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

MICHAEL W. ALLEGRETTI, CHANDRA V. BROWN-DAVIS, YOLANDA BROWN, RONALD DINKEL, SIOBHAN E. FANNIN, KRISTIE KOLACNY, DIANNA J. MARTIN, SHERRI NELSON, BECKY S. RAY, SCOTT C. READ, TIMOTHY M. RENAUD, LISA SMITH, SUSAN WEEKS, AND ANDRO D. YOUSSEF, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **WALGREEN CO.; THE RETIREMENT PLAN COMMITTEE OF THE WALGREEN PROFIT-SHARING RETIREMENT PLAN; THE TRUSTEES OF THE WALGREEN PROFIT-SHARING RETIREMENT TRUST; THE BOARD OF DIRECTORS OF WALGREEN CO.,** **Defendants.**	**Case No. 1:19−cv−05392** **Hon. Charles R. Norgle**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

On behalf of themselves and approximately 195,000 current and former participants in the Walgreen Profit-Sharing Retirement Plan (the "Plan" and the "Class Members"), Plaintiffs Michael W. Allegretti, Chandra V. Brown-Davis, Yolanda Brown, Ronald Dinkel, Siobhan E. Fannin, Kristie Kolacny, Dianna J. Martin, Sherri Nelson, Becky S. Ray, Scott C. Read, Timothy M. Renaud, Lisa Smith, Susan Weeks, and Andro D. Youssef ("Plaintiffs") respectfully submit this memorandum in support of their motion for final approval of the Settlement. Defendants *do not oppose* this motion, and only one Class Member has filed an objection.

Plaintiffs brought this action under the Employee Retirement Income Security Act ("ERISA") on behalf of themselves and Class Members. Plaintiffs alleged that Defendants Walgreen Co., The Retirement Committee of the Walgreen Profit-Sharing Retirement Plan, the Trustees of the Walgreen Profit-Sharing Retirement Trust, and the Board of Directors of Walgreen Co. (collectively, "Defendants," or "Walgreen," and together with Plaintiffs, the "Parties"), breached their fiduciary duties in violation of ERISA.

On November 1, 2021, the Court granted preliminary approval of the Settlement after determining that there was reason to believe that the "Settlement Agreement is fair, reasonable, and adequate, and within the range of possible approval[.]" Doc. 101, ¶ 1. The Court also (1) appointed Analytics Consulting LLC ("Analytics") as Settlement Administrator and Escrow Agent; and (2) approved the Class Notice. *Id.* ¶¶ 3, 4. *See also* Doc. 103-1; 104 (amended Notice and Order granting Plaintiff's Unopposed Motion to Amend Class Notice).

For these reasons and the reasons detailed below, both the Settlement and Plan of Allocation are fair, reasonable, and adequate and should be approved. Plaintiffs therefore respectfully request that the Court grant final approval of the Settlement substantially in the form

submitted herewith. *See* Declaration of Charles Field in Support of Plaintiffs' Mot. for Final Approval ("Field Decl."), Ex. 1 ("Proposed Order").

BACKGROUND

A. Settlement Background And Terms

The Settlement results from extensive negotiations conducted "in good faith at arms-length between experienced attorneys familiar with the legal and factual issues of this case[.]" Doc. 101, ¶ 1. Plaintiffs filed this action on August 9, 2019 (Doc. 1), after Class Counsel conducted in-depth pre-suit investigation. Field Decl. ¶¶ 8-9; *See also* Doc. 99-2, ¶¶ 7-8. During the litigation, Plaintiffs defeated a motion to dismiss, (Doc. 37; Doc. 43), pursued extensive discovery, and achieved class certification. Doc. 73. *See* Field Decl. ¶ 17; Doc 99-2 ¶ 8; Doc. 105-2 ¶ 6.

On August 3, 2020, the parties attended an unsuccessful mediation with Robert A. Meyer, *Esq*. of Judicial Arbitration and Mediation Services ("JAMS"). Following the mediation, the parties continued with discovery and did not resume settlement discussions in earnest until March 2021. Following six months of negotiations, the Parties executed their Settlement Agreement on September 30, 2021. *See* Doc. 99-3 ¶¶ 2.26, 10.1; Field Decl. at ¶ 9.

1. Monetary Relief

Under the Settlement, Defendants will pay $13,750,000 into the Settlement Fund. Following any deductions for (a) attorneys' fees and costs, (b) class representative compensation ("Service Awards"), (c) Administrative Expenses as defined in ¶ 2.1 of the Settlement Agreement (including the cost of class notice, independent fiduciary costs, and tax-related expenses, the Net Settlement Amount will be distributed to Class Members according to the Plan of Allocation).[1] Doc. 99-3, ¶¶ 2.29, 6.

[1] Class Counsel has applied for, and the Court granted, attorneys' fees and costs of $4,583,333.33, and service awards of $15,000 for each of the fourteen Plaintiffs. Doc. 107. Analytics has provided an estimate

Under the Plan of Allocation, Class Members will receive payments in proportion to their estimated losses. Specifically, the Plan of Allocation accounts for: (1) the total dollar amount each Class Member held in each Challenged Fund in each quarter of the Class Period; and (2) the investment performance of each Challenged Fund relative to a benchmark in each quarter of the Class Period. Doc. 99-3 ¶ 6.4. No Class Member with less than $5 of damages will receive a distribution. *Id.* ¶¶ 6.4.3 Any portion of the Net Settlement Amount remaining after distributions, including costs and taxes, shall be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan. *Id*. ¶ 6.16.

2. Non-Monetary Relief

The Settlement also includes Non-Monetary Relief. Defendants agreed to confirm that the Challenged Funds were removed from the Plan in connection with a Request for Proposal. Doc 99-3 ¶10.1. Moreover, for three years from the Settlement Effective Date, Defendants will continue to use an investment advisor to provide ongoing investment monitoring services. *Id* ¶ 10.2.

3. Attorneys' Fees and Expenses and Incentive Award

Class Counsel and Local Counsel have applied for, and the Court has approved, an award of attorneys' fees and costs of $4,583,333.33 (or 33 1/3% of the $13,750,000 value of the Monetary Relief) and a Service Award of $15,000 to each Plaintiff in recognition of their service as Class Representatives. Docs. 105 – 107. Class Counsel's fees and expenses shall be paid from the Settlement Fund before distribution to Class Members. Settlement Agreement. Doc. 99-3, ¶ 5.8.

4. Release of Claims

of $299,700 in administrative expenses. Accordingly, after deducting these expenses, the Net Settlement Amount is estimated to be $8,656,966.67, not including deductions for applicable taxes and the Independent Fiduciary.

In exchange for the relief provided by the Settlement, Plaintiffs, Class Members, and the Plan will release Defendants and affiliated persons and entities from all "Released Claims," which:

> means any and all actual or potential claims that were asserted or could have been asserted in the Litigation and that arise from or relate to: (a) the conduct alleged in the complaints in this Litigation, whether or not included as counts in the complaints; (b) the selection, retention, use, or monitoring of the investment options offered in the Plan, including but not limited to the Challenged Funds; (c) the performance, fees, costs, expenses, and other characteristics of the Plan's investment options, including but not limited to the Challenged Funds; (d) the nomination, appointment, retention, monitoring, and removal of the Plan's Committee members; (e) the Plan's investment structure; (f) the compensation received by the Plan's service providers and investment advisors; and (g) alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions.

Doc. 99-3, ¶¶ 2.36; *see also id.* at ¶ 4.1.4. This definition excludes: (i) claims of individual denial of benefits under the Plan; and (2) claims to enforce the Settlement Agreement. *Id*.

B. Class Notice and Reaction To Settlement

By December 1, 2021, the Settlement Administrator, Analytics, first mailed and/or emailed the approved Settlement Notice (and Former Participant Rollover Form, if applicable) to each Class Member identified on the class list provided by Defendants. Mitchell Decl. ¶¶ 8. In total, Analytics mailed 195,453 Settlement Notices. *Id.* When Notices were returned undeliverable, Analytics located new addresses through a third-party commercial data source and re-mailed the Notices. *Id* ¶ 12. As a result, the Notice program was very effective. Analytics estimates that Notice was successfully delivered to 98.98% of the Class. *Id.*

On December 1, 2021, Analytics also established a settlement website, walgreenserisa.com, to provide Class Members with more information about the case. *Id*. ¶ 13. Among other things, the Settlement Website included: (1) court filings; (2) the Notice; (3) the Former Participant Rollover Form; (4) a list of important deadlines; and (5) contact information to find out more information. *Id.*; *see also* Field Decl. ¶¶ 21-22. Analytics also created and maintained

a toll-free telephone support line (1-833-608-2386) as a resource for Class Members seeking information about the Settlement. Mitchell Decl. ¶ 14. The reaction of the Settlement Class to the Settlement has been favorable. There is only one objection to the Settlement out of approximately 195,000 Class Members. *Id*. ¶ 16; *see also* Field Decl. ¶ 24; Plaintiffs' Resp. to Objection of Paul Adams (filed concurrently herewith).[2]

C. Review and Approval by Independent Fiduciary

Pursuant to PTE 2003-39, the Settlement was submitted to an independent fiduciary, Gallagher Fiduciary Advisors, LLC. ("Gallagher"), for review. Field Decl. Ex. 2. (Gallagher Report). In the course of its analysis, Gallagher (1) reviewed court filings; (2) interviewed counsel for the Parties; (3) interviewed mediator Robert Meyer; (4) evaluated the strengths and weaknesses of the Parties' claims and defenses; (5) reviewed and analyzed the terms of the Settlement; and (6) reviewed Class Counsel's request for attorneys' fees, costs, and Service Awards. Field Decl. Ex. 2 at ECF p. 3-7. Gallagher found, *inter alia,* that the:

> Settlement was achieved at arms' length and is reasonable given the uncertainties of a larger recovery for the Class at trial and the value of claims foregone. The fee request is also reasonable in light of the effort expended by Plaintiffs' counsel in the Litigation and the fact that litigation costs are included in the requested fee.

Id. at ECF p. 5. Accordingly, Gallagher "approves and authorizes the settlement of Released Claims" and "has determined that the Settlement Agreement meets the requirements of ERISA Prohibited Transaction Class Exemption 2003-39." *Id.* at ECF 2.

[2] In addition to issuing Class Notice, Analytics served notices to the State Attorneys General and Department of Insurance Commissioners identified by Defendants as proper recipients, as well as the Attorney General of the United States, pursuant to the Class Action Fairness Act of 2005 (28 U.S.C. §1715) ("CAFA"). Mitchell Decl. ¶ 5.

ARGUMENT

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh,* 75 F.3d 1191, 1196 (7th Cir. 1996). Indeed, "[i]t is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 312–13 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (internal quotations omitted).

A class action settlement may only be approved after a hearing and a finding that the settlement is fair, reasonable, and adequate. Fed. R. Civ. Proc. 23(e)(1)(C). To determine whether a settlement satisfies the requirements of Rule 23(e), courts consider the following factors:

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

Fed. R. Civ. P. 23(e)(2). Subsections 23(e)(2)(A)-(B) of the Rule focus on the "procedural" fairness of the settlement, while subsections 23(e)(2)(C)-(D) concern the settlement's "substantive" fairness. Advisory Comm. Notes to 2018 Amendment to Rule 23(e)(2). The record in this case makes clear that the Settlement is both procedurally and substantively fair.

A. The Settlement is Procedurally Fair: Class Counsel and Representatives Adequately Represented the Class and Engaged in Arm's-Length Negotiations with Defendants

1. Class Counsel Adequately Represented the Class

Class Counsel, Sanford Heisler Sharp, LLP, has adequately represented Class Members. The firm has "extensive experience in handling class actions, other complex litigation, and the

types of claims asserted in this action." Dkt. No, 73 at 4; *accord* Dkt. 107 at 4; *Karg v. Transamerica Corp.*, 2020 WL 3400199, at *4 (N.D. Iowa Mar. 25, 2020) (noting that Sanford Heisler Sharp has "a wealth of experience in navigating class actions and show knowledge of and intellectual engagement with the applicable law" in ERISA breach of fiduciary duty cases). Class Counsel has served as lead or co-lead counsel in scores of class actions, including ERISA actions, and has extensive experience advising on ERISA and fiduciary duty matters. Field Decl. ¶¶ 28-34 (describing Class Counsel's extensive experience). Counsel's "extensive experience in ERISA and class action litigation," supports final approval. *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2588029, at *5 (M.D.N.C. June 24, 2019).

So does Counsel's zealous investigation and advocacy. Before filing this action, Class counsel performed extensive work in identifying and investigating potential claims. Field Decl. ¶ 17; Doc. 99–2, ¶ 7; Doc. 105-2 at ¶ 5. Counsel examined documents that detailed the fees and the performance of each Plan investment; the Plan's filings with the Department of Labor; and the Plan's investment managers' filings with the Securities and Exchange Commission ("SEC"). *Id*. Based on this information, Counsel identified benchmarks and comparator funds for each Challenged Fund and calculated alleged underperformance. *Id*. Counsel also interviewed over 160 current and former Plan participants. *Id.*

Throughout the duration of this action, Class Counsel expended resources necessary to prosecute the case. After Plaintiffs filed an Amended Complaint (Doc. 35), Defendants moved to dismiss on November 4, 2019. Doc. 37. Plaintiffs filed an opposition (Doc. 43), and the Court largely denied Defendants' motion on March 16, 2020. Doc. 46. On February 11, 2021, the Court certified a Rule 23(b)(1) class encompassing all participants who held assets in the Challenged Funds from January 1, 2014 through the date of judgment (the "Class Period"). Doc. 73.

Class Counsel engaged in extensive fact discovery. In total, Plaintiffs propounded more than 70 document requests on Defendants and third parties, issued interrogatories, and pored over many thousands of pages of documents produced in response. Field Decl. ¶ 17; Doc. 99–2, ¶ 8; Doc. 105-2 ¶ 6. Class Counsel also deposed the Rule 30(b)(6) designee of Defendant Plan Committee, *Id.*, and retained an expert to provide estimates of the Class's alleged damages. Field Decl. ¶ 17; Doc. 99–2, ¶ 8; Doc. 105-2 ¶ 7.

Accordingly, Counsel has "adequately represented the Settlement Class" by "prosecuting the claims against [Defendants] and working to gather the documents and information necessary to properly evaluate the case, to prepare for trial, and then Settlement." *Fox v. Iowa Health Sys.*, No. 3:18-CV-00327-JDP, 2021 WL 826741, at *4 (W.D. Wis. Mar. 4, 2021); *Cf. Martin v. Caterpillar, Inc.,* No. 07-CV-1009, 2010 WL 3210448, at *3 (C.D. Ill. Aug. 12, 2010) (noting contested nature of proceedings and "debate between the parties" supported settlement).

2. The Proposal Was Negotiated at Arm's Length

The Parties engaged in arm's-length negotiations over the terms of a potential settlement. The Parties participated in an unsuccessful mediation with Robert A. Meyer, *Esq.*, a highly respected JAMS mediator. Field Decl. ¶ 9. After mediation failed, discovery continued apace. Following the 30(b)(6) deposition of Defendants' designee, the parties resumed settlement negotiations in earnest, working for an additional six months to finalize the Settlement Agreement. *Id.* "A strong presumption of fairness attaches to a settlement agreement when it is the result of this type of [arm's length] negotiation." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002); *Accord Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *3 (S.D. Ill. Dec. 16, 2018).

3. The Class Representatives Adequately Represented the Class

Throughout the proceedings, Plaintiffs "have confirmed that they are willing, ready, and able to serve as class representatives, and have made significant efforts on behalf of the Class." Doc. 73 at 1 (appointing class representatives). *See* Docs. 69-5 – 69-18; Docs. 99-11 – 99-24; Doc. 105-2 at ¶¶ 49-50. They expended significant time to benefit the Class: they responded to document requests and interrogatories, reviewed and approved pleadings, and participated in settlement discussions. *Id*. Through Class Counsel, Plaintiffs have proposed a settlement that awards all Class Members, including Plaintiffs, their proportionate share of the Settlement proceeds based on their investments in the Challenged Funds. *See* Section (B)(2) below. Thus, the interests of Plaintiffs and absent Class Members align because they bring the same claims for the same remedies under the same legal theories applicable to all Class Members (*see* Doc. 73 at 2), who will recover their proportionate share of the Settlement Fund under the Plan of Allocation. Plaintiffs' diligent pursuit of the Class's claims further supports approval. *Hale*, 2018 WL 6606079, at *3; *Fox*, 2021 WL 826741, at *4.

B. The Settlement is Substantively Fair: The Relief is Adequate and Equitable

"The relief that the settlement is expected to provide to class members is a central concern" of the analysis under Rules 23(e)(2)(C)-(D). Advisory Comm. Notes to 2018 Amendment to Rule 23(e)(2)(C)-(D) (2018). Here, the Settlement provides significant benefits for the Class.

The $13.75 million settlement offers the Class a substantial monetary recovery. This sum constitutes approximately 40% of the $34 million in damages calculated by Plaintiffs' expert by comparing the performance of Challenged Funds against the average performance of their Morningstar peer universe starting on January 1, 2018 (five years after the Funds were added to the Plan). This amount compares favorably to similar cases, even accounting for more aggressive damages models. *See*, *e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011)

("numerous courts have approved settlements with recoveries around (or below)" 10% of estimated potential damages); *Baird v. BlackRock Institutional Tr. Co., N.A.*, No. 17-CV-01892-HSG, Doc. No. 490 at *5 (N.D. Cal. Nov. 3, 2021) (approving $9.65 million ERISA settlement, 28.4% of damages plaintiffs intended to prove at trial); *Clark v. Duke Univ*., 2019 WL 2588029 (M.D.N.C. 2019) (approving $10.65 million ERISA settlement, under 4% of total estimated damages).[3] Moreover, since the Agreement provides for distributions on a tax-deferred basis, *see* Doc. 99-3 ¶ 6.2, the "the actual value to the class for the monetary part of the settlement" is "more than [$13.75] million." *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. August 16, 2019).

The Settlement also provides substantial *non-monetary* relief, including confirmation that the fiduciaries have removed the Challenged Funds and an agreement that the fiduciaries will "continue to use an investment advisor to provide ongoing investment monitoring services for the Plan." Dkt. No. 99-3 ¶¶ 10.1, 10.2. This "is an important and valuable benefit for the numerous Class Members." *Schulte*, 805 F. Supp. 2d at 583. *Cf. Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) (recognizing importance of affirmative relief to ERISA settlement); *Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *1 (S.D. Ill. January 31, 2014) (same).

1. The Costs, Risks, and Delay of Trial and Appeal Support Approval

[3] *See also Price v. Eaton Vance*, No. 1:18-cv-12098-WGY (D. Mass. Sep. 24, 2019) (approving ERISA class settlement that equaled approx. 23.8% of expected value); *Mehling v. New York Life Ins. Co*., 248 F.R.D. 455, 462 (E.D. Pa. 2008) (20% recovery in ERISA class action); *Sims v. BB&T Corp*., 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (approving ERISA settlement that represented 19% of estimated damages); *Newbridge Networks Sec. Litig*., 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve percent of a potential recovery . . . seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

"The most important factor relevant to the fairness of a class action settlement is ... the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Dorvit on behalf of Power Sols. Int'l, Inc. v. Winemaster*, 950 F.3d 984, 989 (7th Cir. 2020) (citation omitted). Here, the "costs, risks, and delay" associated with taking this case to trial—and, inevitably, appeal—weigh in favor of approval. Rule 23(e)(2)(C)(i).

This type of ERISA litigation involves substantial risk of loss: "Plaintiffs claiming a breach of fiduciary duty do not often succeed." *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1248 (7th Cir. 1995). "Numerous courts have emphasized the many hurdles plaintiffs must clear to succeed" on a claim for imprudence under ERISA. *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 466 (D. Md. 2014). Such "class actions are extremely complex and require a willingness to risk significant resources in time and money, given the uncertainty of recovery and the protracted and sharply-contested nature of ERISA litigation." *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 269 (S.D.N.Y. 2020).

To prevail in such cases, Plaintiffs must first establish a breach—a tall order. *See, e.g.*, *Howell v. Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011) (affirming summary judgment for plan fiduciaries); *Jenkins v. Yager,* 444 F.3d 916, 926 (7th Cir. 2006) (same); *Wildman v. American Century Services, LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019) (trial judgment that defendants did not breach the duty of prudence when it retained challenged funds); *see also Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011). Even if Plaintiffs show a breach, other issues remain. The elements of causation and damages often present unsettled and hotly contested issues of law. *See, e.g.*, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 364 (4th Cir. 2014) (dispute over causation standard); *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014) (remanding with instruction to "reevaluate" the "method of calculating

the damage award"); *cf. In re Milken & Assoc. Sec. Lit.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement and noting that damage calculations are often a "battle of experts at trial, with no guarantee of the outcome"). If Plaintiffs were unsuccessful on any of these points—which invariably involve contested expert testimony—Class Member "would face the real risk that they would win little or no recovery." *Schulte*, 805 F. Supp. 2d at 582.

Moreover, "a major benefit of the settlement is that Class Members may obtain these benefits much more quickly" without having "to await the outcome of a trial and inevitable appeal" that would delay their compensation "for many years, if indeed they received any at all." *Id*, at 583.

In sum, the "costs, risks, and delay of trial and appeal" strongly favor settlement. Fed. R. Civ. P. 23(e)(2)(C)(i).

2. The Proposed Method of Distributing Relief to the Class Will Be Highly Effective and Equitable

The Parties have developed neutral methods to promptly deliver the settlement proceeds to Class Members. All Class Members will receive a *pro rata* share of the Settlement Fund adjusted for each Class Member's quarterly balance in each Challenged Fund and the quarterly performance of each Fund. Doc 99-3 ¶ 6.4. No Class Member with less than $5 of damages will receive a distribution. *Id.* ¶ 6.4.3. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462-63 (S.D.N.Y. 2004) (approving plans that "allocate the settlement amount among plan participants based on their losses" and exclude claims under $10). Any portion of the Net Settlement Amount remaining after distributions, including costs and taxes, shall be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan. Doc. 99-3 ¶ 6.16. *See Clark*, 2019 WL 2588029 at *3 (approving plan with similar provision). Notably, after being informed of the Settlement's terms through the Court-approved Notice, only one Class Member out of

approximately 195,000 has filed an objection. This further supports approval. *Schulte*, 805 F. Supp. 2d at 586 (approval supported where only "a very small percentage" of class objects; collecting cases); *Martin*, 2010 WL 3210448, at *3 (two objections out of "thousands of participants" supports approval); *see also* Plaintiffs' Resp. to Objection of Paul Adams (filed concurrently herewith).

3. The Attorneys' Fees and Expenses and Service Awards Are Fair, Reasonable, and In Line with Other Cases

Plaintiffs' award of $4,583,333.33 for attorneys' fees costs and represents 33 1/3% of the value of the monetary relief of the settlement. *See* Doc. 106-107. This award aligns with the market rate in the Seventh Circuit, derived from both fee awards in other ERISA class actions and with "privately-negotiated" contracts. *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (noting that these data bear directly on the court's determination of the "market" fee rate). Courts have roundly held that a "one-third fee [percentage] is consistent with the market rate" in ERISA class action litigation, which is a "particularly complex area of law." *George v. Kraft Foods Glob., Inc.*, 2012 WL 13089487, at *2 (N.D. Ill. June 26, 2012).[4] One-third is also "the standard contingent percentage that employment lawyers in the Northern District of Illinois charge individual clients." *Brewer v. Molina Healthcare, Inc.*, 2018 WL 2966956, at *4 (N.D. Ill. June 12, 2018); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUD. 27, 35 (2004) ("Taken as a whole, the evidence suggests that one-third is the benchmark for privately negotiated contingent fees."). Moreover, Counsel's request for an award of 33 1/3% *includes* reimbursement for their costs. *See*,

[4] *See also Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *3 (S.D. Ind. Sept. 4, 2019) (collecting 13 ERISA cases in the Seventh Circuit in which the court awarded one-third of the settlement); *see also* Doc. 105-1 at 1-2, 5 (Plaintiffs' Mot. for Attorneys' Fees) (collecting cases).

e.g., *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *6 (S.D. Ind. Sept. 4, 2019) (noting it is "well established" that such expenses are reimbursable in addition to fees).

Particularly in light of the "uncertainty of recovery" in ERISA actions, *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 269 (S.D.N.Y. 2020), and the "quality of [Class Counsel's] performance" *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007), the award of 33 1/3% for counsel's fees and costs is fair and reasonable. *See* Doc 105-1 at 2-3, 6-11 (describing counsel efforts and risks assumed) (collecting cases).

Similarly, the award of $15,000 for each class representative is fair and reasonable. As detailed in Section (A)(3) above an in Plaintiffs' Motion for Attorneys' Fees (Doc. 105-1 at 13-15), from the inception of the Class Action, Plaintiffs have faithfully attended to their duties to act on behalf of other current and former Plan participants, including by (1) responding to document requests and interrogatories; (2) reviewing and approved pleadings; and (3) being involved in the settlement. Doc. 105-2, ¶¶ 49-50. Accordingly, the request for $15,000 for a service award for each Class Representative is also reasonable.

Finally, the Settlement Notice advised Class Members of the requested amount of attorneys' fees and service awards. To date, only one Class Member out of approximately 195,000 has voiced any objection to the proposed awards. Field Decl. ¶ 24. Accordingly, the attorneys' fees, expenses, and Service Awards are well within acceptable ranges approved by courts in the Seventh Circuit and weigh in favor of approval of the Settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Indeed, this Court has reviewed and approved as fair and reasonable the awards of attorneys' fees, expenses, and Service Awards. *See generally* Doc. 107; *see also* Plaintiffs' Resp. to Objection of Paul Adams (filed concurrently herewith).

4. All Agreements Have Been Identified

The Parties have identified "any agreement required to be identified under Rule 23(e)(3)," as there are no agreements other than the Settlement Agreement and Plan of Allocation described herein. Fed. R. Civ. P. 23(e)(2)(C)(iv).

CONCLUSION

Plaintiffs respectfully request that the Court enter an order granting final approval of the Settlement in the accompanying proposed order. *See* Field Decl. Ex. 1.

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Respectfully submitted,

/s/Charles Field
*Charles Field
SANFORD HEISLER SHARP, LLP
2550 Fifth Avenue, 11th Floor
San Diego, CA 92103
Telephone: (619) 577-4242
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

*David Tracey
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Phone: (646) 402-5650
Facsimile: (646) 402-5651
dtracey@sanfordheisler.com

*Kevin Sharp
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Ksharp@sanfordheisler.com

*Danielle Fuschetti
SANFORD HEISLER SHARP, LLP
111 Sutter Street, Suite 975
San Francisco, CA 94104

DFuschetti@sanfordheisler.com

* *pro hac vice admitted*

Anthony L. Parkhill
Ben Barnow
Barnow and Associates, P.C.
205 West Randolph
Suite 1630
Chicago, IL 60606
(312) 621-2000
b.barnow@barnowlaw.com

Attorneys for Plaintiffs