came out.

3 There are reasons for that. We protected against
4 those reasons, particularly by making sure that we went all the
5 way with our experts because the experts didn't really carry
6 the water they did in the *NYU* case, and we were very cognizant
7 of that.

8 On the issue that your Honor raised about the fact
9 category over time, it was very difficult for our team, and we
10 had a five-person team that accounts for 95 percent of our
11 hours.

12 To put something in what I'll call fact category
13 versus the deposition category versus the trial category versus
14 the settlement category, we created what I'll call the
15 mediation statements which are really summary judgment
16 statements in a trial outline.

17 They all kind of blend together. I think the simple
18 answer is that we were very efficient because it was not a case
19 where we had two, three, four class action firms where everyone
20 wants to get their hands in the til. And I think our Lodestar
21 is actually lower than the Lodestar of defense counsel, even
22 though we were the ones doing what I'll call the original work.

23 No matter what your Honor -- if your Honor thinks that
24 the Lodestar is too high, no matter how you slice it and dice
25 it, it's still going to be a very small multiplier if you grant

1 the fee award that was requested.

2 With respect to the fees, the *Goldberger* case, all the
3 cases don't say that you get some average of every single class
4 action, even the ones that get 2 cents on the dollar, ones that
5 are weak cases, ones that weren't litigated, ones where there
6 is a 5 multiplier.

7 You look at cases that are relevant and comparable.
8 So when you look at those cases, every single recent ERISA
9 pension case -- all of those are -- I don't want to call them
10 cookie-cutter cases, but lawyers do compete for those cases.

11 I know my firm has some, and usually you can't get one
12 of those cases by yourself because lots of people want to join
13 in. Our case had a lot more risk. And in all of those cases,
14 the courts have approved 33 percent.

15 Sometimes lawyers get 5 for the multipliers.
16 Sometimes they get negative multipliers, but that 33 percent
17 does appear to be the market rate for ERISA cases. And we
18 think that we did a great job, not just on the money end but
19 also on the governance end.

20 The issue that was raised -- I know Mr. Walfish raised
21 what I'll call new evidence that I don't think we've ever heard
22 before. I'm not sure that's proper procedurally, but I'm not
23 sure any of that changes anything.

24 Again, we have sympathy for Mr. Nathan and every other
25 musician who is negatively impacted by the potential of the

1 benefit cuts but just not our case, and the money that we're
2 bringing into the plan is still a positive for that.

3 I think your Honor's reference to Mr. Irving can throw
4 a flag properly understands the dynamic of how Mr. Irving does
5 have a lot of power, despite not having what we call a vote.

6 And it puts the trustees in a very difficult position
7 if they decide to go on a course of conduct where Mr. Irving
8 has said, guys, and gals, that's way too risky. Don't do that.

9 That creates a very, very difficult dynamic for the
10 trustee to go forward that way. And as someone who litigates
11 these cases, that would be what I'll call litigator's gold.

12 And the ability of the litigator to use that, if
13 that's the case, would be really, really -- create a lot of
14 leverage and grease a lot of wheels in the settlement.

15 The idea that Mr. Irving needs some kind of litigation
16 slush fund -- I think that misunderstands the concept here.
17 And if Mr. Irving is on record --

18 THE COURT: Somebody has gotten their phone unmuted.
19 Go ahead, Mr. Schwartz.

20 MR. SCHWARTZ: The idea that Mr. Irving needs a slush
21 fund, if Mr. Irving came to me and said, the trustees are doing
22 something crazy, Steve. I think we should bring a lawsuit,
23 that's a lot less risky than the lawsuit we just brought.
24 Mr. Irving has lots and lots of power.

25 Regarding Mr. Walfish's request --

1 THE COURT: Mr. Schwartz, I'm sorry to interrupt. I'm
2 going to give you two more minutes. You really do not have to
3 go through chapter and verse all of Mr. Walfish's argument.

4 MR. SCHWARTZ: Then with respect to Mr. Rumeld's
5 comments, we did address the Fitzpatrick study. But I think
6 I've addressed that. We can debate all the merits of the case.
7 The reality is that we did a good job building our factual
8 record. Were used that as leverage.

9 As far as the early settlement offer issue, you asked
10 the question well, what's the evidence in the record. I put in
11 my declaration. I really went as far as I possibly could, made
12 the offer to open up the window of transparency if you want to
13 talk about what the real offers, the bids and asks, were.

14 The reality is that this case could not have been
15 settled earlier and gotten the plan the same amount of money
16 because, for whatever reason, the insurers were not putting
17 enough money on the table for that.

18 If you need more transparency for that, I don't have
19 an objection to that. This was the same typical negotiation
20 that you get. I think that our JAMS mediator, Bob Meyer -- he
21 went above and beyond in this case.

22 And it wasn't due to a failure of diplomacy because
23 there's a settlement to be had, and people just didn't
24 understand it. We had a big gap, and he had to work and work
25 and work until we got the number to where it was. For that

1 reason, that argument we disagree with.

2 With regard to the other objections, and particularly
3 Ms. Bryant was concerned about her individual claims. I think
4 your Honor covered that nicely. We're not releasing individual
5 contract claims that might be the release of fiduciary duties
6 that relate to this plan.

7 For this kind of breach of fiduciary duty case where
8 it's a defined benefit plan -- it's not a defined contribution
9 plan -- the only way to do it is on a non opt-out class. You
10 can't have different people suing over the same claims.

11 With respect to the issue of the released parties, in
12 order to get peace so that an insurer doesn't pay to settle one
13 claim and then you get a cross-claim, there needs to be peace
14 for what I'll call the related parties, the defendants who
15 settled the case. That happens in every case, and I went
16 through the reasons why we did not sue those other people, and
17 we delineated them appropriately.

18 Those are my comments. I'm certainly happy to answer
19 any other questions that may be out there. The bottom line for
20 us is that having been through this rodeo many times and having
21 defended judgments on appeal that I've had and basically taking
22 settlement positions, I'm not giving a single dollar away
23 because I was able to evaluate the risk, and I've been
24 successful in that.

25 Our best judgment and our expert's best judgment is we

1 got everything there was to be had here. It's a really good
2 settlement. I think that there's a little blind spot with some
3 of the objectors that just because they think the trustees
4 aren't doing a good job, say from 2017 to 2020, our governance
5 provisions have not yet taken effect.

6 I kind of feel like they're denigrating the governance
7 provisions because even though they haven't taken effect, they
8 didn't do something during the 2017 through 2020 period.

9 And that obviously is something that Mr. Irving and
10 the new OCIO monitor has not had a chance yet to do. So we
11 feel very good that these governance provisions will provide a
12 big impact and, along with the money, create a settlement that
13 is in the best interests of plan participants.

14 As I said before, this plan really needs the
15 governance and needs the money now. It is not in a position to
16 wait the many years it will take if we went through trial and
17 appeal.

18 THE COURT: Thank you, Mr. Schwartz.

19 One other question for Mr. Rumeld.

20 To the extent you can tell me, what was the thought in
21 terms of the term that Mr. Irving is severing? The four or
22 five years.

23 MR. RUMELD: Well, it was the product of extensive
24 negotiation. On Mr. Schwartz's behalf, I think I would say
25 that we really proposed a much shorter duration and a much

1 narrower scope of work, and Mr. Schwartz very aggressively
2 bargained from that position.

3 So I don't know that there's a particular magic to the
4 period of time. But I would say that when you think of sort of
5 the frequency with which the fund meets, the initial period of
6 time it will take until Mr. Irving is completely up to speed
7 and understands what's going on, our feeling is the four-year
8 period is plenty enough for him to assess what's going on,
9 steer the fund, if it needs any steering independent of the
10 path that it's already on; and have us sailing going forward.

11 Anything beyond that would seem more like the type of
12 situation we have with say the Teamsters or some situation
13 where trustees are accused of doing some real wrongdoing, and
14 nobody on my side would have appreciated those types of
15 implications.

16 THE COURT: Okay. Thank you.

17 Thank you to everybody.

18 MR. WALFISH: Your Honor, I'm sorry. May I be heard
19 just on a point that Mr. Rumeld made with respect to his answer
20 to your questions regarding the NIF and the voting?

21 THE COURT: You have one minute.

22 MR. WALFISH: Mr. Rumeld's point was that to give the
23 NIF a vote would upset this tried and true dynamic where union
24 and employers are equally represented. As the Court knows, the
25 statute expressly contemplates voting neutrals.

1 All I would say is that the result, the result of the
2 traditional dynamic, is not great. This fund is undeniably
3 very, very troubled and has been so for some time. And it's in
4 a very small minority of peer funds that are in this kind of
5 trouble. So it's not as if the system that they've been using
6 has worked so well.

7 On the be-careful-what-you-wish-for, the NIF's term is
8 time limited. So if the NIF were given a vote and if that
9 didn't work out to everyone's satisfaction, fairly soon people
10 could revisit whether they want to preserve the NIF. That's
11 pretty much all I wanted to say. Thank you, your Honor.

12 THE COURT: Thank you, Mr. Walfish.

13 I want to remind everybody to mute your phone.

14 The Court is going to approve the settlement, and I'm
15 overruling all objections. I am sympathetic to the plan
16 beneficiaries and to the frustrations and the concerns of the
17 objectors.

18 Their defined benefit plan, which many counted on for
19 a comfortable retirement, is in trouble. And it is likely to
20 be in a lot more trouble today than it was a year ago, not
21 because of any decisions made by the trustees, but because of
22 the devastation to the economy caused by COVID.

23 I also understand that there are members of the union
24 and plan beneficiaries who are unhappy with current leadership
25 at the union. I also understand that those people are in the

1 minority. I know they are in the minority, because if they
2 were in the majority, they would have voted the perceived
3 rascal out by now.

4 As everyone understands, this is a settlement. That
5 means two things: First, no one will get everything that they
6 want; and second, the perfect should not be the enemy of the
7 good.

8 Pursuant to Rule 23(e)(2) of the Federal Rules of
9 Civil Procedure, the court may approve a class action
10 settlement that is binding on class members after conducting a
11 hearing and finding that the settlement is "fair, reasonable,
12 and adequate."

13 In making that determination, the Court must consider
14 whether the class representatives and class counsel have
15 adequately represented the class and whether the settlement was
16 negotiated at arm's length. That's what's known as procedural
17 reasonableness.

18 The Court must also consider the adequacy of the
19 relief, taking into account "the costs, risks, and delay of
20 trial and appeal" and the amount of attorney's fees. That's
21 called substantive reasonableness.

22 Before turning to the adequacy of the settlement,
23 which is the most important factor, I'll say a quick word about
24 procedural fairness. Having presided over this action since it
25 was first filed in 2017, which included a motion to dismiss and

1 numerous conferences, including several that took place while
2 the settlement talks were ongoing, I have no doubt that the
3 settlement agreement was reached after an arm's-length
4 negotiation.

5 Class counsel is experienced and has been competent
6 and thorough, both when litigating the motion to dismiss and
7 when conducting extensive fact and expert discovery.

8 When a settlement is the product of an arm's-length
9 negotiation between competent attorneys after meaningful
10 discovery, there is a presumption that the outcome is fair,
11 adequate and reasonable. See Wal-Mart Stores, Inc. v. Visa.
12 U.S.A., Inc., 396 F.3d 96 --

13 Let me remind everybody to mute your phone.

14 -- 396 F.3d 96 at page 116 (2d Cir. 2005). There is
15 also a "strong judicial policy in favor of settlements,
16 particularly in the class action context," in part, because
17 prolonged litigation both delays and reduces the resources
18 available to redress the harms suffered by the class, same
19 case.

20 Now, turning to the adequacy of the relief, I have
21 considered all of the submissions from class members. By my
22 count, there were about 100 individuals who objected to the
23 settlement out of a class of approximately 115,000. That's at
24 docket 194-3.

25 Approximately half of the objections were formulaic

1 objections. Overall, the submissions expressed three primary
2 concerns: First, that there are inadequate restraints on the
3 trustees to prevent them from pursuing high-risk investment
4 strategies in the future; two, that the neutral independent
5 fiduciary trustee lacks sufficient influence and permanence;
6 and three, that the trustees who mismanaged the fund are
7 allowed to remain in place. There are also some concerns about
8 the scope of the release provisions, but those were resolved
9 today in the oral argument.

10 The Court has also received letters of support which
11 were not solicited in the class notice from two individuals and
12 one entity who support approval of the settlement. The entity
13 was the International Conference of Symphony and Opera
14 Musicians, which represents 52 orchestras, 41 of which rely on
15 the fund for their musicians' retirement benefits.

16 Those expressing support say that the trustees are not
17 responsible for the fund's problems and that the trustees
18 should be allowed to devote their full attention to solving the
19 very real challenges facing the plan.

20 The measure of a fair settlement is not only whether
21 other remedies are possible or could have been obtained if
22 plaintiffs were successful at trial. The Court must consider
23 the strength of the plaintiffs' case and the likelihood of
24 success, taking into account the complexity, expense, and
25 likely duration of litigation, as well as the overall reaction

1 from the class and the ability of the defendants to withstand a
2 larger judgment. See *Joel A. v. Giuliani*, 218 F.3d 132 at 138
3 (2d Cir. 2000).

4 In terms of likelihood of success for the plaintiffs
5 at trial, this is a risky case. When I denied defendants'
6 motion to dismiss, I explained that although plaintiffs managed
7 largely to succeed in getting past the motion to dismiss, this
8 was going to be a hard road to hoe on the merits.

9 The reason it is a hard case to make is that this is
10 not a board of trustees that did nothing or that engaged in
11 self-dealing. The board asked questions. They participated.
12 They listened to their consultants who are not fly-by-night
13 operators.

14 They have a reasonable defense, both in terms of the
15 allocations decisions they made and in terms of the active
16 versus passive management. Moreover, even if plaintiffs had
17 prevailed on showing that there was a breach of fiduciary duty,
18 which is by no means clear, it would have been a substantial
19 battle of the experts over whether and to what extent the fund
20 was harmed and significant uncertainty as to what type of
21 equitable relief would be appropriate, if any.

22 In short, this is a case where both parties had
23 litigation risk. That fact renders many of the objectors'
24 objections unfounded. The settlement reflects a reasonable
25 compromise, both from a money perspective a governance

1 perspective.

2 Class counsel negotiated a gross settlement amount of
3 \$26,850,000. While that does not entirely cap out the
4 insurance proceeds, it is a reasonable financial settlement
5 given, as noted, the significant litigation risks associated
6 with the case.

7 Further litigation to trial and a potential appeal
8 would have been much more expensive, could have delayed the
9 fund getting any relief for years, which would have caused it
10 to lose the compounding effect of getting new dollars into the
11 fund sooner rather than later and likely would have further
12 depleted insurance proceeds available to pay any judgment. The
13 trial alone was expected to take a full month, which would have
14 generated millions more in fees and costs.

15 In terms of the amended governance procedures, the
16 addition of an independent fiduciary is meaningful, even if it
17 is not the home run that plaintiffs' counsel represents it to
18 be.

19 The ad hoc committee of objectors want to make it
20 sound as though it is totally useless because the independent
21 fiduciary does not have a vote. the Court disagrees.

22 Having a neutral, well-informed party at the table who
23 can raise alarms if he thinks the trustees are being
24 insufficiently skeptical of the fund's experts or are making
25 decisions that are unduly risky or, particularly now, unduly

1 cautious is a meaningful addition to the governance of the
2 fund.

3 This is particularly so when there is no evidence of
4 self-dealing by the board. At best, the plaintiffs' case shows
5 a board that was leaning too far forward chasing returns in the
6 hope that they could dig the fund out of the hole that was
7 caused primarily by the 2008 recession.

8 The independent fiduciary has the ability, if
9 necessary, to splash cold water in everybody's face if he sees
10 that happening again, assuming, without deciding, that is what
11 happened during the class period.

12 Assuming, as I do, because there is no evidence that
13 this is not true, that all of the trustees had the best
14 interests of the fund at heart, having a third party present to
15 provide a reality check from time to time is a useful thing.

16 That said, while I will not impose it as a condition
17 of approving the settlement, I urge the board of trustees to
18 consider making two changes. At a time when the plan is in
19 deep trouble, clear, trusted communications with the
20 beneficiaries of the plan is critical.

21 Whether it should have happened or not, the disclosure
22 of internal communications by the inside players has fomented
23 distrust which is not good for anyone. Giving the independent
24 fiduciary a vote over approval of the minutes might help
25 restore trust without upsetting in any meaningful way the

1 balance between labor and management that is struck in the
2 normal governance of a Taft-Hartley benefit plan.

3 Similarly, I would urge the board to consider whether
4 an extension of the independent fiduciary's term longer than
5 the four or five years agreed to, depending on the state of the
6 plan at that time, is appropriate.

7 I would also urge the union to consider one change in
8 its obligations. As the settlement is written, the union is
9 obligated to give notice of the identity and qualifications of
10 its newly appointed representatives to the board four weeks
11 before their appointment is effective.

12 I encourage the union to consider providing notice of
13 who it intends to appoint and their qualifications several
14 weeks before the person is actually appointed to encourage
15 members to weigh in if they believe an intended appointee is
16 insufficiently qualified to serve.

17 At the end of the day, it doesn't impinge on the
18 president's prerogative or his obligation to appoint someone
19 who is qualified. But hearing from members might be valuable
20 from their perspective, and it may be valuable from his
21 perspective. He may hear something that he hadn't considered.

22 In terms of the overall response from the class, the
23 100 objections represent less than .10 of 1 percent of the
24 class. The Court of Appeals has found that a similar response
25 rate weighs in favor of approval. See *D'Amato v. Deutsche*

1 Bank, 236 F.3d 78 at 86 to 87 (2d Cir. 2001) (affirming that 72
2 opt-outs and 18 written objections supported approval of
3 settlement affecting approximately 28,000 class members).

4 Taking all of the relevant factors into account, the
5 Court finds that the relief afforded to the class is within the
6 range of reasonable outcomes in this litigation.

7 Finally, we get to plaintiffs' attorney's fees. They
8 are seeking \$8.95 million in fees and \$863,811.37 in costs.
9 This represents a 33 percent fee for a firm that represents the
10 class on a contingency fee basis.

11 For any class member on the phone who isn't an
12 attorney, that means that plaintiffs' counsel has worked on
13 this case devoting thousands of hours and substantial
14 out-of-pocket expenses with no payment and no guarantee of
15 payment.

16 Defendants argue that for a settlement of this size, a
17 25 percent fee is more common, particularly in ERISA cases.
18 Plaintiffs argue that their requested fee is approximately what
19 their Lodestar is.

20 And in any event, defendants do not seriously contest
21 the hours spent. Instead, defendants argue that the hours were
22 needlessly spent pursuing fruitless and unnecessary strategies.

23 They make the argument that the case could have
24 settled earlier, but I have no evidence that that was possible
25 or that it would have yielded a more favorable outcome for the

1 class.

2 As an overarching premise, counsels' fee request must
3 be reasonable. To ensure that, the Court must first determine
4 a reasonable baseline fee using similar cases of comparable
5 complexity.

6 In very large settlement funds, a smaller percentage
7 recovery may be appropriate. Second, adjustments can go up or
8 down based on: "One, the time and labor expended by counsel;
9 two, the magnitude and complexities of the litigation; three,
10 the risk of the litigation; four, the quality of
11 representation; five, the requested fee in relation to the
12 settlement; and six, public policy considerations. That's
13 *Goldberg v. Integrated Resources, Inc.*, 209 F.3d 43 at page 50
14 (2d Cir. 2000).

15 Finally, the Court performs a Lodestar crosscheck. As
16 a starting point, an empirical study has found that in ERISA
17 cases, the average monetary recovery was \$25.75 million, just
18 south of the \$26.85 million recovery in this case.

19 The median and average fee award in that sample of
20 ERISA cases was 26 percent of the recovery. That's from
21 *Theodore Eisenberg et al., Attorneys Fees in Class Actions:*
22 *2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017). That study found
23 a slight variation in fees based on the riskiness of the case.
24 High-risk cases garnered a fee award equal to 29.2 percent of
25 the recovery, while low-risk cases earned 24.5 percent. That's

1 at page 959.

2 Defendants are correct that cases awarding a fee of
3 33 percent frequently involve a smaller settlement amount and
4 reflect above-average recoveries. I would note that the data
5 and the study I cited was gathered about a decade ago. The
6 average recovery has likely gone up a little since then just
7 based on inflation.

8 In terms of adjustment but using the Goldberg factors,
9 plaintiffs' counsel is entitled to a slight upward adjustment
10 for taking on a case that was quite risky and that involved a
11 very substantial commitment of time and money with no guarantee
12 of recovery.

13 The quality of representation was good, but it was in
14 line with what would to be expected in a case of this sort.
15 Thus, quality is neutral in terms of the appropriate amount of
16 attorneys' fees.

17 Discovery was voluminous involving at least half a
18 million documents, nearly 30 depositions, and six experts.
19 That can be found at docket 139, paragraphs 39 and 40.

20 While the complexity of the case warrants some upward
21 adjustment, counsel does not warrant the upward adjustment
22 requested because the nonmonetary relief in this case, while
23 valuable, was not exceptional.

24 In terms of the Lodestar crosscheck, my assessment is
25 that there were a lot of hours spent on this litigation, and

1 many were spent by partners that have high billing rates, and
2 many were unnecessary.

3 For example, the Court agrees with the defendants that
4 requests for emails that included the word "delete" was silly
5 and needlessly increased costs and fees to both sides.

6 Moreover, much of the work that seems to have been
7 done by partners, including 643 hours of document review,
8 could have easily been done by associates at a substantially
9 lower hourly rate.

10 Combining all of that, I find plaintiffs' requested
11 fee of 33 percent is excessive. And I will reduce it to
12 29 percent or \$7,786,500 which is a little above average for
13 ERISA claims and for common fund claims of this size but is
14 warranted for the reasons noted.

15 Plaintiffs' expenses are bloated. Copy costs were
16 billed at 50 cents a page for color papers and 25 cents a page
17 for black-and-white copies and scanning. Plaintiffs argue that
18 I should take into account that much of the copying in this
19 case involved odd-sized documents and involved making copies
20 for depositions on "quick turnaround."

21 I am confident that while some of the copying and
22 scanning involved odd-sized documents that involved more labor
23 than normal copying, I am also confident that in a case of this
24 sort, a substantial amount of the copying was routine,
25 8 1/2-by-11 copies, for which 25 or 50 cents per page is

1 nothing short of highway robbery.

2 To the extent copying was done on a "quick turnaround
3 basis," shame on counsel. You knew when the depositions were,
4 and you knew what your hot documents were. Being required to
5 make substantial numbers of copies for depositions on a quick
6 turnaround basis simply reflects poor planning.

7 In short, copy costs will be reduced by 40 percent
8 which brings the per-page cost to 15 cents per page for
9 black-and-white and scanning or 30 cents a page for color,
10 which is still quite generous given that normal, routine,
11 black-and-white copying should not exceed 5 cents a page.

12 Travel expenses are inflated. Looking only at the
13 expenses associated with the court appearances, it's apparent,
14 as counsel acknowledged, that counsel came to New York the
15 night before an appearance or stayed over an extra night.

16 Counsel is free to do so. And let me say that
17 New York certainly appreciates your taking advantage of our
18 restaurants and hotels. But that was not necessary, and the
19 associated costs should not be borne by the class.

20 Because travel expenses associated with court
21 appearances are inflated, the Court finds it reasonable to
22 conclude the expenses associated with depositions are similarly
23 excessive.

24 In sum, without going line by line through expenses,
25 the Court is going to impose a 40 percent reduction on copy

1 costs and a 50 percent reduction of all expenses, other than
2 expert fees.

3 After all adjustments, plaintiffs' counsel shall
4 receive the following in expenses: \$652,856.38 in expert fees,
5 \$31,603.80 in copying and scanning costs, and \$28,744.27 in
6 travel expenses for a total of \$713,204.45.

7 Finally, plaintiffs are seeking \$10,000 service awards
8 for the named plaintiffs to be paid from plaintiffs' attorney's
9 fees. There has been no objection from the class. Therefore,
10 those awards are granted.

11 Because there has been no objection to the release of
12 the class representatives, I will also grant the request that
13 they be provided a release, although I am still at a loss to
14 know what lawsuit could be brought against them.

15 Counsel for the ad hoc committee requests \$132,975 in
16 fees from class counsels' award. That request represents 197
17 hours at \$675 an hour. Other than clarifying the language of
18 the release, counsel provided no meaningful relief for the
19 class.

20 Even if he had, he's provided no support for his
21 requested fee. His request is wildly out of proportion to the
22 limited benefits of the clarification of the intent of the
23 parties. Accordingly, that request is denied.

24 Any request or objections that I have not expressly
25 discussed during the course of this opinion are denied.

1 Mr. Schwartz, anything further?

2 MR. SCHWARTZ: No, your Honor.

3 THE COURT: Mr. Rumeld?

4 MR. RUMELD: No, your Honor. Thank you.

5 THE COURT: Everybody, thank you very much.

6 (Adjourned)

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