IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, Plaintiffs, v. THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, ET AL., Defendants.	Case 1:17-cv-05361-VEC

NOTICE OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AGREEMENT; FINAL JUDGMENT; REJECTION OF OBJECTIONS; AN AWARD OF ATTORNEYS' FEES AND EXPENSES; APPROVAL OF SERVICE AWARDS AND RELEASES; AND ORDER OF DISMISSAL WITH PREJUDICE

PLEASE TAKE NOTICE that for the reasons set forth in the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and in Response to Objections by certain class members and Defendants' objections to the fee and expense request, Plaintiffs in the above-captioned action hereby move the Court for entry of an order that provides for final approval of the proposed class action settlement, an award of attorneys' fees and expenses, Service Awards and releases in favor of the Class Representatives, and an order overruling all of the objections to the Settlement, attorneys' fees, expenses and Service Awards.

In support of the Motion, Plaintiffs rely upon the declarations of Class Counsel Steven A. Schwartz filed at ECF # 139 in connection with preliminary approval

("Schwartz PA Decl.") and filed concurrently herewith ("Schwartz FA Decl."); the Declarations of proposed Neutral Independent Fiduciary Trustee Andrew Irving filed at ECF # 139-2 in connection with preliminary approval (Irving Decl.") and concurrently herewith (Irving Supp. Decl."); the Report of the Independent Settlement Evaluation Fiduciary Stephen Caflisch of Fiduciary Counselors supporting approval of the Settlement (attached as Exhibit 3 to the Schwartz FA Declaration); and the entire record herein, including the expert materials and depositions posted on the Settlement website http://www.afm-epfsettlement.com/Pages/Home.html. In addition to Class Counsel, Messrs. Irving and Caflisch will make themselves available at the August 26, 2020 Final Approval Hearing to answer any questions the Court may have.

Consistent with the Settlement Agreement, the proposed form of order submitted with this Motion has been approved by both Plaintiffs and Defendants. Defendants do not join in Plaintiffs' supporting Memorandum.

Dated: August 12, 2020

Respectfully submitted,

By: */s/ Steven A. Schwartz*

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2020, a true and correct copy of Plaintiffs' Motion for Final Approval of Class Action Settlement was served by CM/ECF to the parties registered to the Court's CM/ECF system and will be posted on the Settlement Website.

Dated: August 12, 2020

/s/ Steven A. Schwartz
Steven A. Schwartz

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, Plaintiffs, v. THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, ET AL., Defendants.	Case 1:17-cv-05361-VEC

[PROPOSED] FINAL APPROVAL OF THE SETTLEMENT AGREEMENT; FINAL JUDGMENT; AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS; AND ORDER OF DISMISSAL WITH PREJUDICE

WHEREAS, Plaintiffs Andy Snitzer and Paul Livant, individually and on behalf of Class Members and the American Federation of Musicians and Employers' Pension Plan (the "Plan"), and Defendants The Board of Trustees of the American Federation of Musicians And Employers' Pension Fund (the "Board of Trustees"), The Investment Committee of The Board of Trustees of the American Federation of Musicians and Employers' Pension Fund (the "Investment Committee"), as well as Raymond M. Hair, Jr., Augustino Gagliardi, Gary Matts, William Moriarity, Brian F. Rood, Laura Ross, Vince Trombetta, Phillip E. Yao, Christopher J.G. Brockmeyer, Michael DeMartini, Elliot H. Greene, Robert W. Johnson, Alan H. Raphael, Jeffrey Ruthizer, Bill Thomas, Marion Preston, and JoAnn Kessler (collectively, the "Defendants") (with Plaintiffs collectively referred to herein as the "Parties"), have agreed to settle the above-captioned matter (the "Action") on the terms and conditions set forth in the Settlement Agreement dated March

25, 2020 and all exhibits thereto;

WHEREAS, on May 18, 2020 (ECF #163), this Court entered a Preliminary Approval Order that conditionally certified pursuant to Federal Rule of Civil Procedure 23(b)(1)A) and 23(b)(1)(B), a non-opt out class consisting of:

> All participants and beneficiaries of the American Federation of Musicians and Employers' Pension Plan during the Class Period, excluding Defendants and their beneficiaries (the "Settlement Class").

WHEREAS, in the Preliminary Approval Order, the Court appointed, for the purposes of the Settlement only, Plaintiffs Andy Snitzer and Paul Livant as Class Representatives of the Settlement Class and Steven A. Schwartz and Robert J. Kriner of Chimicles Schwartz Kriner & Donaldson-Smith LLP, and their firm Chimicles Schwartz Kriner & Donaldson-Smith LLP as Class Counsel.

WHEREAS, in the Preliminary Approval Order, the Court approved the form and content of the Notice of Proposed Class Action Settlement and Fairness Hearing ("Notice") directed to members of the Class;

WHEREAS, on June 9, 2020, the Plan caused the Notice to be emailed and/or mailed to members of the Class for whom Plan records included an email or mailing address, which informed members of the Class of the Settlement terms and that the Court would consider the following issues at the Fairness Hearing: (i) whether the Court should grant final approval to the Settlement; (ii) the amount of attorneys' fees, costs, and expenses to be awarded to Class Counsel; (iii) whether to approve the payment of the Service Awards to the Class Representatives and the amount of the Service Awards;

and (iv) any objections by members of the Class to any of the above that were timely and properly served in accordance with the Preliminary Approval Order;

WHEREAS, in recognition that Plan records did not include either an email or mailing address for some Class Members, the Plan caused the Notice to be published at www.afm-epfsettlement.com (the "Settlement Website") on June 9, 2020 and also included a link to the Settlement Website on a scrolling banner on the Plan's website at www.afm-epf.org. Additionally, Defendants' counsel arranged for a call-out box with a link to the Settlement Website to be published in the monthly magazine of the American Federation of Musicians for two consecutive months beginning in June 2020, when the Notice was sent to Class Members;

WHEREAS, Defendants provided notice to the appropriate state and federal officials under the Class Action Fairness Act of 2005, 28 U.S.C. § 1715;

WHEREAS, on June 25, 2020, Class Counsel filed an application for Attorneys' Fees and Expenses, Service Awards to Class Representatives (the "Fee Application"), in which Class Counsel also applied to the Court for a release by Class Members of the Class Representatives and responded to some of the objections of Class Member Martin Stoner;

WHEREAS, on July 27, 2020, Defendants responded to the Fee Application, as well as to some of the objections filed as of that date;

WHEREAS, on or about July 29, 2020, an Ad Hoc Coalition consisting of nearly 70 individuals opposed to the Settlement (the "Ad Hoc Objectors"), filed with the Court an Objection of Ad Hoc Coalition Opposed to the Class Action Settlement Agreement,

ECF #186, opposing various aspects of the Settlement, including that the release provided in Section 2.22.1 of the Settlement Agreement is not narrowly tailored and could be construed to release investment-related claims arising after the OCIO Management Date (as defined in the Settlement Agreement);

WHEREAS, on August 10, 2020, Defendants filed a Response to the Objection of Ad Hoc Coalition Opposed to the Class Action Settlement Agreement, in which Defendants explained that claims targeting the types of investment-related decisions that were the focus of the lawsuit and that post-date the OCIO Management Date would not be released because these claims – no matter how they are characterized – would necessarily be directed at new decisions, based on new factual allegations, rather than a continuity of claims previously challenged (ECF#189);

WHEREAS, on August 11, 2020, Fiduciary Counselors, Inc., acting as the Independent Settlement Evaluation Fiduciary, approved and authorized the Settlement on behalf of the Plan in accordance with Prohibited Transaction Exemption 2003-39 ("PTE 2003-39"), but conditioned its determination on the Court making clear that the limits explained by Defendants in ECF#189 apply with respect to the release and the injunction against future claims;

WHEREAS, on August 12, 2020, Plaintiffs moved unopposed for final approval of the Settlement and responded to the various objections to the Settlement filed by class members and responded to the objections related to Class Counsel's request for attorneys' fees and reimbursement of expenses filed by class member Martin Stoner and by Defendants ("Plaintiffs' Motion for Final Approval");

WHEREAS, the Court conducted a hearing on August 26, 2020 (the "Fairness Hearing") to consider, among other things, (1) whether the proposed Settlement on the terms and conditions provided for in the Agreement is fair, reasonable, adequate, and in the best interests of the Class and should be finally approved by the Court; (2) whether Class Counsel's Attorneys' Fee and Cost application is reasonable and should be approved; (3) whether Plaintiffs' request for Service Awards is reasonable and should be approved; and (4) whether this Final Approval Order should be entered dismissing with prejudice all claims asserted in the Action against Defendants; and

WHEREAS, this Court finds that the papers are detailed and sufficient to rule on Plaintiffs' Motion for Final Approval and the Fee Application on the papers; and

WHEREAS, this Court, having heard from Class Counsel on behalf of the Settlement Class, and from Defendants' Counsel, and having reviewed all other arguments and submissions presented by all interested persons and entities with respect to the Settlement and the Fee Application; and

WHEREAS, all capitalized terms used herein have the meanings set forth and defined in the Settlement Agreement, it is hereby

ORDERED, ADJUDGED, DECREED, AND FOUND THAT:

1. This case arises out of Plaintiffs' allegations, *inter alia*, that Defendants violated the Employee Retirement Income Security Act of 1974, as amended, and breached their fiduciary duties in connection with certain investment decisions they made and the processes used by them to make those decisions from 2010 to the OCIO Management Date in 2017.

2. After extensive settlement negotiations, including a formal mediation, the Parties agreed to settle this case. This Final Approval Order and Judgment incorporates and makes a part hereof the Settlement Agreement (ECF #139-1)

3. The Settlement Agreement provides substantial and meaningful relief to the Settlement Class, including the payment of at least $17 million to the Plan and the Plan Trustees' agreement to implement the Governance Provisions specified in Section 8 of the Settlement Agreement.

4. The Settlement Class as provided in the Preliminary Approval Order is unconditionally certified as a non-opt out class pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) and 23(b)(1)(B). The Court finds, in the specific context of this Settlement, that the following requirements are met: (a) the number of Class Members is in the thousands and is so numerous that joinder of all Class Members is impracticable; (b) there are questions of law and fact common to the Class Members; (c) Plaintiffs' claims are typical of the claims of the Class Members they seek to represent for purposes of this Settlement; (d) Plaintiffs and Class Counsel have fairly and adequately represented the interests of the Settlement Class and will continue to do so; (e) prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Defendants; (f) Defendants have acted on grounds that apply generally to the Settlement Class, so that the benefits provided in the Settlement Agreement are appropriate for the Settlement Class as a whole; (g) questions of law and fact common to the Class Members predominate over any questions affecting

any individual Class Member; and (h) a class action provides a fair and efficient method for settling the controversy under the criteria set forth in Rule 23.

5. The Court also concludes that, because the Action is being settled rather than litigated, the Court need not consider manageability issues that might otherwise be presented by trial of a class action involving the issues in the Action.

6. For the purposes of Settlement only, Plaintiffs Andy Snitzer and Paul Livant are confirmed as the Class Representatives of the Settlement Class, and Steven A. Schwartz and Robert J. Kriner of Chimicles Schwartz Kriner & Donaldson-Smith LLP and their firm are confirmed as Class Counsel.

7. Notice to the members of the Settlement Class required by Federal Rule of Civil Procedure 23 has been provided as directed by this Court in the Preliminary Approval Order, and such notice having constituted the best notice practicable, including, but not limited to, the forms of notice and methods of identifying and providing notice to the members of the Settlement Class, has satisfied the requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act of 2005, and all other applicable laws.

8. Defendants have complied with the Class Action Fairness Act of 2005, 28 U.S.C. §1715, *et seq*. by timely mailing notice of the Settlement pursuant to 28 U.S.C. §1715(b), including notices to appropriate state and federal officials under the Class Action Fairness Act. The notice contains the documents and information required by 28 U.S.C. §1715(b)(1)-(8). The Court finds that Defendants have complied in all respects with the requirements of 28 U.S.C. § 1715.

9. Various class members in addition to the Ad Hoc Coalition and Martin Stoner have filed objections to the Settlement. The Court has carefully reviewed all objections to the Settlement and the Parties' responses thereto and overrules all of the objections to the Settlement for the reason set forth on the record at the Fairness Hearing and/or the Court's accompanying ruling.

10. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby fully and finally approves the Settlement set forth in the Settlement Agreement in all respects, and finds that the Settlement is, in all respects, fair, reasonable, adequate, and in the best interests of the Settlement Class. Plaintiffs and Defendants are directed to promptly consummate the Settlement in accordance with the Settlement Agreement and to comply with all of its terms.

11. The Settlement shall not be deemed to constitute an admission or finding of liability or wrongdoing on the part of Defendants, Plaintiffs, the Class Members, or Released Parties.

12. The Action is hereby dismissed, with prejudice, on the merits, as against the Defendants, on the terms and conditions set forth in the Settlement Agreement, and without costs to any party except as provided herein and in the Settlement Agreement. For those defendants who were dismissed without prejudice during the pendency of the litigation, namely Maureen Kilkelly, Andrea Finkelstein, Harold Bradley, Lovie Smith-Wright, Melinda Wagner, Thomas Lee, and William Foster (*see* ECF Nos. 39, 71), the Action is dismissed with prejudice as to them as well.

13. Plaintiffs, each Class Member, and the Plan shall be deemed to have, and

by operation of this Final Approval Order, shall have, fully, finally, and forever settled, released, relinquished, waived, and discharged all Released Claims against the Released Parties in the manner(s) set forth in the Settlement Agreement. Consistent with the condition imposed by the Independent Settlement Evaluation Fiduciary regarding the scope of the release, the Court hereby incorporates the explanation of the release offered by Defendants in ECF# 189 and agrees that the release is limited to the period before the OCIO Management Date with respect to decisions regarding (i) the Plan's asset allocation and the selection (including of the Plan's OCIO), retention, monitoring, oversight, compensation, fees, or performance of the Plan's investments or its investment managers; (ii) investment-related fees, costs, or expenses charged to, paid, or reimbursed by the Plan; (iii) disclosures or failures to disclose information regarding the Plan's investments and/or funding; or (iv) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions in connection with (i) through (iii) above.

14. Plaintiffs, each Class Member, and the Plan are permanently barred and enjoined from asserting, commencing, prosecuting, or continuing any of the Released Claims in the manner(s) set forth in the Settlement Agreement consistent with paragraph 13 above.

15. Defendants and each Class Member shall be deemed to have fully, finally, and forever settled, released, relinquished, waived, and discharged any claims against the Class Representatives that arise out of the institution, prosecution, settlement or dismissal of the Action.

16. The Court has reviewed the objections to Class Counsel's request for attorneys' fees and reimbursement of expenses. Notwithstanding those objections, Class Counsel are hereby awarded (i) attorneys' fees in the amount of $_____(___% of the Gross Settlement Amount) plus (ii) reimbursement of their reasonable expenses in the amount of $_____, to be deducted from the Gross Settlement Amount. Attorneys' fees in this amount are fair and reasonable in light of the successful results achieved by Class Counsel, the monetary benefits obtained in this Action, the substantial risks associated with this Action, Class Counsel's skill and experience in class action litigation of this type, and the fee awards in comparable cases.

17. The award of attorneys' fees to Class Counsel shall be allocated among Class Counsel in a fashion that, in the opinion of Steven A. Schwartz and Robert J. Kriner of Chimicles Schwartz Kriner & Donaldson-Smith LLP fairly compensates them for their respective contributions in the prosecution of the Action.

18. Service Awards are awarded to the Class Representatives in the amount of $_____ each, to be deducted from Class Counsel's Attorneys' Fees and Costs and not from the Gross Settlement Amount.

19. Section 9.1 of the Settlement provides that Class Members and Defendants shall also be deemed to have fully, finally and forever settled, released, relinquished, waived, and discharged any claims against the Class Representatives and Class Counsel, that arise out of the institution, prosecution, settlement or dismissal of the Action. After the Court raised questions about this provision in connection with

preliminary approval, Class Counsel agreed to withdraw their request for a release as to them. The Notice approved by the Court provided Class Members with notice of the proposed release as to the Class Representatives. No Class Member filed any objection as to that proposed release. Nor did the Independent Settlement Evaluation Fiduciary. Defendants take no position on this issue. The Court approves the release as to the Class Representatives.

20. Defendants and the Released Parties shall not be liable for any additional fees or expenses for Class Counsel or counsel of any Plaintiffs or Class Members in connection with the Action.

21. Any appeal or challenge affecting this Court's approval regarding any attorneys' fees, expenses, or Service Awards, shall in no way disturb or affect the finality of the other provisions of this Judgment nor the Settlement Effective Date.

22. By reason of the Settlement, and approval hereof, there is no just reason for delay and this Final Approval Order and Judgment shall be deemed a final judgment pursuant to the Federal Rules of Civil Procedure.

23. Jurisdiction is reserved, without affecting the finality of this Final Approval Order and Judgment, over:

a. Effectuating and enforcing the Settlement and the terms of the Settlement Agreement including payment of the $26.85 million Gross Settlement Amount, implementation of the Governance Provisions, and the payment of Plaintiffs' counsel's attorneys' fees and reimbursement of expenses and Service Awards as ordered by the Court;

b. Determining whether, in the event an appeal is taken from any aspect of this Final Approval Order and Judgment, notice should be given at the appellants' expense to some or all Class Members apprising them of the pendency of the appeal and such other matters as the Court may order;

c. Adjudicating any disputes that arise under the Settlement Agreement; and

d. Any other matters related or ancillary to the foregoing.

24. The above-captioned Action is hereby dismissed in its entirety with prejudice.

IT IS SO ORDERED.

Dated:_____

_____
Honorable Valerie Caproni, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, Plaintiffs, v. THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, ET AL., Defendants.	Case 1:17-cv-05361-VEC

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTIONS FOR FINAL APPROVAL AND ATTORNEYS' FEES AND IN RESPONSE TO OBJECTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The claims asserted in this lawsuit relate to the Trustees' breaches of fiduciary duty from 2010 to the OCIO Date in October 2017 regarding the Trustees' excessively-risky investment decisions and their failure to meaningfully disclose that the primary reason for those risky investment decisions was because coming out of the 2008 recession, the Plan was headed towards insolvency. Class Counsel prosecuted this case almost to the eve of trial, assembled a compelling evidentiary record supporting Plaintiffs' claims, and negotiated an outstanding $26.85 Settlement representing between 65% - 75% of collectable assets available to fund any judgment along with a comprehensive set of Governance Provisions that compare favorably to the injunctive relief obtained in every recent civil ERISA pension case. In short, the Settlement is likely as good as, if not better than, the best result that could have been achieved at a successful trial and sustained on appeal, without the risk and delay of continued litigation.

Plaintiffs and Class Counsel recommend approval of the Settlement. So do Class Counsel's experts. Mediator Robert Meyer of JAMS, who presided over 18 months of negotiations and has intimate knowledge of the claims and defenses, recommended that the Parties accept his "mediator's proposal" to close the remaining gaps for both prongs of the Settlement. The Independent Settlement Evaluation Fiduciary, who owes his duties to the Plan (and not Plaintiffs, Defendants, or any of the lawyers), supports approval, finding that "the amount of the Settlement of $26,850,000 is reasonable, as is the prospective relief." *See* Fiduciary Counselors Report, Schwartz FA Decl. Exhibit 3, at

12. So too do leaders of the International Conference of Symphony and Opera Musicians and the Regional Orchestra Players Association. *See* ECF # 180 at 18; ECF #186 at 237. No AFM Local or organization has filed an objection. Nor has the Musicians for Pension Security organization, which is the largest organization opposing the current Trustees. Nor have any government officials who received CAFA notice.

Unfortunately, a small percentage of class members (less than 0.1%)[1] filed objections to the Settlement based on an incorrect view of the scope of the proposed Release, fundamental misconceptions regarding the scope of the mandate and authority of the proposed Neutral Independent Fiduciary Trustee Andrew Irving, and an unrealistic view of what could be achieved at a successful trial. Plaintiffs and Class Counsel appreciate and sympathize with the angst of these and other class members about the current state of the AFM-EPF Plan, the Trustees' pending MPRA benefit cut application,[2] the evidence regarding beaches of duty, and frustration with the Trustees' insistence they have done nothing wrong. But this lawsuit was not designed to, nor could it, solve every problem with the AFM-EPF. The Settlement largely achieves the goals of the litigation, given the scope of the claims asserted and the limited resources to pay a judgment, and no rational lawyer would recommend risk losing the Settlement

[1] This small percentage supports approval of the Settlement. *See In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 485 (S.D.N.Y. 2009); *TBK Partners, Ltd. V. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982); *In re Lloyd's Am. Trust Fund Litig.*, 2002 U.S. Dist. LEXIS 22663, *67-68 (S.D.N.Y. Nov. 26, 2002 (approving settlements despite hundreds of objections including objections representing between 18% - 36% of the class); *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479 (S.D.N.Y. 1998)(fact that only 10% of the class objected "strongly favors settlement").

[2] Department of Treasury staff will apparently recommend denial of the application.

benefits in favor of going to trial in the hopes of chasing a better result after years of additional litigation. The AFM-EPF desperately needs the $17 million now and also needs the Settlement's Governance Provisions put in place now.

No class member objected to the requested Service Awards for Plaintiffs Snitzer and Livant. The $10,000 requested is less than those approved in most recent ERISA pension cases, and Plaintiffs have committed to donating those awards to organization(s) fighting to protect class members' pension rights. Nor has any class member objected to the proposed release in favor of Plaintiffs. Messrs. Snitzer and Livant admirably did their jobs as Class Representatives and deserve both.

Finally, only one class member, Martin Stoner, objected to the Class Counsel's fee request. The Court should reject that objection along with the hypocritical objection to fees raised by the defendant Trustees, who apparently had no problem with their insurers paying their lawyers about $9 million on a non-contingent basis. Courts have approved a one-third fee request in virtually all recent ERSIA pension class actions. If anything, the unique risks of this case – demonstrated by the inability of many of the objectors here to convince any other lawyers to file this case - justify a higher fee than the fees awarded in the other recent, more desirable cases. Class Counsel risked about $8 million in attorney time and almost $1 million in expenses, and even if the Court awards the full request fee, will receive almost no multiplier on their time.

II. THE COURT SHOULD REJECT ALL OBJECTIONS TO THE SETTLEMENT

Most objectors withdrew their individual objections in favor of the joining the *Ad Hoc* Coalition objection. ECF #186 at 3-220. Martin Stoner filed numerous objections on his own behalf. Other class members filed form objections prepared and solicited by Mr. Stoner. *See* ECF # 169 at 14. Others filed individualized objections. *See, e.g.,* ECF #186 at 221. Most are redundant and we respond to those as a group (with a focus on the Coalition) unless otherwise indicated. Defendants support the Settlement but object to the fee request and disagree with Plaintiffs' (and Objectors') view of the evidentiary support for Plaintiffs' claims. ECF # 184. The Court should reject all objections.

A. The Objections Regarding The Scope Of The Release Are Wrong And In Any Event Moot

As stated in our Preliminary Approval Brief at 28, the Settlement has an appropriately-tailored release limited to the claims asserted in the Amended Complaint related to the Trustees' investment decisions from 2010 to the OCIO Date in October 2107. Objectors nonetheless mistakenly believe that the Release would prevent class members from filing their own lawsuit challenging the Trustees' separate conduct regarding different investment decisions from October 2017 through 2020, even though in our Fee Motion at 34-35, we stated the Release would not release such claims.

For the reasons stated in Defendants' Response to those objections (ECF #189), Objectors misread the Release, and therefore misunderstand the scope of the Release. The Release was subject to hard and careful negotiations regarding its scope and impact

on relevant insurance policies.[3] Objectors mistakenly believe the "including but not limiting to" clause nullifies all the language, including the OCIO date limitation that follows, while ignoring what precedes that clause: limiting the Release to the claims "asserted" in or that relate to the "factual or legal allegations" in the Amended Complaint.[4] The Amended Complaint does not allege claims related to post-OCIO Date conduct. While Defendants initially resisted discovery regarding the Trustees' process regarding choosing an OCIO, after extensive negotiations, the Parties agreed to include that process as part of the discovery process based on Plaintiffs' assertion that facts regarding that process were relevant to the 2010-October 2017 claims asserted in the Amended Complaint while largely excluding discovery regarding the Trustees' decisions after the OCIO Date. Schwartz FA Decl., ¶2.

In any event, since all parties, including Defendants, are on record about the limited scope of release, the objections are moot. These on-the-record statements constitute binding judicial admissions on behalf of not just the Defendants but also the Plan. The Independent Settlements Evaluation Fiduciary concluded that to avoid any ambiguity, the final order entered by the Court should make clear that Release in the Settlement Agreement covers the enumerated types of claims only for the period before the OCIO Management Date. Report at 8. The Parties agree and have included such

[3] All Plan participants have an interest in the Plan's insurance policies actually providing coverage, both with respect to this case and any future case that may be filed.
[4] By design, this language differs from broader releases in other ERISA settlements which release claims that "could have been asserted" in the operative complaint. *See, e.g., Leber v. Citigroup 401(k) Plan Inv. Comm.*, Civ. A. 07-cv-9329-SHS, settlement approved at 2019 U.S. Dist. LEXIS 23593, at *5 (S.D.N.Y. Jan. 3, 2019); release set forth at ECF #281-1 at 708.

language in the proposed Final Order submitted with this Motion. Thus, approval of the Settlement will not impair the ability of Plan participants to bring claims, if appropriate, based on decisions made by the Trustees after October 2017 OCIO Date.

B. Applicable Legal Standards Require Approval Of The Settlement

Federal Rule of Civil Procedure 23(e)(2) requires the Court to determine whether this class Settlement is "fair, reasonable and adequate." To assess procedural fairness, courts examine plaintiffs' counsel's experience and ability, whether the settlement resulted from arms-length negotiations, and whether the parties engaged in the necessary discovery to ensure effective representation. *Milliken v. Hospitality Investor's Trust, Inc.*, No. 1:18-01757-VEC (S.D.N.Y.), ECF #152 at 2, citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). "A settlement's substantive fairness depends on the reasonableness of the benefits achieved by the settlement in light of the potential recovery at trial, the likelihood of success in light of the risks posed by continued litigation, the likely duration and cost of continued litigation, and any [] objections to the settlement." *Id.*, citing *Detroit v. Grinnell*, 495 F.2d 448, 463 (2d Cir. 1974).

Ad Hoc Objectors concede that "Class Counsel worked hard on this case and developed a compelling record of years-long incompetence, mismanagement, and dishonesty by the Trustees." Br. at 25. Class Counsel leveraged that record in the extensive negotiations to maximize the Settlement recovery.

We agree with the *Ad Hoc* Objectors that Rule 23(e) requires the Court to "make an intelligent comparison between the amount of the compromise and the probable recovery." Br. at 7. Objectors concede that the $26.85 million recovery represents a near-

maximum recovery of collectible money damages but ask this Court to ignore that cash recovery in its analysis and focus solely on the injunctive relief. No case supports that proposition. The Settlement must be evaluated as a whole. The $26.85 million, in conjunction with the Governance Provisions, constitute an outstanding result that not only far exceeds the Rule 23(e) standards but also approaches the best *collectable* judgment that likely could have been achieved at trial and sustained on appeal.

Objectors' arguments ignore the Rule 23 standards. They believe the Settlement should be rejected simply because it does not strip away all governing authority of the Trustees appointed by the AFM Union President and the Plan Employers and effectively put the AFM-EPF into receivership (as has been done by the government with union plans riddled by corruption). They also believe that even though many of these very same objectors decided against bringing this very lawsuit in 2017, and admitted they could not even find a lawyer willing to take the case due to perceived risks of success, they should be granted the decision-making authority to make the judgment whether to pocket the $26.85 million and Governance Provisions now, or take the case to trial in the hope that the Court would enter a judgment that would be affirmed by the Second Circuit (sometime in the mid-2020s) that awards at least $26.85 million and places the AFM Plan into receivership. Rule 23 lodges that discretion with Class Representatives and Class Counsel, not absent class members. We made that decision based on our best judgment – judgment which has proven more prescient than the judgment of our respected colleagues who represent the top echelon of ERISA

lawyers. Our judgment was informed by our top-shelf experts with intimate familiarity of the facts, and Mediator Robert Meyer of JAMS.

C. The Objections To The Governance Provisions Are Legally Wrong

Ad Hoc Objectors' reliance on *Selby v. Principal Mut. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 21138, at *9 (S.D.N.Y. Nov. 17, 2003), is misplaced. Unlike here, in *Selby* the maximum damages were $22,000, far less than expected litigation costs, and the settlement provided for no cash, no notice to class members, and agreed fees for class counsel pursuant to a clear sailing agreement. *Id.* at *6-12 & n. 10. The *Selby* settlement only required defendant to "change its computer system" and "supplement and/or amend its manuals and training" procedures. *Id.* at *6-8. The court rejected the argument Objectors make here and approved the settlement "since there are substantial risks and costs involved in continuing this litigation, there is no guarantee such an effort would result in any [better] injunctive relief." *Id.* at *17.[5]

Objectors and Defendants each mischaracterize the Governance Provisions. Contrary to their assertions, the provisions are comprehensive, robust and provide effective limits on the defendant Trustees' ability to breach their duties in the future while simultaneously creating a "litigation trap" that increases the Trustees' exposure should they breach their duties.

[5] Objectors inexplicably also cite *Rievman v. Burlington N. R.R. Co.*, 118 F.R.D. 29, 32-35 (S.D.N.Y. 1987). There the court rejected class-member objections and approved an all-cash settlement (even though the complaint only sought injunctive relief) and approved fees representing a 3.26 multiplier pursuant to a clear sailing agreement.

D. Defendants Make Unsupported Arguments And Distort The Record

Defendants repeat prior false assertions, without citing any evidence, that the injunctive relief sought in this litigation and the Settlement was "designed to bolster efforts to replace the Union Trustees at the union membership Convention." Defs.' Obj. at 11. As reflected at pages 14-16 of our Preliminary Approval brief, and the Schwartz FA Declaration at 3, there was no coordination with the political effort (which included many of the Objectors here and organizations like MPS) at the AFM 2019 convention to oust President Hair. Neither Class Counsel nor Plaintiffs Snitzer and Livant play any role with respect to the 2019 Convention. Nor was there coordination at the outset or during the prosecution of this litigation. *Id*.

Defendants are correct that the Settlement did not remove certain Trustees. Nor has any other recent civil ERISA pension case without evidence of self-dealing or corruption. But as previously stated, the total package of Governance Provisions will likely be more effective than replacing one or two Trustees, as all of them supported the imprudent investment allocation decisions and none disclosed to Plan participants that they made those risky investment decisions due to the looming insolvency of the Plan.

Defendants, without evidence other than their say-so, state at page 12 that they "fully expect" that the NIFT Mr. Irving "will validate the prudence of the process that the Trustees have been engaged in all along."[6] Class Counsel and our experts disagree

[6] Defendants recently walked back their statement and correctly noted that Mr. Irving's job is not to adjudicate the Trustees' prior conduct but rather to help protect against future breaches and add value to the Trustees' future decision-making process. *See* ECF #189 at 2 n. 2.

and believe Mr. Irving will provide a strong deterrent to future breaches and imprudence. Mr. Irving is intimately familiar with the Trustees' track record. Indeed, at our insistence, he was required to review the parties' expert reports and other case materials. Mr. Irving previously assured the Court that he "can add value to the Plan trustees' investment decision-making and will do so in an unbiased and independent fashion." ECF #192-2, ¶7. If the Trustees' processes were historically prudent, there would be little value to add. Mr. Irving's gravitas and judgment with respect to investing and fiduciary duty stand in stark contrast to the Trustees' documented conduct. Moreover, after reviewing Defendants' statement, Mr. Irving judiciously reiterated that: "I have neither formed nor communicated to anyone any view as to the prudence of the Trustees' current processes, let alone any changes in those processes they may make in the future during and subject to the conditions of my tenure as Neutral IFT." Supplemental Irving Declaration, ¶6. Class Counsel carefully vetted Mr. Irving's track record and are satisfied he will provide the necessary strong, independent and unbiased judgment.

From 2011-2018, Mr. Irving served as Area Senior Vice President and Area Counsel to Gallagher Fiduciary Advisors. That experience, and quality of Gallagher's work, informs Class Counsel's assessment. During that time, Gallagher conducted the OCIO RFP process for the Trustees.[7] Upon reviewing the Trustees' unsound asset allocation, Gallagher, in its final draft report, blistered the Trustees' "15% emerging markets target very aggressive" and every OCIO finalist recommended a decrease in

[7] Mr. Irving had no role on Gallagher's work for AFM-EPF.

the EME allocation from 15% to below 5%. SEI criticized the 15% allocation as "too large of an overweight on a risk-adjusted basis" and that "EME at 15% can bring too much volatility" *See* Witz Report at 32-34.

After getting a preview of that final draft, Defendants Brockmeyer and Plan Counsel Rory Albert lobbied Gallagher to remove the specific 15% EME allocation criticism *and never told any of their fellow Trustees of this revision*, thereby adulterating the entire Trustee process regarding one of the most important decisions the Board ever faced. Gallagher's final report provided to Trustees diluted the criticism to: "Have made some aggressive strategic and tactical allocation recommendations." *Id*. The other Trustees, including union President Hair and union OCIO Search Co-Chair Yao, only learned of this revision *from Class Counsel* at their depositions. *Id*.; *see also* Hair Deposition at 136-161.

While Defendants tout their litigation experts, none of them could identify a single other large pension Plan with a similar risky asset allocation. Nor could they identify a real-world *rational* asset allocation that could have been constructed to accomplish the Trustees' outsized 9% target return. *See* Witz Rebuttal Report at 13-14. Ms. Borzi offered no opinions whether the Trustees' decision to increase of the target investment return from 7.5% to 9% was prudent; whether the Trustees' decision to lower the domestic equity allocation far below the norm was prudent; or whether the Trustees' processes that led to the overall asset allocations challenged in this lawsuit were prudent; because, in her words, "that was all I was asked to opine on by counsel. Borzi Deposition at 172 -173; *see generally* pages 168-201.

Moreover, contrary to Defendants' assertions, Meketa did not affirmatively recommend the 11%/15% or 15%/18% EME/PE allocations in 2011 and 2015. *See* Borzi Deposition at 197-198 ("I didn't see anything like that in the record like that.").[8] Meketa refused to recommend or endorse the Trustees' decision to adopt the 15% EME/18% PE allocation other than to say that it was "not a crazy strategy" and that the Trustees had to "decide how much volatility and illiquidity [they] can tolerate." Meketa also described the Trustee's asset allocations as "the most aggressive [asset] allocation" of any Meketa client "with the most downside." Witz Report at 32-34; Borzi Deposition at 197-198. And Meketa ultimately recommended that the Trustees de-risk the portfolio by reducing EMEs by 60% *based on the same risks it had identified since 2010*. Witz Report at 32-34. Contrary to Defendants' bold assertions in their brief, the most Trustee Co-Chair Brockmeyer could say was that Meketa "never objected" and "didn't not recommend [those allocations]." Brockmeyer Deposition (day 2) at 349-350.

To be sure, Mr. Irving's mandate is not to adjudicate the Trustees' conduct from 2010-2017. His mandate is to help the Trustees to make prudent decisions going forward and document his disagreement should they make imprudent decisions. Mr. Irving's familiarity with Defendants' track record will help him carry out that mandate. Class Counsel received uniform views from their experts and other plaintiff lawyers

[8] Defendants misleadingly cite to Meketa statements. Br. at 20-21. The Trustees' depositions and emails reflect that the aggressive allocation was "what the Trustees wanted" and "Meketa shouldn't be faulted for going along with the Trustees' wishes" because Meketa was just following the Trustees' "marching orders." Witz Report at page 35 & note 34; pages 48-49 and note 41. Meketa only told the Trustees that if they wanted to take the risk to shoot for outsized returns, the excessive EME and PE allocations were the best way they could figure out how to do that.

personally familiar with Mr. Irving that he would be an excellent, effective and unbiased Neutral Independent Fiduciary. Schwartz PA Decl., ¶ 16. Indeed, no one, even Objectors, has challenged Mr. Irving's gravitas, judgment, qualifications, or track record of independence, much less provided any evidence to support such a challenge.

E. Objectors Are Wrong; The Governance Provisions Provide Excellent Protective Infrastructure And Exceed The Requirements Of Rule 23(e)

1. The OCIO Monitor Provisions Protect Against Business As Usual For Asset Allocation And Risk Taking

When the Trustees switched to the OCIO model in late 2017, they retained authority to provide the OCIO with marching orders about the target investment return and asset allocation. Brockmeyer Deposition at 81. Put differently, as with Meketa from 2010-2017, the Trustees had control over the level of aggressiveness of risk taking. OCIO Cambridge's role was to make discretionary and strategic decisions subject to those marching orders. Moreover, despite Gallagher's criticisms of the Trustees' outsized 15% EME allocation, the Trustees hired Meketa as OCIO Monitor, instead of hiring Gallagher, as was initially planned. That made no sense given the Trustees' knowledge and failure to do anything about Meketa's bad judgment, disastrous track record, and failure to effectively rein in the Trustees from 2010-2017.

The Settlement ousts Meketa in favor of a new OCIO Monitor to be picked from a list approved by Class Counsel and their experts. The new OCIO Monitor will be educated by Mr. Irving about the Trustees' s track record. Settlement § 1.1.3. Critically, the new OCIO Monitor will have a far greater role than Meketa had in that position, including the mandatory requirement and authority to: analyze and make written

recommendations with respect to the proposed asset allocation targets to be provided to the OCIO; make an alternate proposal should the Trustees veto those recommendations; and document, review, and approve the description of the entire process in the Board Minutes. *See* Settlement § 1.1.4. Mr. Irving, in his role as a *de facto* third Co-Chair of the Investment Committee, will have intimate involvement in the entire process, to provide an effective team to deter outsized risk taking. These OCIO Monitor provisions represent a material additive improvement, and do not represent anything close to "business as usual" as *Ad Hoc* Objectors claim.

2. The Neutral Independent Fiduciary Trustee Andrew Irving Has Robust Authority And Will Provide Robust Protection

Objectors' argument that the NIFT provisions are "toothless" misconstrues the authority granted to Mr. Irving and reflects a lack of understanding of ERISA pension plan fiduciary processes. To be sure, the NIFT provision does not effectively place the Plan into receivership and strip the Trustees of all of their decision-making authority. It does materially alter the Trustees' decision-making process and provide a strong deterrent to making future imprudent investment decisions.

Other than voting, Mr. Irving will "function in all respects" as a Co-Chair of the Investment Committee with "complete access to relevant information." § 8.1.5.1(b). Along with the Trustee Co-Chairs, he will create the agenda, lead the Investment Committee meetings, and participate in any full Board meetings, deliberations and decisions related to Plan investments. § 8.1.5.1(b), (c) & (d). Mr. Irving aptly describes his role as follows: "I may not, and will not, stand by silently or idly in the event I

observe acts or omissions that, in my reasoned view, amount to breaches by other fiduciaries, including (but not limited to) the voting Trustees, of their fiduciary responsibilities as they relate to investment matters." Irving Supp. Decl., ¶3.

If he disagrees with *any* decision or *any* matter under deliberation by the Investment Committee, he must "state his assessment, including his reasoning…" § 8.1.5.1(e) (cleaned up). He must also make recommendations, at least annually, about improving the Investment Committee processes. § 8.1.5.1(f). Objectors mistakenly contend that there is no requirement for Mr. Irving to create a written record of disagreements. In fact, Mr. Irving's views, including disagreements, will be reflected in the final Investment Committee and full Board Minutes. As the functional equivalent of an Investment Committee Co-Chair, Mr. Irving must participate in the drafting of those minutes and must approve those Minutes just like the other Co-Chairs. Mr. Irving confirmed:

> I will take care that the minutes of each meeting at which I make such an assessment reflect that assessment and the underlying reasoning accurately. And more generally, if I decide I need to state to the other Trustees, the OCIO or the OCIO monitor my views on an investment matter in writing, nothing in the Settlement precludes me from doing so.

Irving Supp. Decl.,¶5.[9] Mr. Irving's participation and sign-off of the Minutes will not only provide the written record Objectors seek, but also deter the Trustees from

[9] Objectors fail to recognize that the reason why the Settlement has an express written report requirement for the OCIO Monitor but not the NIFT is because the Monitor does not have sign-off authority over Minutes as a functional Co-Chair of the Investment Committee. The same is true of written reports required in other pension fund settlements where the agreed-upon fiduciary has limited powers.

sanitizing Board minutes as reflected in the evidence assembled by Class Counsel. *See Ah Hoc* Objectors Brief at footnote 29, citing depositions.

Moreover, Mr. Irving must also, in coordination with the Trustees and OCIO, prepare a written report about possible changes to the Plan's Investment Policy Statement. § 8.1.5.1(g). Contrary to *Ad Hoc* Objectors' misconception (page 10) that such a report "is not prepared independently," Mr. Irving has confirmed the "coordination" only means he "may consult with the OCIO and the Trustees" but "the report will be mine." Irving Supp. Decl.,¶4. Critically, as part of his duties, Mr. Irving will undoubtedly insist that the Trustees actually follow the Investment Policy Statement.

The Investment Policy Statement is a vital governance document. Indeed, former Plan counsel Rory Albert testified (page 48) that the IPS is one of only four documents he keeps handy for ready reference. As reflected at paragraphs 15-19 of her Report, Dr. Mangiero explained how the Trustees could not have engaged in their wild and crazy investment bets had they followed the directives in the Plan's existing Investment Policy Statement to protect "Fund Assets from undue volatility or avoidable risk of loss" by requiring the Trustees to limit the "level of investment market risk, consistent with moderate interim volatility; Allocate Fund Assets among asset classes that, during most periods of time, are not expected to correlate with one another; [and] … Avoid extreme levels of volatility."

Incredibly, at her deposition at pages 130-145, Defendants' expert Borzi conceded that, despite her grand pronouncement that the Trustees' processes were the best she had ever seen, she was not familiar with the Plan's Investment Policy Statement (page

130); that the Trustees failed to comply with the key provisions of the Investment Policy Statement such as comparing, gross and net of fees, the performance of actively managed investment to index funds (pages 135-137); that she saw no evidence that the Trustees "were trying to comply" with the IPS (145-146); and that while she identified these issues in preparing her expert report, she had no explanation why she decided against discussing them in her report other than her belief that "there's no significance, really." (pages 138, 142). These examples are symptomatic of Ms. Borzi's entire report and testimony. She makes grand pronouncements without making any meaningful analysis that addresses, much less weighs and evaluates, the key evidence of imprudence. Indeed, her testimony revealed a shocking unfamiliarly with basic facts relevant to her opinions.[10] And she simply ignored evidence contrary to her opinions. Borzi Report at 9-10 ("I have not afforded great weight to [the Trustees' damning] emails").

[10] Other examples include her assertion that: Meketa's unseemly pitch while serving as independent investment consultant to assume the lucrative role as AFM's discretionary private equity manager was "common" and "did not …create a conflict of interest that would warrant scrutiny; and that Meketa's involvement in the *Perez* case brought by the DOL was "minimal" and irrelevant to her analysis and that Meketa made full disclosure to the AFM Trustees. Borzi report at 17 & n. 8. Despite claiming she was "thoroughly briefed" by her DOL subordinates on the *Perez* case, Ms. Borzi made her opinions despite having "no idea" that Meketa's pitch was exactly the central allegation of *Perez*. She also did not know that Proskauer's Robert Projansky said that Meketa "show[ed] "bad judgment" when "it made a similar proposal" to the AFM Trustees and that Meketa stonewalled the Trustees by refusing to give them "any solid information" and providing "contradictory" information that was "carefully worded and misleading." *See* Witz Report at 485- & note 42; Borzi Deposition at 244, 253, 267, and generally at 239-82, which reflects Ms. Borzi's lack of familiarity of the record.

Mr. Irving's role with respect to the content of and compliance with the Plan's Investment Policy Statement directly addresses the breaches asserted in the Complaint. What's more, the catch-all provision at § 8.1.5.1(h) provides Mr. Irving with the ability to seek additional authority as he deems appropriate. And he has total discretion to "determine" whether to continue as the NIFT for a fifth year. § 8.1.5.2.

Contrary to the objections, Mr. Irving will have comprehensive authority to effectively protect the Plan, and to leverage that authority in coordination with the new OCIO Monitor, to deter the Trustees from committing similar future breaches. And should the Trustees commit such breaches, particularly if they do so over the objections of the NIFT and OCIO Monitor, their written statements and testimony will provide Plan participants with strong ammunition to prosecute fiduciary breach claims.[11]

The *Ad Hoc* Coalition mis-cites Dr. Mangiero's February 2020 "Ghostbusters" article purportedly to demonstrate Andy Irving must have complete control over all Plan investment Management to provide robust oversight and benefit participants. Br. at 2 n.2 & Ex. 2. To the contrary, the "Ghostbusters" article only notes "the movement by the plaintiff's bar to set in place operational changes with respect to plan

[11] Various objectors illogically complain that the Governance Provisions, which are not yet in place, did not prevent the Trustees from making outsized investment risks from the October 2017 OCIO date through 2020. They also belittle the deterrent effect of potential future litigation. ERISA, including its fee shift provisions, and DOL policy, each recognize that deterrent effect as part of the overall enforcement scheme. While we appreciate that Objectors failed in their attempt in 2017 to find willing counsel for this case, Class Counsel here have provided a roadmap for how to frame such claims for breaches from 2017-2020 and created a record that can be effectively used by skillful counsel to efficiently frame and prosecute such claims if warranted.

management . . . in addition to any pre-trial or intra-trial financial settlement or, when a court opines against defendants, economic damages." *Id*. at 1. The article notes that the particular NIF terms to address claims in litigation can vary widely in mandates and directives. *Id*. at 2 ("Mandates range from simple to complex"; Not all directives are universally agreed upon as the singular way to add value for participants"; Contract terms will vary by situation"; What should not vary is protection allowing the independent fiduciary to rigorously watch over the actions of in-house ERISA investment committee members and outside vendors with impunity. No one is well-served if a supposedly objective third party rubber stamps decisions or has limited clout to prevent undue risk-taking by others."). Mr. Irving's mandate provides for just such rigorous oversight within the Plan's governance structure and Taft-Hartley.

3. The Governance Provisions here are Better than those in All Other Recent ERISA Pension Settlements

As reflected in our Fee Brief at 7-9, many of the recent ERISA pension settlements provide no governance relief. Moreover, the Governance Provisions here compare favorably to those that do. Objectors fail to dispute our analyses of any of the cases we cited. Nor do they cite any civil ERISA pension settlements or judgments removing trustees in the absence of self-dealing or corruption.[12] Nor do they cite any case where

[12] *Ad Hoc* Objectors cite several inapposite cases brought by the DOL. In *Chao v. Merino*, 452 F.3d 174, 177, 185-186 (2d Cir. 2006), the court removed a fiduciary who knowingly hired a felon convicted for embezzling funds from three other employee benefit plans who proceeded, not surprisingly, to steal plan funds. In *Hugler v. Byrnes*, 247 F. Supp. 3d 223, 230, 236-37, (S.D.N.Y. 2017), the court found it "uniquely appropriate" to remove a fiduciary who invested 95% of plan assets in a single penny stock in order to further his own financial interest in that penny stock without any investigation beyond

the duly-elected union president was removed from serving as a trustee in a Taft-Hartley plan.[13] The assertion by *Ad Hoc* Objectors' counsel that a trial would inevitably or even likely have resulted in effectively placing the Plan into receivership is unfounded. Moreover, since Objectors believe that the Trustees have engaged in new breaches of their fiduciary duties since the OCIO date in 2017, to the extent *Ad Hoc* Objectors' counsel Mr. Walfish or any other lawyer concludes such conduct would support removal, nothing prevents such lawyers from filing a lawsuit to seek the removal of the Trustees and/or to seek damages for breaches after the OCIO date.

The *Ad Hoc* Objectors' citation (page 14) to *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15-cv-9936 (LGS) (S.D.N.Y.) (settlement agreement at ECF 322-1), is

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relying on oral representations. In *Katsaros v. Cody*, 744 F.2d 270, 281-282 (2d Cir. 1984), the court replaced trustees who made a series of loans, without any professional assistance or meaningful evaluation, representing over 60% of plan assets, to Hyman Green for construction of Nevada casinos, with an interim asset manager who had a maximum term of the earlier of 15 months or "as soon as successor trustees are appointed by the union and employer association who meet with the court's approval." (quoting legislative history).

[13] Adam Krauthammer, with the support of many of the Objectors here, secured an amazing and well-deserved victory in the long march towards bringing accountability to the AFM-EPF Plan by defeating and replacing Tino Gagliardi as president of AFM Local 802. But during the pendency of this litigation, despite the opposition of many of the Objectors, defendant Hair won reelection as AFM union president, and accordingly, under Taft-Hartley and the governing documents for the Plan, the notion that Class Counsel had the leverage in settlement negotiations to effect removal of Hair is not realistic. Objectors' disappointment that the litigation did not achieve what some of them failed to achieve in connection with the union president election, while understandable, is not a basis for rejecting the Settlement. The evidence developed by Class Counsel here, and, at Class Counsel's insistence made publicly available the settlement website, provides Objectors and all other Plan participants (and the Trustees and their supporters) with the ability to make an informed decision and engage in an informed, well-armed campaign for the next AFM union presidential election in 2022.

misplaced. Our settlement is better all around. Our $26.85 million recovery is over 20% more than the $21.9 million cash recovery in *Moreno*. The injunctive relief in Article 7 of the *Moreno* settlement was also far less comprehensive or impactful than here. The settlement there did not prohibit Deutsche from continuing to keep Deutsche investment funds in its employees' 401K plan, which was the primary focus of the complaint; it simply called for Deutsche to hire an independent fiduciary to provide an opinion whether those funds should be replaced. Critically, it allowed defendant Deutsche to pick the new (unknown) independent fiduciary without any input from class counsel and or any agreed-upon procedures. Here, the NIF Mr. Irving has been vetted and approved by Class Counsel and their experts, and the new OCIO monitor will be chosen via an RFP process from a list of candidates also approved by Class Counsel and their experts. Moreover, unlike the AFM Settlement, the *Deutsche* settlement does not provide for any additional disclosures; any guaranteed minimum term for the independent fiduciary's tenure; and at section 2.35 provides Deutsche with unfettered discretion to choose the independent settlement fiduciary to evaluate the overall settlement (here the parties jointly agreed upon the retention of Steven Caflisch of Fiduciary Counselors, Inc. to provide the independent settlement evaluation of the entire settlement as required by DOL regulations). Schwartz FA Decl., ¶4. The Deutsche settlement at section 2.45 also has a far broader release than the one Objectors challenge here. And Deutsche settlement does not require removal of any trustees.

Ad Hoc Objectors' citation to *Clark v. Duke Univ.*, No. 16-cv-1044 (D.N.C.) (settlement agreement at ECF # 149-2), is similarly misplaced. The cash settlement there

was only $10.65 million, less than 40% of the cash recovery here. *See* §§5.4, 5.5. The injunctive relief at section 10.4 permits Duke, after waiting until 2 years after the settlement effective date, unfettered discretion to hire a consultant to "provide a recommendation" whether the trustees should do an RFP to hire another consultant of the trustees' choosing to make recommendations about recordkeeping and administrative services. The trustees then have discretion to wait until four years after the settlement approval date to decide whether to follow and implement the recommendations of the second consultant, or alternatively, to decide against following those recommendations by simply providing class counsel with a written explanation of the trustees' "basis for" that decision. Moreover, the release at 2.36 of the Duke settlement agreement is also broader than the release negotiated here.

The most recent ERISA pension settlement is *Karpik v. Huntington BancShares, Inc.*, No. 1:17-1153 (S.D. Oh.). The proposed settlement there is only $10.5 million with no injunctive relief. *See* ECF # 67-1 at 3-4. The next most recent settlement is *Nichols v. The Trustees of Princeton University*, No. 17-3695 (D. N. J.). The proposed settlement is there is only $5.8. million. The injunctive relief does not remove any trustees or their advisors. Nor does it provide for an independent fiduciary trustee. Rather, the defendant trustees only agreed they would not raise record-keeping fees for three years; would revise their procedures to adopt "best practices" per recommendations from their current investment consultant; meet with their consultant four times per year and "review and consider" making changes to the investment line-up; and conduct an RFP (without defined procedures or candidates) for new advisors without any prohibition of

retaining their current advisers). ECF 58-5 at ¶34. The settlement also has a release broader than the one here. *Id*. at ¶¶7-8. And defendants gave class counsel a clear sailing agreement for a 33% fee request. *Id*. at ¶ 22.

Ad Hoc Objector's claim that 5 years is "too short" for the NIFT has no purchase under Rule 23(e) and they cite no civil settlements with a longer term. The term limit was among the most hotly-negotiated terms and Class Counsel were pleased with the outcome and the Mediator Meyer's 4/5 year proposal. Martin Stoner asserts that the 4-5 year term is too short based on an "expert analysis" he allegedly received based on the fact that the monitors for the Central States Pension Fund and UMW plan "served for decades." ECF 180 at 17-19.[14] The US DOL secured a consent decree stripping the CSPF trustees of their power because the trustees engaged in rampant corruption including

[14] The only attribution Mr. Stoner provides for his so-called expert analysis is his selective quote from a communication not in the record purportedly written by a former PBGC attorney. That so-called analysis is unauthenticated, inadmissible hearsay, contrary to *Daubert* standards, and lacking in any evidentiary value, and should be stricken. Indeed, it appears the expert only read a single, unidentified "letter" without reading the Settlement Agreement or Preliminary Approval papers or case materials on the Settlement Website. As a result, he mistakenly thought AFM Plan "actuary [Milliman] has a long history of doing the trustees' bidding and skewing his assumptions to keep required contributions low – too low for safety…" In fact, Milliman refused to increase its assumed rate of return above 7.5% despite the defendant Trustees' lobbying Milliman to increase it based on the trustees' outsized 9% Target Investment Return. Witz Report at 10. Moreover, while the so-called expert correctly stated that Class Counsel "has great expertise in investment related fiduciary breach," he ignorantly stated "they are not known for setting up post judgment watchdog functions." That is not true, and anyone who bothered to look would have known it was not true. Schwartz FA Declaration, ¶ 13. He also apparently did not know of (or ignored) the advice from Class Counsel's experts that the Governance Provisions provide an "excellent protection infrastructure."

making risky loans for casino development to organized crime mobsters.[15] And the decades-long monitors who replaced the trustees performed as bad, if not worse, than those trustees, running the plan into the ground.[16] The neutral trustee Mr. Stoner cites for the UMW plan (Dean Paul Dean) was not appointed pursuant to civil litigation brought by plan participants. Rather, that neutral trustee was appointed at the joint request of the employer and union trustees to replace a prior neutral trustee, also appointed by the union/employer trustees, who had engaged in self-dealing.[17]

Consistent with his conflation of civil and criminal litigation, in his July 22, 2020 objection (ECF 183 at 11), Stoner makes the outrageous, baseless charge that Class Counsel failed to follow non-existent instructions from Plaintiffs Snitzer and Livant and "only agreed" to bring this case as a "civil matter" and "refused to represent class members on their allegations that the trustees… engaged in additional criminal conduct…" Schwartz FA Declaration, ¶ 5. Class Counsel are private, civil lawyers; we do not represent the government, nor do we have authority to bring "criminal" charges against trustees. The appropriate governmental body to bring such charges and to seek sanction or removal of ERISA pension plan trustees is the Department of Labor. Class Counsel developed a comprehensive record cataloging the breaches of duty committed

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[15] https://www.forbes.com/sites/ebauer/2018/12/03/understanding-the-central-states-pension-plans-tale-of-woe/#715d83656c10.

[16] https://www.marketwatch.com/story/how-the-teamsters-pension-disappeared-more-quickly-under-wall-street-than-the-mob-2016-04-04.

[17] *Blankenship v. Boyle*, 329 F. Supp. 1089, 1106, 1110, 1113 (D.D.C. 1971); https://www.nytimes.com/1971/07/22/archives/umw-trustee-named.html.

by the defendant Trustees, including their false and misleading statements to Plan participants from 2010 – 2017. To the extent there is any basis for the DOL to seek sanctions or removal of the Trustees, Class Counsel has created a record and roadmap for the DOL. At the instruction of Class Representatives Snitzer and Livant, to the extent that the DOL requests any cooperation from Class Counsel, we have committed to provide such cooperation at no charge. Schwartz FA Declaration ¶ 6.

F. The Settlement Requires Important, Meaningful Disclosures To Plan Participants And The Trustees

The Trustees knew beginning in December 2011 that the Plan was unlikely to emerge from critical status. But the Trustees hid the ball and waited until late 2016 before giving Plan participants meaningful disclosure of the Plan's looming insolvency. *See* Schwartz FA Decl., Exhibit 2. The Trustees also failed to tell participants that they adopted a highly-aggressive, unprecedented asset allocation strategy solely based on their recognition of the looming insolvency crisis. Indeed, the Trustees' disclosures deliberately hid the massive EME and private equity allocations and the fact that their asset allocation was unlike any other Taft-Hartley pension plan.[18] Even the in their shocking December 2016 letter to participants, the Trustees misled participants in a deliberate effort to avoid disclosing the Trustees' outrageous 15% allocation to EMEs

[18] The Plan's annual funding notices disclosed general asset categories by percentage of the total, and the disclosed general categories did not show the Plan's outsized percentages of high-risk assets. *See e.g.*, ECF # 185-15 at 6-7; ECF #185-16 at 5-6; ECF #185-17 at 5-6.

and 18% allocation to private equity.[19] Thus, as reflected in the Objections, participants were blindsided, and appropriately outraged, when the Trustees disclosed, without any explanation, that the Plan went from projected solvency to projected insolvency despite a raging domestic bull run.

Defendants disagree with Plaintiffs and Objectors and assert that they prudently kept Plan participants informed about the Plan's funded status. They support that argument with a misleading spin on the chronology of their disclosures. Defs.' Br. at 26-29. In fact, Class Counsel's deposition of union Trustee Moriarity tells a compelling story about the inadequacy of the Trustees' disclosures. Schwartz FA Decl., Ex. 1. The April 2010 Rehabilitation Plan stated the Plan was expected to emerge from critical status no later than March 31, 2047. *Id*. at 34-35. Mr. Moriarity testified that during the period after the Rehabilitation Plan, up until the summer of 2016, it was reasonable for Plan participants to assume that the Plan was still projected to emerge from the red zone. *Id*. at 58. But the Trustees knew by early 2012 that Milliman's projections showed the Plan would never emerge from the red zone under Milliman's 7.5% investment return assumption. *Id*. at 39-53. The Trustees failed to disclose that key fact until 2016.[20]

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[19] *See* Schwartz FA Decl., Exhibit 2, at 3: "Our current asset allocation includes the following: equities (domestic, international developed, emerging markets, private equity); bonds (investment grade, high yield and emerging market debt); treasury inflation-protected securities (TIPS); real estate, natural resources and infrastructure. Our domestic equities include core, value and growth and large-cap, mid-cap, small-cap, and micro-cap classes. Trustees, as plan fiduciaries, are required to prudently invest assets."

[20] An internal Milliman document that Milliman designated "attorneys' eyes only" under the Protective Order entered by the Court provides relevant information regarding the adequacy of Defendants' disclosures. Plaintiffs will request that the Court

The Settlement at § 8.1.2 and Exhibit 5 requires the Trustees to make new, meaningful disclosures that address to issues identified in discovery. The new Cambridge reports posted on the Plan Website will provide a meaningful breakdown that shows the Plan's allocations to EMEs and private equity along with a comparison of those allocations to peer Taft-Hartley plans, and performance, net of fees, of the plan's actively-managed funds to comparable index funds. This provides better information than even the Trustees had/knew when making their disastrous investment decisions from 2010-2017. *See* Hair Deposition at 132 (Trustees didn't know if Meketa reports show performance gross or net of fees): Witz Report at 62-64 & note 49 (same plus reflecting Trustee Rood in 2017 first realized he had "missed concerns [about] Meketa's reporting of asset classes" because he did not realize Meketa's "asset class numbers are not net of fees" and concluding that "chasing return through active management has not beaten the index for 3, 5 and 10 years" and therefore the Plan "has seriously underperformed during each time period."); Brockmeyer Deposition at 82 (reflecting ignorance of then-current EMEM allocation because the Cambridge reports "don't distinguish *per se* between emerging market, developed equity or domestic"). These disclosures will not only inform participants, but also improve the Trustees' decision-making process.

The Trustees also actively undermined participants' ability to get information required by Section 1021 of ERISA. In response to Plaintiff Snitzer's pre-suit request,

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permit Class Counsel to publicly file that document so Class Members and the Court can evaluate the Parties' respective disclosure arguments based on a balanced record.

even though the Plan office had PDFs of the requested documents, Defendants slow-rolled production by making hard-paper copies, costing Snitzer $2,500 and the insolvent Plan over $3,600 in labor costs. Brockmeyer Deposition (second day) at 473, 485. They also flat-out lied in response to Snitzer's request for the names of Trustees on the Plan's Board committees, telling him: "The Trustees' practice is not to release this information" even though Executive Director Kilkelly had contemporaneously sent an internal email stating: "We have previously provided names of Inv. Com. members in response to an inquiry." Schwartz FA Decl., ¶8. At her deposition, Kilkelly could not provide *any* explanation as to how her email on behalf of the Trustees to Snitzer was truthful.[21] Nor could any Trustee. Due to pressure from this litigation, the Plan now provides PDF versions in response to § 1021 ERISA requests.

Ad Hoc Objectors quibble about the level of granular information required by the Settlement. Br. at 17-19 (complaining about the number of peer comparisons, the exact underlying composition of the excessive hedge fund allocation, details of the global equity holdings, etc.). But unlike the Trustees' prior disclosures, the new information in the required report discloses the allocation to EMEs (as distinct from international *developed* equities such as investments in Western European markets) and other high-risk categories like hedge funds, natural resources, real estate, etc. The comparison to

[21] Defendants take a potshot at Plaintiff Snitzer for not reading the Plan notices between 2010-2016. Br. at 26. They omit disclosing his reason. He got fed up and assumed the Trustees would only lie to him, since in response his asking at a Local 802 meeting in 2010/2011 for an explanation how the Plan lost $800 million in the 2008 recession, the Plan Executive Director Kilkelly responded: "I don't have to tell you, so I'm not going to." Schwartz FA Decl. ¶14. Given Mr. Snitzer's interaction with Ms. Kilkelly in 2017, Mr. Snitzer's instinct's proved prescient.

peer funds shows just how far out-of-the-box the Trustees pushed the risk envelope. *See* Witz Rebuttal Report at 4-5; Mangiero Report at 22, 52-54. The required disclosures, in conjunction with the information generated by the litigation and posted on the Settlement Website, provide participants with more than sufficient information to identify red flags. To the extent any participant wants more granular information, they can get Cambridge's (and Milliman's) full reports, now free of charge, via an ERISA §1021 request. Objectors' complaint that the return information on Settlement Exhibit 5 only begins in 2017 misses the point that the Cambridge report only provides historical return information during Cambridge's tenure since Cambridge replaced most of the prior active fund investments. The expert reports on the Settlement Website provide that information including illustrative charts from 2010-2017. *See* Witz Report at 52-71.

Ad Hoc Objectors also complain about the requirement in § 8.1.6 that the Trustees must provide Plan Participants with at least four weeks' notice of the identity and qualifications before the "effective date of any new Trustees' appointment." Br. at 2-3, 17. That complaint is surprising, since many of the same objectors unsuccessfully sought the same relief at the AFM 2019 convention. Schwartz PA Decl., ¶20. This provision achieves their stated goal and provides Plan participants with the opportunity to evaluate and raise any objections to prospective new Trustees before their appointments become effective. To the extent their complaint is that they want to have a new trustee not picked by Defendants (something objectors also unsuccessfully sought), the appointment of Mr. Irving achieves that goal as well.

G. Objectors' Other Arguments Are Wrong

Objectors argue that Plan Counsel have a disqualifying conflict because they also served as defense counsel. We will leave it to Plan Counsel to defend their actions. Regardless of whether a conflict exists, it does nothing to undermine the adequacy of the Settlement. Class Counsel, not defense counsel, represented and protected the interests of the Plan participants in the litigation and settlement negotiations. The negotiations were conducted under the auspices of a leading mediator. And the Independent Settlement Evaluation Fiduciary reviewed the Settlement to ensure it was prudent for the Plan to approve it.

Class Counsel did not miss the conflict issue. We advised the Court about of our concern that Defendants might seek to delay trial based on a belated discovery of a conflict of Proskauer's Mr. Rumeld serving as lead defense trial counsel while his partner Rory Albert was a key witness whose testimony and documents Class Counsel believed would prove damaging to the defense at trial. ECF #107 at 3. Mr. Rumeld assured the Court that Proskauer "investigated" the issue and had "no expectation" that Mr. Albert would provide testimony "adverse" to their clients." March 1, 2019 Hearing Tr, at 10-11. While we question that conclusion,[22] we protected class members' interests, protected the trial date, and leveraged the trial date in negotiations.

[22] Mr. Albert's damaging documents and testimony would have included his accurate observations that: "Of the dozen or so active managers retained by the Fund, 10 have provided lackluster -- or worse than lackluster -- returns over more lengthy periods of time and the 'average' 5- and 10- (and in some cases even 3-) year portrayals look worse, at least to my eye, than the single year returns…"; that in 2016, Meketa recommended that the Trusts reduce the EME exposure by 40% based on the same risks

Objectors' augments regarding damages are wrong. Class counsel recovered about 65% of the current remaining insurance proceeds and 75% of the proceeds that would have been available to pay any judgment sustained on appeal. *Ad Hoc* Objectors' argument at footnote 39 that the insurance money "comes from the *class members*" ignores basic concepts of insurance and sunk costs. Regarding the amount of damages, Class Counsel and their damages expert David Witz were fully aware of the interplay between the July 2011 statute of limitations cutoff and potential liability for the failure to correct the imprudent 2010 allocation per the Supreme Court's *Tibble* decision. Mr. Witz was plaintiffs' expert in *Tibble*. The trigger date for duty-to-correct the 2010 allocation was no earlier than the first board meeting after July 2011, which was in August 2011. The damages from the 2010 6% EME allocation had largely accrued by then, and there was only a small window for additional damages flowing from the 2010 allocation since the Trustees adopted a new allocation in November 2011. Nor did we ignore our projected active manager damages (some of which were duplicative of asset allocation damages). While Class Counsel believe we had the better of the battle of the damages experts, our best judgment, and that of our damages expert, was that a successful liability verdict would result in a damages award in the low to mid tens of millions of dollars. Those projected damages were sufficiently above the available insurance policy limits to provide maximum negotiating leverage (*i.e.*, to threaten the

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Meketa had identified since 2010 (Albert Deposition at 368-374); and his role in how he and Brockmeyer failed to inform OCIO Search Co-Chair Yao or other Trustees about Gallagher's original criticism of the 15% EME allocation and how Yao's conduct during the process was "perplexing and surprising." *Id*. at 338-364; quote at 363.

Trustees that we would seek to bankrupt them if they refused to demand their insurers tender their limits, and to set up the insurers for bad faith claims if they refused a request to tender).

Objectors' various litigation-risk arguments are odd given their inability to find counsel in 2017 or their current counsel's apparent risk aversion to filing the 2017-2020 claim he mistakenly believed was released and that his clients want to pursue. Rule 23 does not require class counsel to eschew making a reasoned, objective evaluation of risk in settlement negotiations. Our damages theory was sound and rooted in ERISA jurisprudence, but the "curb appeal" of damages based on absolute losses is different from damages based missing out on additional gains, particularly when, given the nature of the various calculations and debate of the parties' experts, the Court would have wide discretion in calculating damages.

The notion that Class Counsel overstated the "cautionary tales" from defense trial court judgments in *Sacerdotal v. NYU* and *Brotherton v. Putnam,* is wrong. Despite finding no damages causation, in *NYU* Judge Forrest condemned most trustees' conduct as "shocking" and as if "they had no idea" of basic facts. https://www.law360.com/articles/1044492?scroll=1. Those criticisms were hardly "quibbles." *Ad Hoc* Obj. at 25. Nonetheless, both Judge Forrest and subsequently Judge Torres declined to remove or sanction any trustee. While the plaintiffs ultimately secured a partial reversal in *Brotherston*, the case only settled for 28% of damages and injunctive relief less invasive than the Governance Provisions here. 1:15-13825 (D.

Mass.), ECF # 22 at 5.[23]. Martin Stoner's various unsupported pronouncements that the Court would place the AFM-EPF into receivership or that trial victory was certain reflects his lack of knowledge or judgment about the judicial process.[24]

The form objections to a non-opt out class are without merit. *See. e.g.,* ECF # 180 at 11. Courts in this Circuit consistently certify non-opt out classes under Rule 23(b)(1) in ERISA lawsuits raising fiduciary breaches stemming from plan-wide investment decisions because the requirements of Rule 23(a) and 23(b)(1) easily met. *See* ECF 130.

H. Martin Stoner's Objections Should Be Rejected

Most of Mr. Stoners' objections and inflammatory, baseless statements have been covered above, in prior filings (s*ee, e.g.*, ECF #167 at 20-26; ECF # 174 at 7-9) or are facially without merit. With respect to Mr. Stoner's misunderstanding of the class action fee process, the Independent Settlement Evaluation Fiduciary correctly noted (pages 8-9) that there is nothing wrong with Class Counsel's 33% request and further noted, as we have, that unlike many other ERISA settlements, there is no clear sailing agreement, Defendants are opposing the fee request, and the Court will be able to make a judicious decision based on an adversarial record.

[23] Our recovery of damages, collectable or otherwise, is far greater than *Brotherston* or other recent ERISA pension cases. *See Price v. Eaton Vance Corporation et al,* Civ. 1:18-cv-12098-WGY (D. Mass.), ECF No. 32 at 12 (23%); *Johnson v. Fujitsu Tech. & Business of America, Inc*., 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (less than 10%).

[24] *See* https://www.nydailynews.com/new-york/musician-suing-age-bias-complained-elderly-judge-reassigned-88-year-old-judge-article-1.967958.

III. THE COURT SHOULD REJECT DEFENDANTS' FEE-RELATED ARGUMENTS

Defendants make baseless factual and legal arguments regarding the 33% fee request. They contend that the claims asserted were a "mere charade" due to Plaintiffs' "inability to prove their case;" and that the "monetary recovery can be viewed as a 'success' only if success is measured against the precarious claim for monetary relief they were left with as the case approached trial." Defendants incongruently argue that Class Counsel should receive a smaller fee because they rejected early, lowball settlement offers. Br. at 1-2, 4, 9-10. They outrageously claim Class Counsel "needlessly extended this lawsuit for years." *Id*. at 4, 9-10. In fact, Class Counsel assembled a compelling evidentiary record and were well-prepared to proceed to trial; and it was Defendants and their insurers, not Class Counsel, who misjudged the case settlement value only to ultimately move towards Plaintiffs' number to avoid trial.

A. Plaintiffs Skillfully Navigated The Settlement Negotiation

The $26.85 million recovery represents about 65% of the current balance of Defendants' insurance policies and about 75% of what would have been left to collect on a final judgment given the "burn rate" of defense counsel's bills. Defendants' argument that Class Counsel failed to recover uncollectable damages, or damages for claims outside the statute of limitations, are nonsensical.

Defendants argue that "most substantial waste of time is attributable to Plaintiffs' professed strategy of turning down earlier settlement offers that did not exhaust the lion's share of the available insurance proceeds….this strategy served merely to divert to defense costs insurance proceeds that could have funded an earlier,

reasonable settlement." Br. at 31. They doubled down on that argument at ECF # 193, stating: "Plaintiffs pursued certain litigation strategies that were expensive … Plaintiffs should have opted to settle earlier in the proceedings, before costly fact discovery commenced." Nonsense. The notion that Class Counsel should get a *small*er percentage fee because they successfully held out for *more money* for the class is absurd. The notion Class Counsel should have, as Defendants suggest, agreed to an early, cheap settlement based on a weaker hand without performing "document review and depositions," is not only absurd, but conflicts with standards for settlement approval enunciated by this Court and the Second Circuit. *See Milliken, supra.,* ECF #152 at 2, citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). ("whether the parties engaged in the necessary discovery to ensure effective representation.").

Even worse, the factual predicate for Defendants' argument is flat-out false. Defendants made no "earlier settlement offers." Defendants put zero dollars on the table at the 2018 mediation. First excess carrier Hartford canceled the next scheduled mediation in February 2019 on less than one-days' notice. Only after the Court rejected Defendants' request for permission to file a summary judgment motion at the March 1, 2019 status conference did Defendants agree to resume mediation on April 30, 2109. If Defendants want to proceed with this argument at the Final Approval Hearing, Plaintiffs would be pleased to disclose the amount of the first and last offer Defendants put on the table at the April 30, 2109 mediation (Defendants have refused our request to make this disclosure). What we can say is neither was "early" nor "reasonable," and the substantial incremental gains from the additional six months of continued prosecution

by Class Counsel and shuttle diplomacy by the Mediator to get the case settled at $26.85 million, for practical purposes, will pay virtually the entire requested fee. Schwartz FA Decl., ¶9. If Defendants and their insurers truly believed that Plaintiffs could not prove their case, they would have proceeded to trial and only paid a few million in additional defense counsel's fees. Plaintiffs had confidence in their trial prospects, and therefore held out until they got their number. And if Defendants wanted an early settlement, they should have put at least a $26.85 million offer on the table before burning $9 million in defense costs. They did not. Not even close.

Similarly, while Plaintiffs did not win removal of any Trustees as alleged in the complaint, they patiently and zealously negotiated the Governance Provisions, which Class Counsel and their experts believe are more valuable than removing one or two Trustees, despite the risk that presented to the cash portion of the Settlement.

B. Defendants' Merits Arguments Fare No Better Here Than They Would Have At Trial

Defendants cherry-pick snippets from their expert reports to argue that their decisions to push the risk envelope to chase unprecedented rates of return and invest an unprecedented percentage of assets to EMEs and private equity were prudent. In defending their actions, they distort the advice provided by Meketa and the OCIO candidates. *See* Defs.' Obj. at 13-24. Defendants make these arguments under the guise

of objecting to Class Counsel's fee request.[25] In fact, the true purpose is to wage a PR campaign with Plan participants to support the political interests of the Trustees.

The simple answer to Defendants' arguments is transparency – something that Plaintiffs, Class Counsel and Plan participants have advocated for, and Defendants have opposed, throughout this process. The expert materials and depositions posted on the Settlement Website provide compelling evidence debunking Defendants' merits-based arguments. The discussions above address defense experts Borzi and Carron.

Defendants also tout the *investment* and *fiduciary process* opinion by their *actuarial* expert Franklin, even though, as an actuary he has no expertise to make such opinions. *See* Pitts Report at ¶15. Franklin made the absurd opinion that given the Plan's looming insolvency, it was better for the Trustees to chase losses like drunken gamblers, because it was better to try (and fail) to "win ugly" than "lose elegantly." Franklin report at 19-20. Class Counsel debunked that theory at the July 12, 2019 Court conference (ECF 122 at 27-31) as did Plaintiffs' actuarial expert Mr. Pitts at 18-19 of his report and the *Ad Hoc* Objectors at 4-5 & n. 5. Franklin also goes far beyond his area of expertise in opining: "Based on my review of the relevant documents and meeting minutes indicates that the AFM-EPF's Board of Trustees' process was second to none." Report at 27. That Defendants had to have their actuarial expert stretch to say things like that highlights the weakness of their defense and the inability of their experts to identify a single other pension plan with a risk profile or asset allocation anything like the one adopted by the

[25] Not only are these merits arguments largely irrelevant regarding fees, if they were true, and Plaintiffs had no case, then these arguments would support a higher fee for negotiating such a favorable settlement from a weak hand.

Trustees. Indeed, Defendants did not have any *investments* expert, presumably because they couldn't find one willing to endorse their irrational asset allocations.

In any event, perhaps the leading actuary, Mercer, told the Trustees in 2010 that trying to solve the Plan's solvency shortfall by taking a "more aggressive investment approach" was a "highly risky roll of the dice." Despite that warning, Defendants rolled the dice in 2010 and lost, doubled down and rolled the dice and lost again in 2011, and tripled down and lost again in 2015. Defendants have the same answer to Mercer's prescient advice as with all the other devastating documents uncovered by Class Counsel. They claim they don't mean what they say. Defs. Obj. at 17-18. Defendants similarly criticized Class Counsel for making what they believe was an "outlandish" statement in their complaint that the Trustees "doubled down" like acted like "drunken sailors" in making a continuing series of excessively-risky investment bets. *Id*. at 1. Class Counsel had not seen the Mercer warning when they filed the complaint, but Class Counsel's gambling analogy and Mercer's gambling analogy each hit the mark.

C. Defendants' Fee Arguments Conflict With ERISA Fee Jurisprudence

Other than Martin Stoner, no class member filed an objection to Class Counsel's fee request.[26] Nonetheless, Defendants challenge the requested fees.

Defendants accuse Class Counsel of paying "lip service" to the *Goldberger* standard. Br. at 6. But Defendants ignore the very standard they cite. Virtually all of the recent ERISA pension plan cases award 33% of the recovery for counsel fees. Fee Brief at

[26] Class member Chris Deschene initially challenged the fee request (ECF #180 at 4) but withdrew it as part of the *Ad Hoc* Coalition Objection. ECF #186 at 1 n. 1.

6-7. Citing those cases is not "cherry picking;" it is considering similar cases of similar complexity and risk.[27] Class Counsel here faced more risk because, unlike most of the ERISA 403(b)/401K fee cases, where members of the class action bar have competed to lead those cases since they have a proven track record of success, none of the other leading class action firms decided to take this case despite being solicited by Plaintiffs and many of the objecting class members. That legal market evidence underscores the risk faced by Class Counsel here.

Defendants' argument that Class Counsel here should get a lower percentage because they got a higher monetary settlement than in other ERISA cases supports a higher, not lower, percentage fee. Critically, Class Counsel obtained a higher percentage of collectible damages here than in the other ERISA pension cases awarding a 33% fee.

Moreover, the lodestar crosscheck supports the one-third fee. There will be virtually no multiplier here, and at the end of the day there may be a negative multiplier. Moreover, Class Counsel here had a tight, 5-person team accounting for 95% of their lodestar. The teams in many of the other cases we more diffuse, with larger teams and more firms serving as co-leads. If anything, our lodestar represents a more

[27] Defendants cannot find recent relevant cases so they cite old, irrelevant cases. They cite *Figs v. Wells Fargo & Co.*, No. 08-cv-04546 (D. Minn. 2011), ECF Nos. 264, 265, 295 (awarding fee of 25% from a $17.5 million settlement fund). Without providing reasoning it is 2-page order, the court in *Figs* awarded a 25% fee, which represented a 1.3 multiplier, more than the requested multiplier here. Plaintiffs recovered less than 20% of damages there and only took 14 depositions, each less than here. In *In re Healthsouth Corp. ERISA Litig.*, No. 03-cv-1700 (N.D. Ala.), the court awarded the full requested 25% fee, which represented a 2.15 multiplier for a lightly-litigated case with no depositions. Their citation to the Fitzpatrick survey is irrelevant because it only lists the average percentage award based on the dollar recovery without any other context including complexity, percentage recovery of damages, or lodestar multiplier.

efficient lodestar. Finally, defense counsel billed a higher lodestar than Class Counsel even though we had to piece together the claims and the documents from scratch and took virtually all of the depositions. Defense counsel had the head start of decades-long experience as Plan counsel and the benefit of Defendants explaining their documents. Unless defense counsel believe they were inefficient or inflated their bills, their lodestar arguments are the proverbial pot calling the kettle black.

Since Class Counsel litigated this case almost to the eve of trial, the summary lodestar chart filed with our Fee Motion (ECF #168-1) in conjunction with the additional information provided about the work we performed (ECF #168, ¶¶5-7 and ECF #139, ¶¶ 34-4244-50) met the standards for crosscheck purposes. *See Kornell v. Haverhill Ret. Sys.*, 790 F. App'x 296, 298-99 (2d Cir. 2019)(rejecting defendant's argument that court erred by relying on total hours instead of a breakdown of hours by time and task, and holding that where the lodestar acts as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized); *Bryant v. Potbelly Sandwich Works*, LLC, No. 1:17-cv-07638 (CM) (HBP), 2020 U.S. Dist. LEXIS 21900, at *19 (S.D.N.Y. Feb. 4, 2020)(where lodestar acts as a cross-check, it need not be exhaustively scrutinized, and courts in the Second Circuit regularly award lodestar multipliers from two to eight times lodestar and in some cases even higher); *In re Tremont Sec. Law*, 2019 U.S. Dist. LEXIS 21910, at *40 (S.D.N.Y. Feb. 11, 2019)(same).

Nonetheless, per the Court's instructions, we filed additional information breaking down the time spent by 14 separate categories. ECF #190. That information confirms that even if the Court awards the requested one-third fee, there will be little if

any multiplier. In their most recent submission (ECF # 193) Defendants state they do not contest the amount of time spent on the various tasks but reiterate their objections raised at ECF #190.

Defendants' arguments about two alleged examples of "excessive hours spent on fruitless activities" which they falsely claim, without evidence, was part of a "politically motivated [] witch hunt," are wrong. Br. at 30-31 (discovery regarding spoliation and inappropriate romantic relationships). In every class case, we take discovery regarding document preservation and potential spoliation, as part of our basic fiduciary duty of vigorous representation. Schwartz FA Decl., ¶10. In this case, during the course of our investigation, we received specific information alleging that defendant Gagliardi destroyed emails. *Id.*, ¶11. So we took a short deposition of an IT designee of Local 802 discovery on that issue, plus the issue of Proskauer's procedures for document preservation and collection. The time spent was immaterial, and included no extra travel, as it was the day after the Brockmeyer and Gagliardi depositions. *Id*. While that spoliation due diligence did not produce admissible evidence regarding spoliation, it did lead to information that answered our questions about another allegation of Trustee misconduct.

Objector Martin Stoner argues that Class Counsel should have spent more time and money, including hiring private investigators, on the issue. ECF # 183 at 9-10. Defendants argue we spent too much time on the issue. Br. at 31. Neither are right.

In every breach of fiduciary duty case, we take discovery regarding potential conflicts between fiduciaries and their advisors. Schwartz FA Decl., ¶10. During our

investigation, we learned of allegations (that had been widely circulated amongst various Plan participants) that Trustee Hair was having a romantic relationship with an unidentified lawyer at former AFM Pension Plan counsel Bredhoff & Kaiser. *Id*., ¶11. That was a serious charge because, if true, it would undermine the Trustees' reasonable reliance on their advisors. The relevance was amplified because Hair abruptly fired the Bredhoff firm under suspicious circumstances, in clear violation of the Plan's governing terms and over the intense opposition of several other union Trustees. *See* Hair Deposition at 111-114; 118-129; 217-222; 248-255; 321-323; 328. Accordingly, we properly asked a few questions, which took an immaterial amount of time, at depositions regarding potential conflicts. That questioning revealed that Hair fired Bredhoff because he thought the union Trustees need a stronger counterweight to Proskauer and concerns about Rory Albert (*e.g*., "…I thought that Rory ought to just shut up."). Hair Deposition at 116-117. It also revealed pre-existing attorney-client relationships between Proskauer and some Plan advisors including Meketa.

While it turns out that Class Counsel did not uncover evidence backing up the rumors of a romantic relationship between Hair and *Pension Plan* counsel, our investigation of the spoliation issue led us to a well-placed source who told us that Trustee Hair and Gagliardi were having romantic relationships with lawyers representing the AFM union (one outside counsel; one in-house) who allegedly were hired and/or promoted to positions and/or given salaries inconsistent with their qualifications and experience. Schwartz FA Decl., ¶11. While those allegations, if true, would not have been as directly relevant in evaluating Hair and Gagliardi's fiduciary

duties owed to pension Plan participants and their reliance on Plan advisors defense, they may have been relevant at trial with respect to evaluating how they treat their fiduciary duties generally. *Id*.

Regardless, taking discovery on the issue was consistent with our duty of zealous advocacy and the time we spent on this issue was immaterial.

D. Class Counsel Properly Documented Their Expenses

No class member challenges Class Counsel's request for reimbursement of expenses. Per the Court's request, Class Counsel recently provided additional information about the cost for each trip, amounts paid to each expert, and copying costs. ECF # 190. After reviewing that information, Defendants withdrew their prior objection regarding expenses. *See* ECF # 193.

IV. THE COURT SHOULD APPROVE THE SERVICE AWARDS

No class member objected to the proposed service awards for Plaintiffs Snitzer and Livant. Courts make such awards, usually much higher than $10,000, in most ERISA settlements, and Defendants fail to cite a single case refusing to make such an award. Any award approved by the Court will not cost the Plan a single penny; rather, it will reduce the amount of attorneys' fees otherwise awarded by a corresponding amount. Defendants nonetheless vindictively oppose the service awards solely because Snitzer and Livant have committed to donating those awards to an organization or organizations fighting to protect AFM Plan participants' pension rights. Defendants bizarrely characterize that selfless act as an improper "collateral objective" inconsistent with the purposes of service awards. But a service award is designed to provide

compensation for a class representative's "service" to the class. If anything, that Messrs. Snitzer and Livant want to continue providing a service to the class, instead of simply spending any service award on personal consumption, supports approving the requested award. To our knowledge, no court has ever told a class representative how to spend their service award, and no reason exists for this Court should to become the first.[28]

Moreover, Messrs. Snitzer and Livant have spent more hours on this case (including sophisticated pre-suit damages analyses) than almost any other class representative (except institutional investor plaintiffs) in any of the cases prosecuted by undersigned counsel, who collectively have more than 60 years of class experience, and many multiples more than the time spent by the plaintiffs in *Melito v. Am. Eagle Outfitters*. ECF 167 at 28-29; Schwartz FA Decl., ¶ 12.

V. THE COURT SHOULD APPROVE THE RELEASE IN FAVOR OF THE CLASS REPRESENTATIVES

No class member raised any objection about the proposed narrow release of claims class members might have against Messrs. Snitzer and Livant for their role in the

[28] Defendants label the notion that Messrs. Snitzer and Livant risked retaliation for bringing this lawsuit as "offensive" and "unsubstantiated." Br. at 32 n. 18. In fact, no responsible plaintiff lawyer would ever fail to advise a prospective class plaintiff of such a risk where the defendants have any power over the plaintiff's employment prospects. Schwartz FA Decl., ¶ 15. Mr. Livant plays guitar for Broadway shows; Mr. Brockmeyer is the Broadway League's full-time trustee employee. Mr. Snitzer largely depends on others to hire him to play saxophone gigs. Union President Hair has deep tentacles in the union music world and has been accused of sharp tactics. *See, e.g., Trudell v. Hair et al.*, No. 2:19-10249 (S.D. Mich.), ECF # 1 at ¶44 (accusing Hair of "extortion, coercion, bullying, intimidation and threats"). The heated emotions of this case are apparent to all. The risk to Snitzer and Livant, whether materialized or not, was real and a proper consideration under governing law.

initiation, prosecution and settlement of this action. Nor do Defendants object. The absence of class member objections is particularly significant, not just because they are the ones providing the release, but also since they have apparently given great thought and not hesitated to advise the Court who they might sue in the future. Given the circumstances, including the blunderbuss of baseless charges of criminal and ethical violations that have thrown about in connection with the settlement approval process, providing the requested release is more appropriate than those approved in more routine ERISA settlements.[29]

VI. CONCLUSION

This settlement approval process has engendered a multi-dimensional wide-ranging discussion regarding a troubled pension Plan and musicians genuinely concerned about their pensions. But the undisputed facts and governing standards under Rule 23 dictate approval. This was a risky, highly-contested case, litigated by skilled lawyers on both sides, that was settled via hard negotiations before an experienced mediator, resulting in a Settlement that provides substantial cash relief plus a comprehensive set of injunctive relief that compares favorably to injunctive relief in other recent ERISA pension class settlements. The one-third fee request is the same as approved in most of the recent ERISA settlements and will result in a minuscule, if any, multiplier. The Court should approve the Settlement, fees, Service Awards, and releases to the Class Representatives.

[29] In response to the Court's concerns, the parties have removed the release in favor of Class Counsel in the proposed Final Approval Order filed concurrently herewith.

Dated: August 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2020, a true and correct copy of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Final Approval and in Response to Objections was served by CM/ECF to the parties registered to the Court's CM/ECF system and will be posted on the Settlement Website.

Dated: August 12, 2020

/s/ Steven A. Schwartz
Steven A. Schwartz

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, Plaintiffs, v. THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, ET AL., Defendants.	Case 1:17-cv-05361-VEC

DECLARATION OF STEVEN A. SCHWARTZ IN SUPPORT OF PLAINTIFFS' MOTIONS FOR FINAL APPROVAL AND ATTORNEYS' FEES AND IN RESPONSE TO OBJECTIONS

I, Steven A. Schwartz, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a Partner and member of the Executive Committee at the law firm of Chimicles Schwartz Kriner & Donaldson-Smith LLP ("CSKD"). I submit this declaration in support of Plaintiffs' Motion for Final Approval and in response to objections. My partner Robert J. Kriner, Jr., with whom I prosecuted this case, has reviewed and approved this declaration.

2. The Amended Complaint does not allege claims related to post-OCIO Date conduct. While Defendants initially resisted discovery regarding the Trustees' process regarding choosing an OCIO, after extensive negotiations, the Parties agreed to include that process as part of the discovery process based on Plaintiffs' assertion that facts regarding that process were relevant to the 2010-October 2017 claims asserted in the

Amended Complaint while largely excluding discovery regarding the Trustees' decisions after the OCIO Date.

3. Contrary to the repeated assertions by Defendants, my firm did not initiate or prosecute Plaintiffs' claims in coordination with the Musicians for Pension Security group or any other political organization. Nor did we play any role in the Local 802 election in which Mr. Krauthammer defeated Mr. Gagliardi or the AFM 2019 convention and elections. Nor, to our knowledge, did our clients Messrs. Snitzer and Livant.

4. As part of the Settlement, the Parties jointly agreed upon the retention of Stephen Caflisch of Fiduciary Counselors, Inc. to provide the independent settlement evaluation of the entire settlement as required by DOL regulations.

5. There is no basis to Martin Stoner's assertion that my firm failed to follow non-existent instructions from our clients Messrs. Snitzer and Livant or that we "only agreed" to bring this case as a "civil matter" and "refused to represent class members on their allegations that the trustees… engaged in additional criminal conduct..."

6. At the instruction of our clients Messrs. Snitzer and Livant, to the extent that the Department of Labor requests any cooperation from Class Counsel with respect to any investigation related to the AFM-EPF, we have committed to provide such reasonable cooperation at no charge.

7. Attached as Exhibit 1 is the cover page and pages 17-69 of the deposition of Trustee Moriarity. Attached as Exhibit 2 is a copy of Defendants' December 2016 letter to Plan participants. Attached as Exhibit 3 is the Report of the Independent Settlement evaluation Fiduciary.

8. My client Mr. Snitzer asked Plan Executive Director Maureen Kilkelly for the names of the Plan's Investment Committee members. Contemporaneous with Ms. Kilkelly telling Mr. Snitzer that "The Trustees' practice is not to release this information," she sent an internal email stating: "We have previously provided names of Inv. Com. members in response to an inquiry." Deposition Exhibits 44-46.

9. Defendants never made an "early reasonable settlement offer" as suggested in their Objection and or even any reasonable settlements offer prior to the April 30, 2019 mediation. After that mediation, the substantial incremental gains from Defendants' offers at during the additional six months of continued prosecution by Class Counsel and shuttle diplomacy by the Mediator to get the case settled at $26.85 million, for practical purposes, can pay virtually the entire requested fee.

10. In our class cases, we, along with our co-counsel, take discovery regarding document preservation and potential spoliation, as part of our basic fiduciary duty of vigorous representation. In our breach of fiduciary duty cases, we, along with our co-counsel, take discovery regarding potential conflicts between fiduciaries and their advisors.

11. We received information about potential spoliation of electronic documents by Mr. Gagliardi. We also learned of allegations (that had been widely circulated amongst various Plan participants) that Trustee Hair was having a romantic relationship with an unidentified lawyer at former AFM Pension Plan counsel Bredhoff & Kaiser. Our investigation of the spoliation issue led us to a well-placed source who told us that Trustee Hair and Gagliardi were having romantic relationships with lawyers

representing the AFM union (one outside counsel; one in-house) who allegedly were hired/promoted to positions/given salaries inconsistent with their qualifications/experience.

12. Our clients Messrs. Snitzer and Livant have spent more hours on this case (including sophisticated pre-suit damages analyses) than almost any other class representative (except institutional investor plaintiffs) in any of the cases prosecuted by either Mr. Kriner or me.

13. Contrary to the assertion in one of Mr. Stoners' objections that the lawyers in my firm "are not known for setting up post judgment watchdog functions.," my firm has extensive experience in fiduciary duty litigation and settlements including governance reforms to address fiduciary malfeasance. My firm has had an extensive practice in the Delaware Court of Chancery and courts in other jurisdictions litigating fiduciary duty claims, typically involving corporate boards of directors or partnership fiduciaries, for over 30 years. Indeed, my partner Mr. Kriner has over 30 years of extensive experience in these matters. These matters commonly involve reforms to improve the independence, diligence and transparency of fiduciary processes, and often relate to highly-publicized cases.

14. As reflected in Mr. Snitzer's deposition at page 102, in response Mr. Snitzer asking at a Local 802 meeting in 2010/2011 for an explanation how the Plan lost $800 million in the 2008 recession, Plan Executive Director Kilkelly responded: "I don't have to tell you, so I'm not going to."

15. Based on my decades-long experience prosecuting class cases, my view and practice, and the view and practice of my co-counsel, is to advise prospective class representatives of the risk of retaliation where the prospective defendants have any power over the prospective class representative's employment prospects.

I declare pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on August 12, 2020 in Berwyn, Pennsylvania.

By: */s/ Steven A. Schwartz*
Steven A. Schwartz

Counsel for Plaintiffs
and Class Counsel

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 1:17-cv-05361-VEC

----------X

ANDREW SNITZER and PAUL LIVANT, individually and as representatives of a class of similarly situated persons, on behalf of the American Federation of Musicians and Employers' Pension Plan,

Plaintiffs,

- against -

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, THE INVESTMENT COMMITTEE OF THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, RAYMOND M. HAIR, JR., AUGUSTINO GAGLIARDI, GARY MATTS, WILLIAM MORIARITY, BRIAN F. ROOD, LAURA ROSS, VINCE TROMBETTA, PHILLIP E. YAO, CHRISTOPHER J.G. BROCKMEYER, MICHAEL DEMARTINI, ELLIOT H. GREENE, ROBERT W. JOHNSON, ALAN H. RAPHAEL, JEFFREY RUTHIZER, BILL THOMAS, JOANN KESSLER, MARION PRESTON,

Defendants.

----------X

November 14, 2018
9:32 a.m.

Deposition of WILLIAM MORIARITY, taken by Plaintiffs, pursuant to Notice, held at the offices of Proskauer Rose LLP, 11 Times Square, New York, New York, before Todd DeSimone, a Registered Professional Reporter and Notary Public of the State of New York.

year.

Q. Were you paid as a consultant in St. Louis?

A. I was paid on basically a piecemeal basis, on a work-for-hire basis.

Q. Are you presently employed?

A. No.

Q. Do you have any informal training or experience in managing investments?

A. Only what I got through the international foundation and through the AFL-CIO and by listening to our professionals at the meetings.

Q. When I use the term "plan" today, I will try to make it clear, what I'm talking about is this plan versus some other plan, but I mean the American Federation of Musicians, when I use "plan." Do you understand that?

A. Okay, yes.

Q. Are you a plan participant?

A. Yes.

Q. What's your current age?

MORIARITY

A. 80.

Q. You are retired and receiving benefits?

A. Yes.

Q. When did you begin to receive benefits?

A. 2004.

Q. When the multiplier was reduced from $4 and some cents, did that affect you at all?

A. No.

Q. When it was reduced from $2 to $1, did that affect you at all?

A. No.

MR. RUMELD: I'm going to object to the form.

MR. KRINER: What's the objection, Myron?

MR. RUMELD: I'm not sure it's clear what it means, did that affect you. Are you saying did he accrue any benefits after it changed?

Q. Did you understand the question?

MORIARITY

A. I understood it to that extent, yes.

Q. And your answer was no, right?

A. Right.

Q. Do you have any relationship with any of the plan trustees or former trustees outside of plan business?

A. I'm friends with some of them.

Q. Who are you friends with?

A. Well, I'm friends with almost all of -- I guess all of the union trustees.

On the employer side, I'm friends with all except the most recent, who I don't know very well.

Q. Are you friends with any former union trustees?

A. Most of the former union trustees I know are dead, so I think the answer is no to that.

Q. I hope the answer is no.

What about, do you have any relationship with any of the plan's consultants or advisors outside of plan

business?

A. What do you mean by relationship?

Q. Anything other than your give and take with them during plan business; friendships, personal relationships, dinners, on a social level?

A. No.

Q. How about with any of the law firms that are currently engaged by the plan or have previously been engaged by the plan, do you have any personal business with any of those firms?

A. I don't. I have friendships, though, with one of the -- some lawyers from one of the previous law firms.

Q. And who would that be?

A. The law firm would be Bredhoff & Kaiser, and the two legal counsel would be Anne Mayerson and Penny Clark.

Q. You are personal friends with them?

A. Yes.

Q. You still are?

MORIARITY

A. I still speak to them. I don't see them very often, but I consider them friends.

Q. When is the last time you spoke to either Ms. Mayerson or Ms. Clark?

A. I think I spoke to Ms. Mayerson maybe four or five months ago.

Q. What did you speak to her about?

A. We both tend to read the same books. We spoke about those books.

Q. What books were they?

A. Well, I was attempting to get through Middle March and Daniel Deronda, and I successfully did that, and she was recommending some other books to me, and I have tried -- I forget which ones, but I never got through those.

Q. Did you speak with Ms. Mayerson about any plan business during that communication?

A. I don't think so, no.

Q. Was it personal, by phone, e-mail, how was it?

MORIARITY

A. By phone, personal by phone.

Q. How long was the discussion?

A. Maybe 15 minutes.

Q. When is the last time you spoke with Ms. Clark or communicated with Ms. Clark?

A. I don't recall. I don't recall. I think the last thing I recall speaking to Ms. Clark about was baseball.

Q. You must be a Nationals fan?

A. No, she is. They have season tickets.

Q. With Brett Kavanaugh?

And you are a baseball fan?

A. I have been in the past and still am a little bit, yeah, not as much.

Q. When was your last discussion with Ms. Mayerson -- or, I'm sorry, Ms. Clark?

A. I can't recall that. I had a phone conversation with her sometime within this year, I think, but I don't recall what it was about, and I don't think it was about plan business. I think it had to do

with -- I don't recall.

Q. You joined the Board of Trustees for your second stint in August of 2010, right, as a union trustee?

A. That's right.

Q. And how did that come about?

A. The president of the American Federation of Musicians called me and asked me if I would serve, and I said yes and he appointed me.

Q. Mr. Hair?

A. Yeah, right.

Q. Did he tell you why he wanted to appoint you?

A. Yes. He said he was appointing a number of -- he was making a number of changes in the union side of the board and he wanted somebody who had had some experience at the board, some prior experience at the board, to be one of those trustees, and that was my function.

Q. Did he tell you why he was making changes?

A. No, he did not.

MORIARITY

Q. You didn't ask him?

A. No, I did not. He had defeated the then incumbent for office as the president and the incumbent had basically named those other trustees, and I guess I just assumed something.

Q. When you joined the board, did you attend a new trustees seminar?

A. I attended the new trustees seminar that was held for the new members of the board, yes.

Q. Where was that?

A. It was, at that time, it was at the pension fund's offices, 1 Penn Plaza.

Q. So the new trustees attended, who else attended?

A. Basically legal counsel.

Q. What was covered?

A. I have no clear recollection of that.

Q. Did the plan's financial condition, was that covered?

A. Yes.

Q. Extensively?

A. Yes.

Q. Did the current matters under consideration by the Board of Trustees at that time, were they covered?

A. I don't remember that.

Q. Did you review any documents there?

A. We reviewed summary plan description, I think, and I think beyond that, no.

Q. No board minutes?

A. No, I don't recall any board minutes.

Q. No financial statements?

A. Possibly financial statements, yes. I don't know. I don't remember that.

Q. And when you joined the board, you also joined the Investment Committee and the Strategic Planning Committee, correct?

A. My recollection is that the Strategic Planning Committee had not yet been formed.

I joined the -- well, yes, that

Investment Committee and other committees.

Q. So you joined the Investment Committee. What other committees?

A. At the time there was a Computer Committee, I was the only member of that committee. There were several other committees that I joined, and I would have to look at documents to see which those were.

Q. Fair enough.

And you are correct, the Strategic Planning Committee wasn't immediately formed, but shortly after you joined it was formed?

A. Yes.

Q. And you became a member, correct?

A. Yes.

Q. And how did you become a member of the Investment Committee and the Strategic Planning Committee?

A. I was appointed by President Hair.

Q. Did Mr. Hair tell you why he

was appointing you?

A. I had been a member of the Investment Committee when I was on the board previously, and I think he appointed me to that committee because he recognized it as an important committee and wanted my participation in the committee.

Q. Were you aware when you joined the board that the plan was in critical status and had formulated a rehabilitation plan?

A. Yes.

Q. How did you know that?

A. I had tried to keep current with board matters during the five years I was off the board, and during that time I had made presentations to various musical groups around the country about the pension.

Q. And you are also a participant, correct?

A. Yes.

Q. So you received the --

A. I received the annual funding

notice, yes.

Q. And you received the rehabilitation plan, correct?

A. Yes.

Q. So around April of 2010 or shortly thereafter you would have received or you did receive a copy of the rehabilitation plan, correct?

A. Yes.

(Exhibit 107 marked for identification.)

Q. Mr. Moriarity, I'm going to hand you what's been marked as Exhibit 107, which I believe is an update of the rehabilitation plan that was made after fiscal year '16 for the plan.

Do you see that?

A. Yes.

Q. Have you read this?

A. Yes.

Q. Were you part of --

A. I read it at the time that it was put into effect.

Q. Did you participate in

formulating the contents of the updated rehabilitation plan?

A. Yes, I participated by approving it, yes.

Q. Let me ask you to turn to page 2, and direct your attention to the second full paragraph on page 2, and the second to the last sentence beginning "The Rehabilitation Plan originally employed reasonable measures to enable the Plan to emerge from critical status at a later date than the 10-year Rehabilitation Plan. As the Plan is currently not projected to emerge from critical status, the Rehabilitation Plan now employs reasonable measures to enable the Plan to forestall insolvency."

Do you see that?

A. Yes.

Q. This statement that the plan was not projected to emerge was new information added to the rehabilitation plan in the summer of 2016, correct?

A. Yes.

MORIARITY

Q. And that information had not been previously provided to the participants, correct?

MR. RUMELD: I object to the form.

MR. KRINER: What's the objection?

MR. RUMELD: I think your question is unclear. Are you saying it previously wasn't provided in the rehabilitation plan or in any other matter?

MR. KRINER: In any other matter, in any other form.

Q. Are you aware of any other form of information provided to the participants prior to the summer of 2016 that the information that the plan is not projected to emerge from critical status that was provided to the participants?

A. I'm not aware of any.

Q. Let me hand you what has been marked as Exhibit 108.

(Exhibit 108 marked for identification.)

MORIARITY

Q. 108, do you recognize as the original rehabilitation plan?

A. Yes.

Q. Let me direct your attention to page 7 of the rehabilitation plan.

The second paragraph under the Roman section VIII, Rehabilitation Plan Objectives, do you see that?

A. Yes.

Q. And in that paragraph, it says "Under the Rehabilitation Plan adopted by the Board, the Plan is estimated to emerge from critical status no later than March" --

A. Where are you? Oh, I see.

Q. So you are following me now?

A. Yes.

Q. "Under the Rehabilitation Plan adopted by the Board, the Plan is estimated to emerge from critical status no later than March 31, 2047 and also is not projected to become insolvent at any point during the projection period."

Do you see that?

A. Yes.

Q. And that was accurate at this time, correct?

A. Yes, so far as I know, yes.

Q. Let me ask you to look at page 10, and the first paragraph beginning at the top of the page states that "In consultation with the Plan's actuary, the Board will review the Rehabilitation Plan annually and amend it, as appropriate, to meet the objective of enabling the Plan to emerge from critical status."

Do you see that?

A. Yes.

Q. It also says "The annual review will include a thorough review of the Plan's funding status, including projections by the actuary of whether and when the Plan is expected to emerge from critical status or become insolvent."

Do you see that?

A. Yes.

Q. Did the board conduct these annual reviews?

A. Yes.
Q. They did?
A. Yes.
Q. In consultation with the actuary?
A. In consultation with the actuary, yes.
Q. And who was in charge of the annual funding notices provided to plan participants?
A. Who was in charge?
Q. Yes. Who was in charge of the contents of the annual funding notices that were provided to participants?
A. The annual funding notices were provided in a form that is required by statute, and the actuary then puts the numbers in.
Q. And the board approved the contents of the funding notices?
A. I do not recall an approval process. I haven't gone over those minutes, so I don't know that.
Q. Did you review the annual

funding notices before they went out?

A. I think we were shown them, yes, and we looked at them, yes.

(Exhibit 109 marked for identification.)

Q. I show you what has been marked as Exhibit 109.

109 is the annual funding notice for the plan fiscal year 2011; is that right?

A. Yes.

Q. And let me direct your attention to page 2, and specifically the second paragraph under the topic Critical or Endangered Status. Do you see that?

A. Yes.

Q. This funding notice states, as did the original rehabilitation plan, "Based on projections using the Plan's actuarial assumptions as required by law and the Plan's financial status at the time of the adoption, it was estimated that the Plan would emerge from critical status no later than March 31, 2047," correct?

MORIARITY

A. Yes, that's what it says.

(Exhibit 110 marked for identification.)

Q. I'm handing you what has been marked as Exhibit 110, which is the annual funding notice for the fiscal year of 2016.

Do you have that?

A. Yes.

Q. This got to the participants roughly in the summer of 2016; is that right?

A. Sometime in July, yes.

Q. And let me direct your attention to page 2 of that document.

Are you there?

A. Yes.

Q. The last sentence on page 2 states that "The Plan is not projected to emerge from critical status either during the 10-year rehabilitation period that began April 1, 2013 or otherwise."

Do you see that?

A. Yes.

Q. So it says the plan is never

expected to emerge, right?

A. Right.

Q. And did that information -- was that information in any of the annual funding notices prior to the funding notice delivered in 2016?

A. I wouldn't know that without reviewing those funding notices.

Q. Do you know whether the answer is yes or no, sitting here today?

A. No, I don't.

Q. You are not aware of that information that the plan was never expected to emerge being communicated to the participants anytime prior to 2016 by the plan; is that correct?

A. I would have to review the documents prior to, the previous funding notices, to know the answer to that question.

Q. But sitting here today, you are not aware of any means or instance in which the fact that the plan is not projected to emerge from critical status ever was

MORIARITY

communicated to participants at any time prior to 2016; is that correct?

A. I don't know whether it was or whether it wasn't.

Q. You are not aware of any instance, sitting here today, that it was, correct?

MR. RUMELD: I object to the form. He has answered your question.

MR. KRINER: No, he hasn't.

Q. You are not aware of any instance, sitting here today, where the participants were provided with that information prior to the summer of 2016, correct?

MR. RUMELD: I object to the form.

A. No, I'm not.

(Exhibit 111 marked for identification.)

Q. I will hand you what has been marked as Exhibit 111.

Do you have that?

A. Uh-huh.

MORIARITY

Q. That's the funding notice for fiscal year 2015, which is the funding notice for the year prior to the '16 in the previous exhibit, correct?

A. Yes.

Q. Let me ask you to look at page 2, and at the bottom of the page, bottom of page 2, there is a statement regarding the plan's emergence, the expectation regarding the plan's emergence, correct?

A. You are talking about that last sentence at the bottom?

Q. Yes.

A. Yes.

Q. That does not include the information that the plan is never expected to emerge, correct?

A. That's correct.

MR. RUMELD: Objection to the form.

Q. And you are not aware that any of the other annual funding notices prior to 2015 after the rehabilitation plan was instituted where the information was

included there that the plan was never expected to emerge, correct?

A. I'm not aware.

(Exhibit 112 marked for identification.)

Q. I'm going to hand you what has been marked as Exhibit 112, and 112 are the minutes of the Board of Trustees for February 16, 2012.

Do you have that?

A. Yes.

Q. Have you seen these minutes before?

A. Yes.

Q. And you would have approved the draft of these minutes for finalization, correct?

A. Yes.

Q. Did you review these minutes in preparation for the deposition?

A. I do not recall that I did. I don't think I did.

Q. I will direct your attention to page 3.

MORIARITY

Page 3 appears to include a synopsis of the Strategic Planning Committee meeting on the previous day; is that right?

A. Yes.

Q. You, at the time, were a member of the Strategic Planning Committee, right?

A. Right.

Q. The third bullet point down in the synopsis states "The Committee discussed the Plan's financial condition and the types of messages that could be provided to participants and current or prospective contributing employers."

Do you see that?

A. Yes.

Q. Do you recall the contents of that discussion?

A. No, I don't.

Q. Let me direct your attention to previously marked Exhibit 90.

So Exhibit 90 I believe is notes generated by Ms. Clark relating to the February 16 -- February 15 meetings.

MORIARITY

Do you see that?

A. Yes.

Q. Did you review these in preparation for the deposition?

A. I don't recall reviewing this.

Q. Let me ask you to look at page 7. The bottom of the page states "Strategic Planning Committee." Do you see that?

A. Yes.

Q. And there is a colon, and then there is text following it.

I infer from that that the written material beginning on page 8 relates to proceedings at the Strategic Planning Committee; is that fair?

A. Yes.

Q. Moving down to the fourth full paragraph, which says "BT," colon, do you see that?

A. Fourth full paragraph, okay.

Q. It says "BT," colon?

A. Yes.

Q. Based on your familiarity with Ms. Clark's notes, are they Mr. Thomas'

initials, BT?

A. Yes.

Q. That would indicate Mr. Thomas was speaking?

A. Yes.

Q. And that paragraph indicates that Milliman had given the Strategic Planning Committee some projections, correct?

A. Yes.

Q. And "The base case doesn't look as good as it did earlier in the plan years," do you see that?

A. Yes.

Q. It also states "The projections based on various assumptions which may never come true show us never coming out of the red zone or even becoming insolvent"; is that correct?

A. Yes.

MR. RUMELD: Objection to the form.

Q. So is it fair to say that the trustees knew in February of 2012 that

MORIARITY

Milliman's projections at that point were showing the plan never to emerge; is that fair?

MR. RUMELD: I object to the form.

A. Yes.

(Exhibit 113 marked for identification.)

Q. I hand you what has been marked as Exhibit 113, and I believe these are notes generated by Mr. Projansky relating to trustee meetings.

Do you have that?

A. Yes, I have it.

MR. KRINER: Myron, is it a fair representation that they are notes generated by Mr. Projansky?

MR. RUMELD: If you make that representation, I won't deny it. It is hard for me, sitting here now, to confirm that. But I know we produced notes of Mr. Projansky.

MR. KRINER: I will represent they are copies of what you have produced.

MORIARITY

Q. So they are Mr. Projansky's notes relating to trustee meetings.

From the top there, item 1 on the first page looks like minutes were approved. Do you see that?

A. Yes.

Q. And that would be the previous meeting minutes, right?

A. Yes.

Q. That's December of 2012.

So is it a fair inference these are notes from the February 2013 meetings of the trustees?

A. Yes.

Q. Let me ask you to look at page -- now, Mr. Projansky's notes don't always have page numbers, so I'm going to refer to the Bates number, which is the DEF number at the bottom. Okay?

A. Okay.

Q. If you can look at page DEF ending with 225, and about a third of the way down the page there is a topic 12, Milliman; do you see that?

MORIARITY

A. Yes.

Q. Is it a fair inference that was notes relating to Milliman's conveyances to the trustees at this meeting?

A. Yes.

Q. Is it correct that down about in the middle of that item 12 on this page, there is actuarial valuation 4/1/12, and Mr. Behar, he was with Milliman, correct?

A. Yes.

Q. And he gave an executive summary, correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. And the third item under that actuarial valuation says "never expected to emerge," correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. So was it your understanding Milliman was telling the trustees in February of 2013, again, the plan was never

expected to emerge, correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. And that's emergence from critical status, correct?

A. Right.

(Exhibit 114 marked for identification.)

Q. Let me hand you what has been marked as Exhibit 114.

These are Ms. Clark's notes from the same group of meetings in February of 2013. Do you have that?

A. Yes.

Q. And let me direct your attention to page 6 of that, and the paragraph that carries over on the top of the page from the previous page.

Are you there?

A. Uh-huh.

Q. And the second to the last sentence on that page begins "KC," colon, do you see that?

MORIARITY

A. Yes.

Q. You understand that to be a reference to Mr. Campe?

A. Yes.

Q. From Milliman, correct?

A. Yes.

Q. And Mr. Campe is conveying to the trustees that as of the -- "Due to the actuarial loss at 3/31/12, the Plans do not show the Plan emerging within the projection period," correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. So Mr. Campe is telling the trustees, as Mr. Projansky's notes reflected also, the plan is never expected to emerge, correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. And you note, two paragraphs down, "we are projecting only to 2047," correct?

MORIARITY

MR. RUMELD: I object to the form.

A. Yes.

Q. That's the projection period that he was referring to, correct?

MR. RUMELD: I object to the form. Look, I don't want to keep objecting.

MR. KRINER: I don't want you to keep objecting, Myron.

MR. RUMELD: So I will state a continuing objection that if you don't make it clear whether you are asking the witness just to say what the document says or you are asking what his recollection is, I'm going to object to the form. I can state it each time.

MR. KRINER: Why don't we just continue with that standing objection.

MR. RUMELD: That's fine.

MR. KRINER: Then we can move on.

Q. So you state "we are projecting only to 2047," correct?

A. Yes.

Q. Do you have any reason, sitting here today, to believe that Ms. Clark's notes don't accurately reflect what you said at that meeting?

A. No, I don't.

(Exhibit 115 marked for identification.)

Q. Mr. Moriarity, let me hand you what has been marked as Exhibit 115.

Do you have that?

A. Yes.

Q. These are minutes of the April 11, 2013 Strategic Planning Committee meeting, correct?

A. Yes.

Q. You reviewed these in preparing for the deposition?

A. No.

Q. Let me direct your attention to page 2, and under the subheading Funding Policy. Do you have that?

A. Yes.

Q. The second sentence, "He" -- do

you understand that to be referring to Mr. Behar?

A. Yes.

Q. With Milliman, correct?

A. Yes.

Q. "He reported that the Plan is not projected to emerge from critical status, which would be the minimum that would have to occur in order for the Trustees to increase the multiplier."

Do you see that?

A. Yes.

Q. Do you have any reason, sitting here today, to believe Mr. Behar didn't convey to the trustees at the April 11, 2013 Strategic Planning Committee that the plan was never expected to emerge?

A. Yes. Well, repeat the question.

Q. Do you have any reason, sitting here today, to believe Mr. Behar didn't convey to the trustees at the April 11, 2013 Strategic Planning Committee that the plan was never expected to emerge?

MORIARITY

A. There was a lot of negatives in there, but I think the answer is no.

Q. You have no reason to believe he didn't convey that, correct?

A. Right.

Q. Right?

A. Right.

(Exhibit 116 marked for identification.)

Q. We have handed you what has been marked as Exhibit 116.

And I will represent these are Ms. Clark's notes relating to the May 2016 trustees meetings, okay?

A. Yes.

Q. I direct your attention to page 3, and down about two-thirds down the page there is a paragraph which begins "ARM."

Do you see that?

A. Yes.

Q. Do you know what those initials are?

A. Yes, I do.

Q. What are those initials?

MORIARITY

A. Anne Ronnel Mayerson.

Q. Moving down into that paragraph, do you see the sentence beginning "As of 4/1/14, Milliman" -- do you see that?

A. Yes.

Q. -- "concluded that there was no date within its projections when the Plan would either emerge or become insolvent."

Do you see that?

A. Yes.

Q. Do you have any reason, sitting here today, to believe that the trustees weren't told at this meeting that "as of 4/1/14, Milliman concluded there was no date within the projections where the Plan would emerge"; do you see that?

A. Yes.

Q. So we have gone through instances in 2012, '13, '14 and '16, trustees were aware the plan was not projected to emerge, correct?

MR. RUMELD: I object to the form.

MORIARITY

A. Yes.

Q. Why wasn't that information provided to participants?

MR. RUMELD: I object to the form.

A. All the pertinent information, so far as I'm concerned, is in the annual funding notice.

Q. So is your answer that that wasn't pertinent to participants?

A. My answer is we gave to the participants all that we were required to give to the participants under the law at that time.

Q. Why wasn't that piece of information provided?

MR. RUMELD: I object to the form.

A. It wasn't required under the annual funding notice.

Q. How do you know?

A. I know because we provided, according to our lawyers, we provided in the annual funding notice what we were

MORIARITY

required to provide.

Q. Did the lawyers tell you that you didn't need to provide the plan participants with information you had relating to Milliman's projections that the plan was never expected to emerge, did your lawyers tell you that?

MR. RUMELD: I object to the form.

A. They didn't tell us that. They told us everything that was required was in the funding notice.

Q. They didn't tell you that though, correct?

A. No, they didn't tell us that.

Q. And you knew as a participant and as a trustee that the plan was never expected to emerge, correct?

A. I knew that.

MR. RUMELD: Objection to form.

Q. Is that important information for trustees, that the plan was never expected to emerge from critical status, was that important during this period to

trustees?

A. I think it is important for trustees, yes.

Q. How about to participants, was it important for participants during that period?

MR. RUMELD: I object to the form.

A. I'm not sure how that would affect participants, I don't know.

Q. Didn't the plan have to emerge in order to increase the multiplier?

A. Yes.

Q. Is that important to participants?

A. It is important to trustees. I'm not sure it is important to -- it has the same level of importance to participants.

Q. Why do you say that? You said the same level. Do you think it is important to participants, that information?

A. I can't right offhand think of

MORIARITY

why it is important to -- I don't know what action they would take as a result of that.

Q. How about the fact that the trustees had previously said the plan was expected to emerge no later than 2047, does that make it important?

MR. RUMELD: Objection to form.

A. I think we provided the information that was required, and that's what was considered to be important.

Q. My question was a little different.

It was based on the fact the trustees had previously provided the participants with two pieces of information, one, that the plan was expected to emerge no later than 2047, correct?

MR. RUMELD: I object to the form.

A. Yes.

Q. The second piece of information was you, the trustees, were going to meet annually with the actuary and look at the

projections regarding whether the plan was expected to emerge, correct?

A. Repeat that whole question again.

MR. KRINER: Read it back, please.

(The record was read.)

A. And your question is?

Q. My question was, isn't it true that you, the trustees, told the plan participants at the same time that you told the plan participants that the plan was expected to emerge no later than 2047, that you, the trustees, would meet annually with the actuary regarding projections whether the plan was expected to emerge, correct?

MR. RUMELD: I object to the form.

A. Yes, that's correct.

Q. And you knew during this period that the plan was not expected to emerge, according to Milliman's projections, correct?

MR. RUMELD: I object to the

form.

A. Yes.

Q. Did you think plan participants, during the period after the original rehabilitation plan and original annual funding notice, up until the summer of 2016, was it a reasonable assumption of them based on what was originally disclosed that the plan was still projected to emerge?

MR. RUMELD: I object to the form.

A. Yes.

Q. Did you ask the lawyers specifically whether that information needed to be disclosed?

A. I don't recall.

Q. You don't recall doing that?

A. I don't recall doing that. I don't recall not doing it.

(Exhibit 117 marked for identification.)

Q. Mr. Moriarity, I have handed you what has been marked as Exhibit 117.

MORIARITY

These are Ms. Clark's notes of trustees meetings, and the top of the page, it indicates that the minutes of the December meeting were approved. Do you see that?

A. It doesn't say what committee this is.

Q. Okay. But you are listed as an attendant, whether you are on the committee or not, right?

A. Yes.

Q. And this indicates that the minutes of the December meeting were approved, correct?

A. Yes.

Q. Is it a fair inference that these are notes of the February meeting, 2013?

A. Yes. I don't know what committee, though.

Q. Let me direct your attention to page 2.

About two-thirds of the way down the page, there is a discussion that

MORIARITY

says -- there is initials JR. Do you see that?

A. Yes.

Q. Is that Mr. Ruthizer?

A. Yes.

Q. And he says "Could Meketa prepare some talking points for the union trustees?"

And AS, is that Mr. Spatrick?

A. Yes.

Q. He says "Yes."

Then after that, there is an indication that you said "Our job right now is to give answers that will help persuade people to stick with us."

Do you see that?

A. Yes.

Q. Did you say that?

A. I assume that I did, yes.

Q. What did you mean by it?

A. I think I meant what it says, but it needs some context.

Q. I want to know what you meant by it, and then you can explain the

context.

A. I think it means exactly what it says.

Q. Okay. Explain then.

A. I'm going to give you some context.

Q. Okay, go ahead.

A. I had been -- I, I think, was alone among the trustees who had been going out and talking to various musical groups, and in talking to those musical groups, I had tried to walk a fine line between telling them the exact status of the fund and give them the message that we were working on some of these issues and that we were not immediately going insolvent, but we had time to work on these kinds of issues.

But yes, we did need to give some kind of a positive message to the participants to keep them basically from running towards the exits.

Q. So you thought that -- is it fair, you say you were trying to walk a

fine line "between telling them the exact status of the fund and give them a message that we were working on some of these issues and we were not immediately going insolvent," that's what you said?

A. Right.

Q. Is it fair to say what you mean by that is you were trying -- you were not telling them the exact status, correct?

MR. RUMELD: I object to the form.

A. I was not telling them that we were never going to exit the red zone. I was telling them that we had time to work on the serious problem that we were in. I always told them that we were in very serious condition.

Q. But you knew the plan wasn't projected to emerge, correct?

MR. RUMELD: I object to the form.

Q. Correct, you knew?

A. I knew that at the 7.5 percent --

MORIARITY

Q. No, you knew the plan wasn't expected to emerge?

MR. RUMELD: I object to the form.

A. I knew at the 7.5 percent projection we were not expected to emerge from the red zone.

Q. By 7.5 percent projection, you mean the actuarial projection, correct?

A. Right.

Q. But you knew that, correct?

A. I knew that, yes. I also knew that we had a targeted return higher than that.

Q. We will get to that.

But the actuarial return is something completely different, correct?

MR. RUMELD: I object to the form.

Q. Than your targeted investment return?

A. It is something different.

Q. Okay.

A. It was completely different

MORIARITY

and --

Q. Okay.

MR. RUMELD: I would appreciate it if you don't cut the witness off when he is answering.

MR. KRINER: That is fair, Myron.

Q. So you didn't want the participants to run for the doors, correct?

A. Right.

Q. And you thought if they knew the plan was never expected to emerge, they might, correct?

A. Yes.

Q. So the participants might find that information material to them in their actions?

A. They might find that information material, but they also --

Q. No, that's all I asked you.

MR. RUMELD: Mr. Kriner, let him answer the questions the way he understands them.

Q. What did you understand me to

ask you?

MR. RUMELD: No, he was answering.

MR. KRINER: Excuse me.

MR. RUMELD: We are going to take a break.

MR. KRINER: No, we are not. There is a question pending.

MR. RUMELD: There is no question pending. You asked him to --

MR. KRINER: "What did you understand me to ask you?"

MR. RUMELD: Fine, I will let him answer that question, and we are going to take a break, and you are going to need to calm down, because you need to ask questions designed to get recollections and not badgering the witness.

So lean back in your chair and let him answer the questions.

MR. KRINER: I will ask the questions.

MR. RUMELD: But if you don't let the witness answer the question, that

MORIARITY

is the third or fourth time you have cut him off in the middle of his answer, I'm going to excuse him from the room and you can decide how you want to proceed.

MR. KRINER: That is fair, Myron. I shouldn't cut the witness off.

Q. So did you think that if the plan participants knew the plan was never expected to emerge, they might run for the doors?

A. That was one of my fears, yes.

Q. So that information might be important to the plan participants to hear, correct?

A. Yes. But I also told the plan participants that we were looking at more aggressive targeted returns that might do us some good.

Q. You say "also." You didn't tell them that the plan --

A. No, I did not.

Q. Okay, that's fair enough.

MR. KRINER: Did you want to take a break, Myron?

MORIARITY

MR. RUMELD: I will ask Bill if he wants to take a break.

THE WITNESS: I'm okay.

MR. RUMELD: That's okay. I thought it was getting a little too heated here and I just wanted to calm it down a little.

MR. KRINER: It is not heated with the witness, just between you and me.

MR. RUMELD: Well, that is a matter of opinion.

(Exhibit 118 marked for identification.)

Q. Let me hand you what has been marked as Exhibit 118, and it starts with some e-mail traffic between you and -- or involving you and Mr. Yao and Mr. Rood.

Do you see that?

A. Yes.

Q. Let me direct your attention to Mr. Yao's e-mail about a third of the way down the page on February 7, 2015.

Do you see that?

A. Yes.

MORIARITY

Q. You believe that the way this is presented, you received that e-mail from Mr. Yao?

A. Yes, I believe I received it. I don't know from these -- okay.

Q. So the middle -- or the second paragraph of Mr. Yao's February 7, 2015 e-mail, he states "As for the concern of the statement 'Our fund is not projected...,' I am going to contact Anne and ask if she and Rob might have a discussion about their uneasiness and how we should deal with that."

Do you see that?

A. Yes.

Q. Do you know what that's referring to?

A. I know what I believe it is referring to.

Q. Well, do you know?

A. It is referring to the fact that the 7.5 -- under the 7.5 percent we never emerge from red zone.

Q. But do you know what their

uneasiness refers to?

A. Not specifically, no, I don't.

Q. Did you know whether they had any uneasiness about the statement that our plan is not projected?

A. I don't recall. I don't recall.

(Exhibit 119 marked for identification.)

Q. Let me hand you what has been marked as Exhibit 119, Mr. Moriarity. It is a copy of the plan trust agreement. Do you have that?

A. Yes.

Q. You have read this document previously?

A. Yes.

Q. When is the first time you read this document?

A. When I first joined the fund in 1993.

Q. That would have been some prior iteration of the document?

A. It would have been this same

EXHIBIT 2

American Federation
of Musicians &
Employers' Pension Fund

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Fund

Important Information from the Board of Trustees of the American Federation of Musicians and Employer's Pension Plan

December 2016

This letter provides information developed in response to questions that surfaced since our July 2016 mailing – such good questions, in fact, that we thought it warranted a letter to all participants. Thank you to those of you who asked.

Our History

Over the years, from its inception in 1959 until the 2008 financial crisis, the Fund's assets experienced steady growth. The Fund suffered from occasional down markets, most recently in the early 2000s following the bursting of the tech bubble, but each time quickly recovered. As recently as April 1, 2007, our funded percentage was 107%, which meant that our assets were more than the amount our actuaries told us we needed to cover the Plan's benefit obligations for both current and future pensions. Then, the financial crisis and subsequent recession hit.

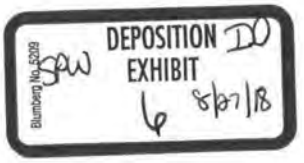
Over the 18 months from its peak at the end of September 2007 through the first quarter of 2009, the Fund's assets declined by nearly 40% or about $800 million. A year later, we were in what the Pension Protection Act of 2006 defined as "critical" or "red zone" status. We were not alone in the magnitude of the decline in our assets; almost all multiemployer funds suffered substantial declines.

As required by law, we put a rehabilitation plan in place in April 2010. The rehabilitation plan mandated increased employer contributions and elimination of certain benefits. The Trustees had anticipated this need earlier and lowered the benefit multiplier to $1.00 effective January 1, 2010.

Snapshot of Our Fund – and How It Works

To understand how the Fund works, we need to look at the money coming in and the money going out during the Fund's most recent plan year ending March 31, 2016.

- **Money coming into the Fund**. We have two sources of income:
  1. Employer contributions, which were $63 million
  2. Investment earnings, which were not a positive source of income for this plan year because the Fund experienced a $10 million loss
- **Money going out of the Fund.** There are three categories of "expenses":
  1. Benefits paid, which were $150 million
  2. Administrative costs, which were $14 million
  3. Investment fees, which were $11 million



So for the most recent plan year ending March 31, 2016, we had more money leaving the Fund ($175 million) than coming into the Fund ($53 million) which resulted in a shortfall of $122 million.

With this understanding of how the Fund works, let's back up and look at the five plan years that followed the recession and showed some recovery. Starting in plan year ending March 31, 2010, the Fund experienced gross annual returns of 32.0%, 12.8%, 2.2%, 8.8%, and 8.3% for an annual average of 12.5%. This meant we had a $500 million increase in the market value of our assets (money coming in) as of plan year ending March 31, 2014. However, the amount of our liabilities (or money needed to go out to pay future benefits) also increased in that time period from $2.1 billion to $2.4 billion, as we expected.

The past two plan years have not been as kind as the market value of assets was further dampened by lower returns with a 5.2% return for the plan year ending March 31, 2015 and an essentially flat return (-0.1%) for the plan year ending March 31, 2016.

Making Up the Shortfall

For many decades, pension plans have had the good fortune of using strong investment returns as an adequate source of income, which has been particularly useful to strengthen plans such as ours where the number of people receiving a benefit has increased over the years (money going out) and the number of active participants (money coming into the plan) has slowly declined. For last year, the $122 million shortfall had to be pulled directly from our existing assets since money going out exceeded money coming in and our investment earnings for the year did not cover the shortfall. This gap is widening, which is normal for a maturing plan such as ours, and only became problematic because of the Fund's asset loss during the recession.

Despite having investment returns similar to institutional investors (including pension plans and 401(k) plans) with similar diversified asset allocations, the Fund has an ongoing shortfall because it is constantly paying benefits. That is part of what makes the Fund different from a 401(k) plan that you might be watching over the same period of time. While many 401(k) plans have been able to return to pre-2008 levels, many pension plans have struggled to make up the difference as money goes out of the Plan for benefit payments and Plan liabilities continue to grow.

Investment Return Assumptions

Participants have asked about the 7.5% investment return assumption. They voice concern that it's too high for today's market. The Fund's return assumption is not meant to be an indicator of what we expect each and every year, but is intended as a cumulative annual average over a lengthy time period of 30+ years, through up and down markets. This assumption is reviewed periodically and set by the Plan actuaries after lengthy discussions with the Trustees and with the Fund's investment consultant.

Both the actuaries and our investment consultant use a significant amount of research to determine the expected rate of return for our asset allocation. It allows us to do the kind of financial planning necessary for reasonable long-term pension fund management. For the last 25 years, our average annual return has been 7.5%, net of investment fees.

Fund Investments

Trustees are pulled in two seemingly opposing directions when it comes to Fund investments. On one hand, the Trustees want a high return on the investments to ensure the assets grow at least enough to pay benefits in the future. On the other hand, obtaining higher returns frequently means taking higher risks, which could, depending on the actual investment results, threaten the viability of the Fund and call into question its ability to meet its benefit payment obligations.

We struggle with this dilemma, as do all similarly situated pension boards. The goal is to attempt to devise an asset allocation that maximizes returns and minimizes risks. Our current asset allocation includes the following: equities (domestic, international developed, emerging markets, private equity); bonds (investment grade, high yield and emerging market debt); treasury inflation-protected securities (TIPS); real estate, natural resources and infrastructure. Our domestic equities include core, value and growth and large-cap, mid-cap, small-cap, and micro-cap classes. Trustees, as plan fiduciaries, are required to prudently invest assets. One of the measures of investing prudently is diversifying across different types of investments. So the Trustees generally cannot simply put all of the Fund's assets in one basket such as stocks.

The Fund currently uses 25 professional investment managers with proven long-term track records to manage these assets. To facilitate its oversight of investments, the Trustees have established an Investment Committee composed of five management Trustees and five union Trustees. The Investment Committee relies heavily on the Fund's independent investment consultant and fiduciary in selecting and monitoring each of its investment managers. The investment consultant is responsible for reviewing the Fund's asset allocation, and for providing ongoing advice and specific recommendations to the Investment Committee and the Trustees with respect to the Fund's overall performance and the performance of its managers.

So Where Are We Today?

The Fund has now been in critical status for six years and is projected to remain so for the foreseeable future. Since we cannot increase benefits at this time, the one-dollar benefit multiplier will continue going forward. We currently have a plan that incorporates reasonable measures available under the law to address our situation. At this time, we are reliant on the Fund's investment performance and to a much lesser extent employer contributions.

In December 2014, legislation passed by Congress created a new "critical and declining" funding status, which is applicable to a fund that is critical and is also projected to be insolvent and unable to pay benefits within a 15 to 20 year period. The law provides that plans that are critical and declining may submit an application to the Treasury Department that, if approved, would, with certain restrictions, allow the reduction of benefits already earned in order to better secure the longer-term financial solvency of the plan. These unprecedented reductions could apply to many participants, including some currently receiving pensions and those not yet in pay status. Any such cuts would have to be the minimum cuts needed to avoid insolvency.

While we are not yet in critical and declining status and therefore these measures don't apply at present, the Board has discussed it because it is possible that we will be in critical and declining status in the future, even as early as next year. But the discussions have been challenging for two reasons. First, without detailed knowledge of what the actual finances of the Fund might look like were it to become critical and declining, detailed substantive planning is not possible. Second, there is uncertainty related to the Treasury Department application process for relief when in critical and declining status. Currently ten critical and declining funds have submitted applications for benefit reductions to the Treasury Department; six of these are awaiting decision and four have been denied including an application from one of the largest plans in the country, the Teamsters Central States Pension Fund. For all multiemployer plans facing similar challenges, the absence of any approved application creates uncertainty as to what Treasury might approve.

What Participants Can Do

Finally, many of you have asked "What can we, the participants, do now?" Given our financial status, we are faced with the reality of the one-dollar benefit multiplier as the basis for any benefits earned in the future. This means that while the AFM-EPF pension you receive will still be important, for many the benefit will be a modest one. A modest pension emphasizes the importance of having a comprehensive retirement strategy that includes a personal savings component to supplement the AFM-EPF pension and Social Security benefits.

We hope this letter offers some insight as to the Fund's attempt to address the most difficult problem we have ever faced. Thank you for your questions. We expect to communicate with you further about these issues in the future. For now, the Fund's website at www.afm-epf.org will be the primary source of information, so please refer back periodically to find answers to frequently asked questions.

Signed,

AFM-EPF Board of Trustees

EXHIBIT 3

Report of the Independent Fiduciary for the Settlement in *Snitzer v. the Board of Trustees of the American Federation of Musicians and Employers' Pension Fund* (Case 1:17- cv-05361-VEC (S.D.N.Y.))

August 11, 2020

TABLE OF CONTENTS

Report of the Independent Fiduciary
for the Settlement in
Snitzer v. the Board of Trustees of the American Federation
of Musicians and Employers' Pension Fund
(Case 1:17- cv-05361-VEC (S.D.N.Y.))

I. Introduction

Fiduciary Counselors Inc. has been appointed as an independent fiduciary for the American Federation of Musicians and Employers' Pension Plan (the "Plan") (a Taft-Hartley multiemployer plan) in connection with the settlement (the "Settlement") reached in the class action litigation entitled *Snitzer v. the Board of Trustees of the American Federation of Musicians and Employers' Pension Fund* (the "Litigation" or "Action"), which was brought in the United States District Court for the Southern District of New York (the "Court"). Fiduciary Counselors has reviewed over 70 previous settlements involving ERISA plans.

II. Executive Summary of Conclusions

After a review of key pleadings, decisions and orders, selected other materials and interviews with relevant parties, Fiduciary Counselors has determined that:

- The Court provisionally certified a class for settlement purposes, and in any event, there is a genuine controversy involving the Plan.
- Subject to the condition stated in Section V.C regarding the Court order approving the Settlement, the Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, the non-monetary consideration and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone.
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.
- The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.
- The transaction is not described in Prohibited Transaction Exemption 76-1.
- All terms of the Settlement are specifically described in the written settlement agreement.
- The Settlement includes non-monetary consideration that is in the interest of the Plan's participants and beneficiaries.

Based on these determinations about the Settlement, Fiduciary Counselors hereby approves and authorizes the Settlement on behalf of the Plan in accordance with Prohibited Transaction Exemption 2003-39 ("PTE 2003-39").

III. Procedure

Fiduciary Counselors reviewed relevant Litigation documents, including the Complaint, Amended Complaint, the Motion to Dismiss, the Response to the Motion to Dismiss, the transcript of the hearing at which the Court ruled on the Motion to Dismiss, the Motion for Preliminary Approval and related papers, the Settlement, the Court's Order Preliminarily Approving Settlement, the Motion for Attorneys' Fees, Reimbursement of Expenses, Service Awards and Release for Class Representatives and Defendants' Response thereto, objections (including the Objection Of Ad Hoc Coalition Opposed to the Settlement), Defendants' Response to Objection Of Ad Hoc Coalition Opposed to the Settlement Agreement, Supplemental Declaration of Andrew Irving, expert reports and other materials posted on the Settlement website. In order to help assess the strengths and weaknesses of the claims and defenses in the Litigation, as well as the process leading to the Settlement, the members of the Fiduciary Counselors Litigation Committee conducted separate telephone interviews with counsel for both Defendants and Plaintiffs.

IV. Background

A. Procedural History of Case

***Litigation*.**

On July 14, 2017, Andrew Snitzer and Paul Livant ("Class Representatives" or "Plaintiffs") on behalf of themselves and a class of other similarly situated participants and beneficiaries of the Plan, filed a Class Action Complaint (the "Complaint") in the United States District Court for the Southern District of New York. Thereafter, and including in response to defendants' motion to dismiss, the Class Representatives amended the Complaint to add and subtract defendants and allegations. As a result, the operative complaint became the Amended Class Action Complaint [1](the "Amended Complaint") filed on December 1, 2017, naming as defendants The Board of Trustees of the American Federation of Musicians and Employers' Pension Fund (the "Board of Trustees"), The Investment Committee of The Board of Trustees of the American Federation of Musicians and Employers' Pension Fund (the "Investment Committee"), as well as then-existing and former individual Board and Investment Committee members Raymond M. Hair, Jr., Augustino Gagliardi, Gary Matts, William Moriarity, Brian F. Rood, Laura Ross, Vince Trombetta, Phillip E. Yao, Christopher J.G. Brockmeyer, Michael DeMartini, Elliot H. Greene, Robert W. Johnson, Alan H. Raphael, Jeffrey

[1] Class Counsel made it clear that the pending application by the Trustees seeking approval from the United States Department of Labor under the Multiemployer Pension Reform Act of 2014 ("MPRA") to impose benefit cuts on Plan Participants, is not part of this Litigation and the claims asserted in the Amended Complaint were never intended to or capable of preventing the Trustees from seeking approval for cuts nor would any damages that could have been awarded and collected after a successful trial likely been sufficient to prevent the Plan's eventual funding shortfall.

Ruthizer, Bill Thomas, Marion Preston, and JoAnn Kessler (collectively, the "Defendants").

The Amended Complaint advanced: (i) two direct claims for breach of fiduciary duty under ERISA stemming from decisions regarding the Plan's asset allocation, including the decision to allocate Plan assets to investments in emerging market equities and private equity, as well as to allegedly underperforming and costly actively managed investments (Counts I and II); and (ii) one claim for co-fiduciary breach for knowingly participating and failing to remedy the breaches in Counts I and II (Count III).

On January 8, 2018, Defendants filed a motion to dismiss the Amended Complaint for failure to state a claim. At a hearing on April 26, 2018, the Court granted the motion as to Count III, but denied the motion with respect to Counts I and II. On May 29, 2018, Defendants filed their Answer to the Amended Complaint, denying all allegations of wrongdoing and liability and advancing certain affirmative and other defenses.

At the conclusion of fact and expert discovery, on September 20, 2019, the Class Representatives and the Defendants jointly requested that the Court certify the Action as a class action pursuant to Fed. R. Civ. Pro. 23(b)(1).

During the course of the Action, the Settling Parties engaged in extensive discovery, including (1) production of over 200,000 pages of documents by Defendants, (2) production of additional documents by the Class Representatives, (3) production of over 200,000 pages of documents by non-parties, including the Plan, (4) twelve depositions of defense fact witnesses, (5) depositions of each of the Class Representatives, (6) ten non-party fact witness depositions, and (7) six expert depositions.

Settlement and Preliminary Approval.

During the course of the Action, the parties engaged in more than two years of extensive and contentious adversarial negotiations before mediator Robert Meyer, Esq. of JAMS (the "Mediator"). The parties exchanged many detailed mediation briefs and expert analyses; participated in three in-person full-day mediation sessions; exchanged hundreds of emails; and participated in dozens of additional conference calls with the Mediator, the parties and the Trustees' insurers. The Parties (including insurers) agreed to the mediator's proposal for $26.85 million in monetary consideration in early November 2019. Over the next few months, the Parties engaged in hard-fought negotiations over the non-monetary Governance Provisions. The Parties agreed to the mediator's proposal on these provisions on February 13, 2020.

Plaintiffs filed a motion seeking preliminary approval of the Settlement on March 25, 2020. The Court granted that motion on May 18, 2020 and preliminarily approved the Settlement and scheduled a Fairness Hearing for August 26, 2020.

Objections.

July 27, 2020 was the date for Class Members to file objections to the Settlement. As of that date, the Court received numerous objections. Most challenge the adequacy of the prospective relief, generally asserting that the Settlement:

(1) lacks meaningful restraints on Plan Trustees going forward;

(2) is not adequate because it only requires a Neutral Fiduciary for 4-5 years;

(3) is not adequate because it does not restrict Plan resources from being used to disparage Class Representatives and Class Members;

(4) allows Defendants Raymond Hair and Christopher Brockmeyer to retain their positions on the Board of Trustees;

(5) does not give the Neutral Fiduciary decision-making authority with voting power;

(6) does not include expert actuarial advice for the monitor/Neutral Fiduciary; and

(7) the disclosure provisions are weak and need to be strengthened.

The objections also:

(1) assert that the "Release and Waiver" provisions are overbroad because they exceed the scope of the allegations of the operative complaint and further limit the rights of class members to pursue meaningful and adequate remedies and relief in the future;

(2) challenge the attorneys' fees;

(3) assert that the Trustees must provide a written statement disavowing their March 29, 2020 disparaging comments in their email to Plan Participants, which harshly criticized Plaintiffs Snitzer and Livant prior to Final Approval; and

(4) assert that Class Counsel has underlying conflicts which undermine the integrity of the Settlement.

There were also objections requesting that many additional documents be disclosed on the Settlement website. The objections resulted in disclosure of some but not all of the requested additional documents. We defer to the Court with respect to the additional disclosure of documents related to the Litigation, but note the considerable amount of public posting of documents related to this Action substantially exceeds the disclosure provided to class members in most ERISA class action settlements.

Fiduciary Counselors reviewed all objections submitted to the Court. We address the objections to the release in Section V.C below. We address attorneys' fees in Section V.D below. We address the objections to the adequacy of the prospective relief in the second bullet of Section VI below.

The objections do not change our conclusion that the Settlement meets the requirements of PTE 2003-39.

V. Settlement

A. Settlement Consideration

The Settlement Agreement requires Defendants' insurers to pay $26,850,000 as the Gross Settlement Amount. Since the Plan is a defined benefit plan, the balance of the Gross Settlement Amount, after deduction of any attorney' fees, expenses and Service Awards to the Class Representatives, will be paid to the Plan, not individual Plan participants.

The Settlement also provides for prospective relief in the form of Governance Provisions. The provisions of the prospective relief are lengthy and are attached as Exhibit I to this report.

B. Settlement Class

The Settlement defined the Settlement Class as follows:

> All Participants and Beneficiaries of the Plan during the Class Period, excluding Defendants and their Beneficiaries.

The "Class Period" is defined as the period from August 9, 2010 through the date the Court issues its Preliminary Approval Order (May 18, 2020).

The Court has provisionally certified the Settlement Class, for settlement purposes only.

C. The Release

The Settlement defines Plaintiffs' released claims as follows:

> any and all actual or potential claims, actions, allegations, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action, whether arising under federal, state or local law, whether by statute, contract or equity, whether brought in an individual, derivative, or representative capacity, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, that:
>
> - were asserted in the Complaint or Amended Complaint or that arise out of, relate in any way to, are based on, or have any connection with any of the

factual or legal allegations asserted in the Complaint or Amended Complaint, including, but not limited to, those that arise out of, relate to, are based on, or have any connection with decisions made, prior to the OCIO Management Date, regarding (i) the Plan's asset allocation and the selection (including of the Plan's OCIO), retention, monitoring, oversight, compensation, fees, or performance of the Plan's investments or its investment managers; (ii) investment-related fees, costs, or expenses charged to, paid, or reimbursed by the Plan; (iii) disclosures or failures to disclose information regarding the Plan's investments and/or funding; or (iv) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions in connection with (i) through (iii) above;

- arise out of, relate in any way to, are based on, or have any connection with the approval by the Independent Settlement Evaluation Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone; or

- would be barred by res judicata based on entry by the Court of the Final Approval Order.

Plaintiffs' Released Claims do not include claims in connection with the pending MPRA Proceeding.

In addition, at the Court's request, the Parties agreed to modify Sections 5.1(f)[2] and 9.1[3] of the Settlement Agreement to remove the proposed release by Class Members as to Class Counsel and to provide that Plaintiffs would apply to the Court for a release by Class Members of the Plaintiffs/Class Representatives at the same time they applied for attorneys' fees and service awards, which application the Court would evaluate in connection with final approval proceedings.

As discussed above in Section IV relating to objections, we note that there were objections to the scope of the release. The clearest objections to the basic scope of the release are stated in the Objection Of Ad Hoc Coalition Opposed to the Settlement

[2] That Defendants and each Class Member shall be deemed to have fully, finally, and forever settled, released, relinquished, waived, and discharged any claims against the Class Representatives or Class Counsel, that arise out of the institution, prosecution, settlement or dismissal of the Action.

[3] As of the Settlement Effective Date, the Class Representatives and the Class Members (on behalf of themselves and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, agents, attorneys, predecessors, successors, and assigns), on their own behalves and on behalf of the Plan, shall be deemed to have fully, finally, and forever settled, released, relinquished, waived, and discharged all Released Parties from the Released Claims, regardless of whether or not such Class Members receive a monetary benefit from the Settlement, filed an objection to the Settlement or to any application by Class Counsel for an award of Attorneys' Fees and Costs and Service Awards, and whether or not the objections have been allowed. Class Members and Defendants shall also be deemed to have fully, finally, and forever settled, released, relinquished, waived, and discharged any claims against the Class Representatives or Class Counsel, that arise out of the institution, prosecution, settlement or dismissal of the Action.

Agreement. In the brief, objectors argue that, despite Class Counsel's assertions in the Memorandum in Support of Motion for Preliminary Approval, the scope of the release in the Settlement Agreement will prevent the objectors from filing new claims challenging investment-related decisions post-dating the retention of the Outsourced Chief Investment Office ("OCIO") in October 2017. The objectors stated that release language "invites an argument that the release bars suit for any conduct at any time, including after November 2017 and on into the future, that has any connection to the allegations in the Amended Complaint." Specifically, the objectors argue that the reference to "decisions made, prior to the OCIO Management Date," which appears to limit the period covered by the release for the listed types of decisions that follow, is rendered meaningless by the language that precedes it, which refers to claims that:

> … were asserted in the Complaint or Amended Complaint or that arise out of, relate in any way to, are based on, or have any connection with any of the factual or legal allegations asserted in the Complaint or Amended Complaint, including, but not limited to, those that arise out of, relate to, are based on, or have any connection with decisions made….

Based on this and other language, objectors argue:

> To the extent that imprudent behavior XYZ (i) was challenged in the Amended Complaint *or has any arguable connection with anything challenged in the Amended Complaint*, (ii) has continued from October/November 2017 to this day and/or (because the governance provisions are so weak) continues or recurs in the future, and (iii) a future suit is filed challenging imprudent behavior XYZ based on the Trustees' acts or omissions in 2018 or 2020 or 2022, the defense is sure to argue release, covenant not to sue, res judicata (and theoretically there is also a risk of contempt). Thus, even as the Agreement fails to prevent ongoing and future breaches, it also *extinguishes or hampers the assertion of claims based on such breaches*.

In Defendants' Response to Objection Of Ad Hoc Coalition Opposed to the Settlement Agreement, Defendants argue that under the scope of the release, claims targeting investment-related decisions that were the focus of the lawsuit and that post-date the OCIO Management Date would not be released because these claims – no matter how they were characterized – would necessarily be directed at new decisions, based on new factual allegations, rather than a continuity of claims previously challenged. Specifically, Defendants argue that whatever claims that were made in the Complaint relating to Trustee investment decisions during the period from August 9, 2010 through July 14, 2017 (when the Complaint was filed) ended as a result of the retention of the OCIO effective October 1, 2017 (the "OCIO Management Date"). Further, Defendants state that whatever decisions the Trustees have made pursuant to this more limited authority (post OCIO Management Date) are new decisions that are not connected to those that were previously made, and therefore are not released. With respect to these delineated decisions described in the release, the release is limited to the period before the OCIO Management Date. This cut-off reflected the fact that the lawsuit was directed at these decisions only insofar as they were made before, not after, the OCIO Management Date,

and thus Plaintiffs' counsel was not releasing claims based on decisions that were made after that date that they did not investigate. Defendants assert their interpretation of the release to be that any such delineated decisions that post-dated the OCIO Management Date would be disconnected from the decisions that were at issue in the lawsuit. Therefore, a claim challenging these decisions would not be released because it would not properly be viewed as among claims "that arise out of, relate in any way to, are based on, or have any connection with any of the factual or legal allegations asserted in the Complaint or Amended Complaint." Defendants also disagree with the objectors' assertion that the language "including but not limited to" overrides the language "prior to the OCIO Management Date." Defendants argue that objectors' interpretation would make no sense because it would render the reference to OCIO Management Date completely superfluous. In sum, Defendants argue that the release is limited to the period before the OCIO Management Date with respect to decisions regarding "(i) the Plan's asset allocation and the selection (including of the Plan's OCIO), retention, monitoring, oversight, compensation, fees, or performance of the Plan's investments or its investment managers; (ii) investment-related fees, costs, or expenses charged to, paid, or reimbursed by the Plan; (iii) disclosures or failures to disclose information regarding the Plan's investments and/or funding; or (iv) any alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions in connection with (i) through (iii) above[.]"

If the release covers the enumerated types of claims only for the period before the OCIO Management Date, we find the scope of the released claims to be reasonable. However, potential future plaintiffs should be able to count on this limitation and not have to re-litigate it or face possible contempt for bringing claims for the enumerated types of decisions for the period after the OCIO Management Date. Thus, we find the scope of the released claims reasonable only if in its order approving the Settlement, the Court makes these limits clear with respect to the release and the injunction against future claims.

Another objection to the release involved the parties subject to the release, including Meketa and attorneys. The inclusion of advisors and attorneys/counsel is standard in released parties provisions in settlement agreements.

Fiduciary Counselors finds the terms of the release, including the provision for the Independent Fiduciary to provide a release of claims by the Plan, as well as the parties subject to the release, to be reasonable, subject to the conditions stated above regarding the Court's order approving the Settlement.

D. Attorneys' Fees, Litigation Expenses and Service Awards

The Settlement requires Class Counsel to file a timely motion for an award of attorneys' fees (not to exceed one-third of the Gross Settlement Amount or $8,950,000) and Class Counsel's litigation costs (not to exceed $900,000) and service awards (not to exceed $10,000 for each of the Class Representatives. Service awards are payable out of attorneys' fees and costs rather than the Gross Settlement Amount, so that the maximum amount being sought from the Gross Settlement Amount is $9,850,000.

The Settlement is not contingent on a specified amount of attorneys' fees, litigation expenses or case contribution awards. Instead, the Court will determine the amount awarded. Unlike most ERISA class action settlements involving alleged breaches of fiduciary duty, the Settlement specifically provides that Defendants may oppose Class Counsel's application for attorneys' fees and costs and Class Representatives' application for service awards.

Class Counsel has requested one-third of the $26.85 million Settlement recovery ($8.95 million) for attorneys' fees. Class Counsel also requested reimbursement of their litigation expenses. Class Counsel's lodestar is over $7.94 million, according to the attorneys' fees papers, which results in a current lodestar multiplier of 1.3.

Class Counsel also seeks reimbursement for $863,811.37 of expenses. The largest expense item is $652,856 for experts (representing 75% of total expenses). The other large expense items are for deposition/court reporting transcripts ($44,841, or about 5.2%); travel expenses for depositions, mediations, settlement meetings, and court hearings ($54,705 or about 6.3%); reproduction costs ($58,717, or about $6.8%); and mediation fees ($36,744, or about 4%). Other categories include filing fees, process server and witness fees, postage, and database fees.

Furthermore, Class Counsel has requested $10,000 service awards for Class Representatives Snitzer and Livant for their work initiating and prosecuting the claims against the Trustees.

Defendants have opposed the request for attorneys' fees on multiple grounds, have opposed the requested expenses on the ground that the request provides insufficient documentation, and have opposed the service awards.

ERISA settlements do not need to have provisions allowing defendants to object, and defendants do not need to object, in order for the settlements to be reasonable in terms of attorneys' fees, expenses and service awards, but in this case the Settlement terms and Defendants' objections provide an additional level of protection to participants' interests and assure that the fees will be reasonable.

In light of the foregoing, we have determined that the terms of the Settlement regarding attorneys' fees, expenses and service awards are reasonable, and the amounts awarded will be reasonable.

VI. PTE 2003-39 Determination

As required by PTE 2003-39, Fiduciary Counselors has determined that:

- **The Court provisionally certified the Litigation as a class action for settlement purposes.** Thus, the requirement of a determination by counsel regarding the existence of a genuine controversy does not apply. Nevertheless, we have determined that there is a genuine controversy involving the Plan. Based on the Amended Complaint, the motion to

dismiss, the supporting and opposing memoranda, and the filing in support of preliminary approval of the settlement, we find that there is a genuine controversy involving the Plan within the meaning of the Department of Labor Class Exemption, which the Settlement will resolve.

- **The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.**

  Plaintiffs brought this Action against certain Trustees of the Plan, on behalf of Class Members and the Plan for violations of fiduciary duty under ERISA. Defendants deny all allegations in this Action. Plaintiffs allege that as a result of the financial crisis of 2008 and 2009, the Plan lost approximately $810 million and, as a result, its funding status dropped to 72.8%, reaching "critical" status under the Pension Protection Act of 2006. Plaintiffs allege that in April 2010, the Plan's Rehabilitation Plan approved by the Trustees, included investment allocations with a goal to achieve a 7.5% annual return. Plaintiffs allege that the Trustees made a series of increasingly-risky asset allocations to attempt to exceed the 7.5% actuarial assumption. Plaintiffs asserted that those included: (1) increasing the Plan's long-term target return from 7.5% , which was standard in the Taft-Hartley world, to 9%; (2) significantly increasing the Plan's investment in its two riskiest investment asset classes – Emerging Markets Equities (EMEs) and Private Equity – to one-third of its assets while reducing its investment in domestic equities below 20%; and (3) investing about 70% of the Plan's assets in high-cost actively-managed funds that repeatedly underperformed benchmarks.

  According to Plaintiffs, the Trustees hired Meketa in 2009, and in early 2010 Meketa recommended that the Trustees diversify the Plan's equity investments by reducing its investment allocation to domestic equities (from about 33% to 26%) and investing 6% of Plan's assets in EMEs (the average pension plan invested about 4.5% of assets in EME's) plus another 3% in private equity. Although Plaintiffs allege this 2010 asset allocation was questionable, they also state that it was expressly recommended by Meketa, was based on a reasonable rationale, was not "multiples of" the average plan's investment in EMEs, and further that its initial adoption was outside ERISA's six-year statute of limitations. Of course, the statute of limitations does not preclude claims for failure to change the allocation within the statute of limitations.

  Plaintiffs also argue that in 2011 and 2015 the Trustees increased the EME allocation from 6% to 11% and then to 15% and increased the allocation to private equity from 3% to 15% and then to 18%, without an explicit, affirmative recommendation to do so from Meketa or Milliman. Plaintiffs argue that Meketa told the Trustees the allocations were formulated to meet the Trustees' desired projected long-term annualized return substantially in excess of 7.5%, but Meketa expressly stated that it was the Trustees' decision whether to take the extra risk. Meketa was not a Defendant in this Action.

Objectors' challenge the adequacy of the Settlement, focusing primarily on the prospective relief, but they proceed from the assumption that if the case had proceeded to trial, Plaintiffs would have prevailed and obtained a large damage award and sweeping injunctive relief.

In fact, however, Plaintiffs faced substantial risk and uncertainty in proving fiduciary breaches and damages under ERISA, as well as substantial uncertainty in obtaining injunctive relief. Defendants continue to deny all allegations of wrongdoing and deny all liability for the allegations and claims made in the Action. Defendants, represented by highly qualified counsel, vigorously contested every aspect of the case. They filed a motion to dismiss the Amended Complaint; sought to file motions for summary judgment and to exclude Plaintiffs' experts; hired top experts (including Phyllis Borzi, the Assistant Secretary for Employee Benefits Security of the United States Department of Labor who was the official in charge of the Employee Benefits Security Administration in the Obama administration), and presented a completely different view of Defendants' actions than the view presented by Plaintiffs.

Plaintiffs' main allegations did survive a motion to dismiss, but a key reason for the denial was the Court's view that, in light of the information on which Defendants were relying, the motion to dismiss was effectively a premature motion for summary judgment. Despite denying Defendants' motion to dismiss, the Court warned Plaintiffs that "the gestalt of the board minutes is likely to cause the plaintiffs difficulty at trial or at summary judgment …. In sum, plaintiff has plausibly alleged an ERISA violation, albeit one that will have a tough road to hoe to get past summary judgment." Although discovery has produced substantial additional evidence for both sides, the Parties continue to take diametrically opposed positions on what the evidence shows, and the Court's statement underscores the risks Plaintiffs faced in proving liability.

Continuing the litigation process would have been complex and time consuming, with any recovery for Class Members, as well as any injunctive relief, delayed substantially and reduced by substantial additional litigation expenses and potentially additional attorneys' fees.

The size of the Settlement is $26.85 million. Plaintiffs believe that amount represents the vast majority of provable damages that likely would have been won at trial and between about 65% to 75% of the Trustees' available insurance policy limits to pay any final judgment, which represent, for practical purposes, the only available source for payment of any judgment obtained at trial. The Ad Hoc Coalition argues that both provable damages and insurance limits were higher. Even if provable damages were higher, that would be moot if insurance limits applied. Plaintiffs' counsel examined likely insurance coverage, estimated that Defendants already had spent approximately $9 million of the insurance coverage defending the case, and concluded that continued litigation would have further reduced the available insurance. Even if in the event of successful litigation, the damage award and insurance coverage might have been higher than Plaintiffs estimated, such an outcome was far from certain. We believe $26.85 million is a fair and reasonable recovery in light of potential recovery, the defenses that Defendants would

have asserted, the risks involved in proceeding to trial and the possibility reversal on appeal of any favorable judgment.

The prospective relief also is reasonable even though it is not as sweeping as many objectors argue is necessary. Objectors assert the prospective relief is inadequate because, among other things, the Neutral Independent Fiduciary Trustee does not have sufficient authority and the Settlement does not require removal of trustees. Although the Neutral Independent Fiduciary Trustee does not have a vote, he can play a significant role in improving the decision-making process to the extent that is needed. As is clear from the Supplemental Declaration of Andrew Irving, he intends to play an active role and does not see his role as being as circumscribed as objectors fear.[4] The Ad Hoc Coalition correctly notes that removal of trustees can be an appropriate remedy in cases that to do not involve self-dealing or corruption on the part of trustees, but it is far easier to obtain removal in those circumstances than in a case such as this one. As noted above, if this case proceeded to trial, there is a substantial likelihood Plaintiffs would obtain no injunctive relief because they could not establish fiduciary breaches. The Court also could find extensive injunctive relief unwarranted even if liability had been established. Taking these risks into account, we believe the prospective relief is reasonable as part of the entire Settlement package.

Given the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages and the right to injunctive relief, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement of $26,850,000 is reasonable, as is the prospective relief.

Subject to the condition stated in Section V.C regarding the Court order approving the Settlement, Fiduciary Counselors finds the scope of the release to be reasonable. For the reasons described in Section 5.D, Fiduciary Counselors also finds the attorneys' fees, expenses and service awards will be reasonable.

- **The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.** As indicated in the finding above, Fiduciary Counselors determined that Plaintiffs' counsel obtained a favorable agreement from Defendants in light of the challenges in proving the underlying claims. The agreement also was reached after arm's-length negotiations supervised by an experienced mediator.

- **The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.** Fiduciary Counselors found no indication the Settlement is part of any broader agreement between Defendants and the Plan.

[4] In a previous declaration filed with the Court, Mr. Irving stated that he has no business, professional or personal relationships with any of the Plan's Trustees and has become familiar with the issues raised in the Litigation by reading key court documents and expert reports.

- **The transaction is not described in Prohibited Transaction Exemption 76-1.** The Settlement did not relate to delinquent employer contributions to multiple employer plans and multiple employer collectively bargained plans, the subject of PTE 76-1.

- **All terms of the Settlement are specifically described in the written settlement agreement.**

- **The inclusion of consideration other than immediate cash payments in the Settlement meets the requirements of PTE 2003-39.** In addition to the cash payment, the Settlement provides for prospective relief designed to address issues raised in the Action. Defendants agreed to a number of Governance Provisions including: appointing Andrew Irving, Esq., to serve as a Neutral Independent Fiduciary Trustee for the Plan for 4-5 years; replacing Meketa as OCIO Monitor; and requiring new disclosures to the Trustees and Plan Participants. This non-monetary consideration is specifically described in the Settlement and in Exhibit I attached to this report. Including the non-monetary consideration was more beneficial to participants and beneficiaries than an all-cash settlement would have been. The non-cash consideration rules were not intended to preclude settlement provisions intended to address on a prospective basis the issues that gave rise to the litigation. The non-cash consideration does not include non-cash assets, so the requirements related to non-cash assets do not apply.

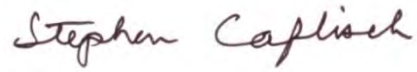
- **Acknowledgement of fiduciary status.** Fiduciary Counselors has acknowledged in its engagement that it is a fiduciary with respect to the settlement of the Litigation on behalf of the Plan.

- **Recordkeeping**. Fiduciary Counselors will keep records related to this decision and make them available for inspection by the Plan's participants and beneficiaries as required by PTE 2003-39.

- **Fiduciary Counselors' independence**. Fiduciary Counselors has no relationship to, or interest in, any of the parties involved in the litigation, other than the Plan, that might affect the exercise of our best judgment as a fiduciary.

Based on these determinations about the Settlement, Fiduciary Counselors (i) authorizes the Settlement in accordance with PTE 2003-39 and (ii) gives a release in its capacity as a fiduciary of the Plan, for and on behalf of the Plan. Fiduciary Counselors also has determined not to object to any aspect of the Settlement. This determination is subject to the condition stated in Section V.C regarding the Court order approving the Settlement.

Sincerely,



Stephen Caflisch
Senior Vice President & General Counsel

8. GOVERNANCE PROVISIONS

8.1 The Plan's Board of Trustees agrees that, as further consideration to settle the Action, the following governance provisions shall become operative no later than thirty (30) calendar days after the Settlement Effective Date:

8.1.1 Replace the Resigning Trustees with two new trustees who were not previously members of the Plan's Board of Trustees and who will serve on the Investment Committee once the Resigning Trustees have formally resigned;

8.1.2 Arrange to be posted on the Plan's website at www.afm-epf.org: a quarterly investment report, in substantially the same form as Exhibit 5, prepared by the OCIO comparing the Plan's asset allocation to the asset allocation of Large Taft-Hartley Plans and containing a running cumulative comparison of Plan's actual equity performance since October 2017 versus an appropriate index benchmark;

8.1.3 Select a replacement for Meketa to serve as OCIO monitor in accordance with a Request for Proposal ("RFP") process described in Exhibit 6. As part of the RFP process, the Neutral Independent Fiduciary Trustee will be responsible for advising the RFP selected candidates of the claims that were asserted in the Action relating to asset allocation and the use of actively managed funds based on the Neutral Independent Fiduciary Trustee's review of certain lawsuit materials including the parties' respective expert reports.

8.1.4 Adopt asset allocation procedures such that the Board of Trustees retains responsibility for setting the asset allocation policy, subject to the following procedures: the investment consultant who will be retained (in lieu of Meketa) to periodically review the performance of the OCIO will also be charged with providing proposed asset allocation targets for the OCIO, subject to: (i) instructions from the Trustees on the Plan's investment return and risk objectives, and (ii) the Trustees' right to veto any proposed targets, in which case the consultant will be responsible for selecting other targets. The Board minutes will include the consultant's written description of his or her rationale for proposing both sets of targets, including any considerations against implementing them, as well as the Trustees' grounds for vetoing the initial set of targets, and the consultant shall be permitted to review and comment on the full description of the relevant discussion in the relevant portion of the minutes;

8.1.5 Appoint the Neutral Independent Fiduciary Trustee to serve as an additional, nonvoting, neutral trustee. The Neutral Independent Fiduciary Trustee shall serve as (i) a nonvoting member of the Investment Committee; (ii) an advisory resource to the voting members of the Investment Committee Trustees, including the Investment Committee co-chairs.

8.1.5.1 In addition, the Neutral Independent Fiduciary shall have the following responsibilities:

a. Work with, and provide input to, the Union- and Employer-side Co-Chairs of the Investment Committee in fulfilling their functions and responsibilities as Co-Chairs.

b. Have complete access to the information available to the Union- and Employer-side Co-Chairs of the Investment Committee, and function in all respects (other than voting authority) as those Co-Chairs;

c. Participate in Investment Committee meetings, deliberations and decisions, with all the authority and responsibilities of a Trustee with respect the Plan's investments (other than voting authority);

d. Participate in the portion of the Board meetings, deliberations and decisions, with all the authority and responsibilities of a Trustee, related to the Plan's investments (other than voting authority);

e. Be responsible to state his/her assessment, including his/her reasoning for such assessment, for all matters under deliberation or subject to a decision or vote related to the Investment Committee (including asset management and allocation);

f. Make recommendations, at least annually, regarding changes (if any) in the processes pursuant to which the Investment Committee performs its responsibilities;

g. In coordination with the Trustees and the OCIO, prepare a written report regarding possible changes to the Plan's Investment Policy Statement;

h. Have such other responsibilities as appropriate based on input from the prospective Neutral Independent Fiduciary Trustee.

8.1.5.2 Subject to 8.1.5.3 below, the Neutral Independent Fiduciary Trustee shall be retained for a four-year term commencing from the effective date of his engagement (whether it is before or after the Settlement Effective Date). At the conclusion of the four-year term, the Neutral Independent Fiduciary Trustee shall determine whether the four-year term should be extended for an additional year.

8.1.5.3 The Board of Trustees shall retain the power to remove the Neutral Independent Fiduciary Trustee for "good cause" (which shall mean a failure to adequately perform the responsibilities and functions set forth above, but which shall not include making recommendations adverse to the decisions of the Trustees) after vote, on the record, of a majority of the Employer-side Trustees and Union-side Trustees. Should the Neutral Independent Fiduciary Trustee be removed, the Board of Trustees shall appoint another Neutral Independent Fiduciary Trustee to serve out the remainder of the term pursuant to procedures attached as Exhibit 7.

8.1.6 At least four weeks before the effective date of any new Trustees' appointment to serve on the Board, the Trustees shall post on the Plan's website the identity of such new Trustees along with their bios and any other experience relevant to their qualifications to serve as a Trustee. The Plan Website will also provide a

description of the training or education any new Trustees will receive. Notwithstanding the foregoing, if the President of the American Federation of Musicians changes, notice shall be provided of new Union Trustee appointments as soon as practicable under the circumstances. In addition, in the case of a resignation, death, or incapacity of a Trustee within four weeks of a previously scheduled Trustees meeting, notice of the replacement Trustee will be posted as soon as practicable.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT, individually and as representatives of a class of similarly situated persons, on behalf of the American Federation of Musicians and Employers' Pension Plan,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, THE INVESTMENT COMMITTEE OF THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, RAYMOND M. HAIR, JR., AUGUSTINO GAGLIARDI, GARY MATTS, WILLIAM MORIARITY, BRIAN F. ROOD, LAURA ROSS, VINCE TROMBETTA, PHILLIP E. YAO, CHRISTOPHER J.G. BROCKMEYER, MICHAEL DEMARTINI, ELLIOT H. GREENE, ROBERT W. JOHNSON, ALAN H. RAPHAEL, JEFFREY RUTHIZER, BILL THOMAS, JOANN KESSLER, MARION PRESTON,

Defendants.

No. 1:17-cv-5361 (VEC)

SUPPLEMENTAL DECLARATION OF ANDREW IRVING

Andrew Irving declares under penalty of perjury the following:

1. I am submitting this Supplemental Declaration to clarify certain aspects of the role I will play as Neutral Independent Fiduciary Trustee ("Neutral IFT") of the American Federation of Musicians and Employers' Pension Fund (the "Fund") if the Court approves the Settlement of this Action providing for my appointment in that position.

2. As Neutral IFT, I will, among other things, have the authority and responsibility

    a. to function in all respects, other than voting authority, as the Union- and Employer-side Co-Chairs of the Investment Committee of the Board of Trustees,
    b. to participate in Investment Committee meetings, deliberations and decisions, with all the authority and responsibilities of a Trustee with respect to the Plan's investments (other than voting authority); and

c. to participate in the portion of the Board meetings, deliberations and decisions, with all the authority and responsibilities of a Trustee, related to the Plan's investments (other than voting authority).

3. While the Settlement does not confer authority on me to cast a formal vote on investment matters that come before the Investment Committee and the Board, my status as a fiduciary under ERISA, which I accept, imposes on me the same co-fiduciary duties, responsibilities and potential liabilities as every other Trustee under ERISA Section 405. Accordingly, I may not, and will not, stand by silently or idly in the event I observe acts or omissions that, in my reasoned view, amount to breaches by other fiduciaries, including (but not limited to) the voting Trustees, of their fiduciary responsibilities as they relate to investment matters.

4. The Objection of Ad Hoc Coalition Objecting to the Settlement Agreement (the "Coalition Objection") misconstrues the provision of the Settlement directing me to "prepare a written report regarding possible changes to the Plan's Investment Policy Statement." While the Settlement states that I am to prepare the report "in coordination with the OCIO and the Trustees," the report will be mine. The "coordination" refers to nothing more than the fact that I may consult with the OCIO and the Trustees regarding the history and context behind the current Investment Policy Statement and to determine whether any possible changes I propose to set forth in the report raise operational or practical concerns, or would undermine aspects of the Plan's investment program in ways that I did not intend. The concern that I will "in cases of disagreement . . . defer to the Trustees and their OCIO as to the contents of the report" (Coalition Objection at 10) is misplaced. Again, the report will be mine.

5. The Coalition Objection seems to express concern that the Settlement does not enumerate specific instances when I am to be required to state my views on investment issues in writing (other than possible changes to the Investment Policy Statement and my disagreement, if any, with the Investment Committee's recommendation to the Board for approval of a new OCIO monitor). As a full participant in meetings of the Investment Committee and meetings of the Board and the portions of Board meetings related to investments, I will state my views to the extent I deem appropriate and consistent with my fiduciary responsibility, and also confirm that the written minutes of the meetings accurately reflect my material comments. More particularly, the Settlement directs me to state my "assessment, including [my] reasoning for such assessment, for all matters under deliberation or subject to a decision or vote related to the Investment Committee (including asset management and allocation)." I will take care that the minutes of each meeting at which I make such an assessment reflect that assessment and the underlying reasoning accurately. And more generally, if I decide I need to state to the other Trustees, the OCIO or the OCIO monitor my views on an investment matter in writing, nothing in the Settlement precludes me from doing so.

6. Finally, I note that Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees, Costs and Service Fees states (at 12) that my appointment "is certainly welcomed by the Trustees, as they fully expect that [the Neutral IFT] will validate the prudence of the

process that the Trustees have been engaged in all along." I interpret the last clause as only a statement of the Trustees' confidence in their own prudence. I have neither formed nor communicated to anyone any view as to the prudence of the Trustees' current processes, let alone any changes in those processes they may make in the future during and subject to the conditions of my tenure as Neutral IFT.

Executed on August 10, 2020

Andrew Irving

Andrew Irving