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**

UNOPPOSED MOTION TO APPROVE SUPPLEMENTAL CLASS NOTICE AND SET DEADLINE AND MEMORANDUM IN SUPPORT

For the reasons that follow, Plaintiffs respectfully move the Court for an order (1) approving the attached notice and rollover form to be sent to certain class members omitted from the original class list and (2) setting a deadline for any motion for relief from the judgment.

I. SUMMARY

This class action, filed in 2019, alleged that Defendants failed to adequately monitor a suite of investments (the "Challenged Funds") held in Walgreen's 401(k) Plan (the "Plan") and thereby breached their fiduciary duties to Plan participants under the Employee Retirement Income Security Act ("ERISA"). After extensive litigation and negotiations, the parties reached a $13.75 million settlement, of which notice was sent to approximately 195,000 identified class members. To identify and locate class members, the settlement administrator relied on a list of class members provided by the 401(k) Plan's recordkeeper through defense counsel. Only two class members objected. On February 16, 2022, the Court held a fairness hearing and later approved the settlement over their objections, finding the agreement was fair, reasonable, and adequate. *See* Dkt. No. 116.

Nearly one month after final approval, upon reviewing newly-produced data provided to facilitate the settlement distribution, the Settlement Administrator discovered that the original class list had inadvertently omitted the names and addresses of a group of 5,993 class members. Because those class members were not on the original class list, they did not receive settlement notices. The Administrator promptly notified counsel. Defendants have since provided a complete list of class members and their contact information to the Administrator, which continues to implement the plan of allocation pursuant to the Settlement Agreement and this Court's Final Approval Order.

Class Counsel investigated this issue and has carefully considered its implications. Upon review, Plaintiffs continue to believe that the Administrator used reasonable efforts to identify class members and provide them the best notice practicable based on the facts then available. The notice program complied with the Court's orders and exceeded the requirements of due process, as explained below. Plaintiffs therefore believe that it remains in the best interests of the Class as a whole—including the additional Class members discovered by the Administrator—to distribute

the settlement fund as scheduled. In an abundance of caution, however, Plaintiffs propose that the Court (1) approve the attached notice and rollover form for class members who were omitted from the original class list and (2) set a deadline by which they may file any motion for relief from the judgment. Class Counsel will place their attorneys' fees in escrow until that deadline passes.

Plaintiffs respectfully submit that this course of action best serves the Class's interest in prompt payment, protects the interests of all parties in the finality of the court-approved settlement, and notifies the affected class members of a procedure through which they may raise any argument that they should not be bound by the judgment. Defendants do not oppose the relief requested.

II. PERTINENT BACKGROUND

On November 1, 2021, the Court issued its order preliminarily approving the $13.75 million settlement reached on behalf of a previously-certified Rule 23(b)(1) Class of Plan participants. *See* Dkt. No. 101 ("Preliminary Approval Order); Dkt. No. 99-3 ("Agreement").[1] The $13.75 million settlement represented 40% of the potential damages calculated by Plaintiffs' expert when comparing the performance of Challenged Funds against the average performance of the Morningstar universe of similar funds starting on January 1, 2018 (five years after the Funds were added to the Plan). *See* Pls' Mot. for Final Approval (Dkt. No. 109-1) at 9.[2]

The Settlement Administrator (Analytics, LLC) notified Class members of the settlement as provided in the Court's Preliminary Approval Order and the Settlement Agreement. The Order

[1] The Class encompasses all Plan participants who were invested in the Challenged Funds from January 1, 2014 through the date of judgment. *See* Dkt. No. 73 ("Class Certification Order").

[2] Plaintiffs' expert calculated the potential damages based on the total Plan *assets* invested in the Challenged Funds and the losses to *the Plan* as a whole, so the calculations remain correct regardless of the number of class members who shared in the Plan's investment in the Challenged Funds. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142, n.9 (1985) (explaining that ERISA § 502(a)(2) claims are brought "on behalf of the plan as a whole").

directed the Settlement Administrator to send a court-approved Notice[3] "to each class member identified by the Administrator" as outlined in the Settlement Agreement. *See* Dkt. No. 101 ¶¶ 4–5 (requiring Analytics to "perform all of the duties of the Administrator as set forth in the Settlement Agreement"). The Agreement, in turn, directed the Administrator to mail the Notice to "the last known address" or e-mail address of "each Class Member provided by the Plan's recordkeeper (or its designee) through Defense Counsel, unless an updated address [was] obtained by the Settlement Administrator through its efforts to verify" the addresses on the recordkeeper's list. Agreement § 3.4.1. The Agreement also required the Administrator to "use commercially reasonable efforts to locate any Class Member whose Class Notice is returned and re-send such documents at least one additional time." *Id.* Finally, the Agreement directed Class Counsel to post the Notice to the Settlement Website, www.walgreenserisa.com. *Id.*

Class Counsel and the Administrator fully complied with those directives. *See* Declaration of Jeffrey Mitchell (Dkt. No. 109-5) ¶¶ 6–12. In late October 2021, consistent with the Settlement Agreement, defense counsel sent Class Counsel and the Administrator two spreadsheets listing Class members and their contact information (including last known addresses), which they received from the Plan's recordkeepers[4] (the "Class List"). *See* **Ex. 1**, Declaration of Richard Simmons, ¶ 6; **Ex. 2**, Declaration of Sean Ouellette ¶ 3. Defense counsel indicated to Class Counsel that, to the best of their knowledge, this was the full list of Class members. *See* Ex. 2, Ouellette Decl. ¶¶ 3–4. On November 16, 2021, two weeks before the Administrator mailed Notices to Class

[3] The Class Notice was filed with the Final Approval Motion as Exhibit 1 to the Declaration of Jeffrey Mitchell, Dkt. No. 109-5 at 7–14.

[4] The Plan had two recordkeepers during the Class Period: Empower and Fidelity. The data provided by Fidelity, the Plan's current recordkeeper, is the data at issue here.

members, defense counsel confirmed that the Class List was current and did not require supplementation before being used to send settlement notices to Class Members. *Id.* ¶ 5.

The Administrator then cross-checked the recordkeeper's list of addresses with the U.S. Postal Service Change of Address Database, updated the list accordingly, and mailed and emailed (for current Plan participants) the Notice to each Class member listed. Mitchell Decl. ¶¶ 7–8. When the post office returned Notices as undeliverable, Analytics took further steps to ascertain valid addresses for the affected class members and re-mailed the Notice to the new addresses identified. *Id.* ¶ 12. In the end, Analytics successfully delivered Settlement Notices to 193,460 participants, or over 95% percent of the 201,429-member Class. *See id.* ¶ 12; Simmons Decl. ¶ 20.

On February 16, 2022, the Court held a fairness hearing, approved the settlement, and denied the sole timely objection. *See* Dkt. No. 116 ("Final Approval Order") ¶ 6 (finding that the settlement was, "in all respects, fair, reasonable and adequate, and [was] in the best interests of the Class Members").[5] In doing so, the Court found that the Class Notice: (a) "was implemented in accordance with the Preliminary Approval Order"; (b) "constituted the best notice practicable under the circumstances"; (c) was "reasonably calculated" to apprise Class members of the litigation, the effect of the settlement, Class Counsel's fee petition, and their right to object; (d) "constituted due, adequate, and sufficient notice to all persons … entitled to receive notice" of the settlement; and (e) satisfied Rule 23 and due process. *Id.* ¶ 3.[6] Those findings remain correct.

Nearly one month after final approval, on March 16, 2022, the Settlement Administrator learned that the Class List omitted the names and addresses of 5,993 Class members. *See* Simmons Decl. ¶ 13. Analytics discovered the omission only after comparing the Class List to new data

[5] The Court also later denied a belated objection submitted after the hearing. *See* Dkt. No. 120.

[6] The Court's Final Approval Order became a final judgment 35 days later, on March 23, 2022. *See* Final Approval Order, Dkt. No. 116 ¶ 9; Agreement, Dkt. No. 99-3 §§ 2.22, 2.42.

produced by Defendants only *after* the Notices were mailed, data provided to implement the plan of allocation. *See id.* ¶¶ 10–11.[7] After processing and reviewing that data, Analytics discovered 5,993 additional participants who invested in the Challenged Funds for short periods in 2020 and the first two quarters of 2021 (when Fidelity was the Plan's recordkeeper). *Id.* ¶ 15. Because the original Class List omitted that group of Class members, Analytics did not know about them and did not mail them a Notice before the final approval hearing. *Id.* ¶ 17.

The Administrator promptly informed counsel of the omission. *See* Simmons Decl. ¶ 14; Ouellette Decl. ¶ 9. On March 18, 2022, defense counsel provided the Administrator with the names and addresses of the 5,993 Class members who were left off the original Class List. Simmons Decl. ¶ 16. The Class List now includes 201,429 Class members in total. *Id.* ¶ 19. Of the 5,993 Class members omitted from the original list, only about 142 are set to receive payments (totaling $4,471.23) from the Settlement Fund under the terms of the plan of allocation.[8] *Id.* ¶ 18.

III. ANALYSIS

Federal Rule of Civil Procedure Rule 23 requires the Court to direct notice of a class action settlement and petition for attorneys' fees "in a reasonable manner" to absent class members. Fed.

[7] The new data reflected the balances that each Class member held in the Challenged Funds during the Class Period, which are needed to determine the settlement allocation due to each Class member (but not to distribute settlement notices). *See* Simmons Decl. ¶ 10. Defense counsel provided that data only after the notices were sent, as is customary in ERISA settlements. *See id.* ¶¶ 8, 10. While the Administrator received the balance data on January 20, 2022, it took until March 16, 2022 to fully process and compare the data to the original Class List. *See id.* ¶¶ 10–14.

[8] Only a small portion of these Class members stands to receive a payment likely because this group was only briefly invested in the Challenged Funds and suffered an accordingly small share of the alleged damages the Class sustained. The court-approved plan of allocation provides that "[n]o amount shall be distributed to a Former Participant that is five dollars ($5.00) or less, because such an amount is de minimis and would cost more in processing than its value." Agreement § 6.4.3. "All Former Participants that are entitled to $5.00 or less shall be excluded from the Plan of Allocation …. The Settlement Administrator shall then recalculate the Plan of Allocation excluding those Excluded Former Participants and distribute the Net Settlement." *Id.*

R. Civ. P. 23(e)(1)(B) & (h)(1). To satisfy due process, such notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). But due process "does not insist on actual notice to all class members in all cases." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015). Rather, "the operative question" is whether the party sending notice (here, the Administrator) "acted reasonably in selecting means likely to inform the persons affected" based on the facts available "at the time that the notice was sent." *Krecioch v. United States*, 221 F.3d 976, 980 (7th Cir. 2000); *Adelson v. Ocwen Fin. Corp.*, No. 07-cv-7208, 2014 WL 9954175, at *3 (N.D. Ill. Oct. 27, 2014) ("The proper inquiry … is whether *the party providing notice* acted reasonably in selecting the means likely to inform persons affected") (emphasis added). In other words, courts assess the adequacy of the notice procedure "*ex ante*," not "*post hoc*," *Jones v. Flowers*, 547 U.S. 220, 231 (2006), or "based on events that occurred later," William B. Rubenstein, Newberg on Class Actions ("Newberg") § 18:43 (5th ed.).

In mandatory class actions under Rule 23(b)(1), like this case—from which individual class members do not have a right to opt out—the administrator need not mail notices to every class member. *See* Newberg § 8:15 (explaining that in these cases, "courts treat individual settlement notice as discretionary"). "Notice to a representative cross-section" of the Class serves the purpose of providing notice in such cases: to "assure that inadequacies in representation of the entire class" will "likely be called to the court's attention." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983). Accordingly, "notice calculated to reach a significant number of class members often will protect the interests of all." Fed. R. Civ. P. 23, Committee Notes on 2003 Amendment.

Even under the more stringent requirements of Rule 23(b)(3) (inapplicable here), the administrator need only mail direct notice to those class members whom he can then "identif[y] through reasonable effort." *Mullins*, 795 F.3d at 665; *see also Krecioch*, 221 F.3d at 980. Publication otherwise suffices to give notice to unidentified class members. *See Mullane*, 339 U.S. at 317–18 (requiring notice to be mailed to parties whose "names and post office addresses … are at hand," but holding that "in the case of persons missing or unknown," "whose interests or whereabouts could not with due diligence be ascertained," the Constitution permits an "indirect and even a probably futile means of notification," such as notice by publication).

In several cases, therefore, courts in the Seventh Circuit have held notice by publication satisfied due process when the sender could not identify all class members using reasonable efforts based on records provided by the company. *See Mirfasihi v. Fleet Mortg. Corp*., 356 F.3d 781, 786 (7th Cir. 2004) (holding that notice by publication sufficed when company records did not list all class members); *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 145–46 (N.D. Ill. 2010) (notice by publication or web sufficient when company's records were not complete); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) (same); *see also Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (holding notice sufficed even though some class members were not listed in company records and thus were not mailed a notice, where notice was also published in newspaper of general circulation).

In any event, the question before a court ensuring the fairness of a class action settlement "is not whether some individual shareholders got adequate notice, but whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). If so, the settlement should proceed. *Id.* (affirming class action

settlement even though approximately 20% of class did not receive a notice before the objection deadline); *Torrisi*, 8 F.3d at 1375 (affirming where approximately 1/3 of the class did not get timely notice); *accord DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 946 & n.18 (10th Cir. 2005). There is no question that the Class had adequate notice here.

A. The Class Notice Satisfied Rule 23 and Due Process

In this case, the Class likewise received the best notice practicable based on the information reasonably available to Class Counsel and the Administrator before final approval. Consistent with the Court's Orders and the Settlement Agreement, the Administrator mailed the Class Notice "the last known address" of "each Class Member provided by the Plan's recordkeeper … through Defense Counsel" and to any updated address obtained through its diligent verification efforts. Ex. 1 § 3.4.1; *see* Mitchell Decl. (Dkt. No. 109-5) ¶¶ 6–12. In doing so, the Administrator reasonably relied on the Class List provided by the Plan recordkeeper through defense counsel, who indicated that the list was complete and current. *See* Simmons Decl. ¶¶ 6–8; Ouellette Decl. ¶¶ 3–4, 7. Analytics also posted the notice on the Settlement Website, available to all Class members through a simple Internet search. *See Mirfasihi*, 356 F.3d at 786 (noting that "[t]he World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers" in providing publication notice). These efforts to locate and notify all class members were more than reasonable. Indeed, they far exceeded efforts taken in notice programs upheld by the Seventh Circuit. *See Burns v. Elrod*, 757 F.2d 151, 153 (7th Cir. 1985) (holding that notice satisfied due process even though the sender used ten-year-old addresses and therefore failed to reach a majority—about 463 of 700—of class members).

The parties and the Administrator learned only *after* Final Approval that certain class members were not included in the records the recordkeeper provided and therefore did not receive notice. This post-approval information does not change the fact that the Court, Class Counsel, and

the Administrator all "acted reasonably in selecting the means likely" to identify and notify the Class "at the time that the notice was sent." *Krecioch*, 221 F.3d at 980; *see* Newberg § 18:43 (explaining that courts do not assess the adequacy of notice "ex post, based on events that occurred later"); *accord Jones*, 547 U.S. at 221. A contrary rule—requiring a new round of notice and hearing based on new information that was unavailable to class counsel or the party charged with sending notice (here the administrator) until *after* final approval—would undermine the interests of the parties, the judiciary, and the Class *as a whole* in the finality and the timely administration of the settlement. *See In re VMS Ltd.*, No. 90-cv-2412, 2003 WL 151388, at *1 (N.D. Ill. Jan. 17, 2003) (explaining that the "proper inquiry is whether the procedures used to provide notice to the *class as a whole* satisfied due process") (emphasis added); *see also In re VMS Sec. Litig.*, No. 89-cv-9448, 1992 WL 203832, at *3 (N.D. Ill. Aug. 13, 1992) (explaining "that in any settlement there will be some class members who are difficult to locate and who may not receive timely notice of the settlement," but that the interests of "finality and certainty in class action settlements" weigh against reopening the case based on lack of notice to some class members).

B. The Settlement Administration Should Proceed as Scheduled

In any event, there are no grounds to delay or otherwise disturb the administration of the settlement because is no question that "the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Torrisi*, 8 F.3d at 1375.

Even when assessed based on the updated class list, the Notice was still sent to the last known addresses of approximately 97% of the Class and appears to have reached over 95% of Class members. *See* Mitchell Decl. ¶¶ 8, 12 (noting that notice was mailed to 195,453 and successfully delivered to 193,460 class members); Simmons Decl. ¶ 20 (noting that over 95% of the 201,429-member Class received a Notice). These figures are well within (and in fact above)

the range that the Federal Judicial Center and courts in this district have adjudged reasonable. *See* Simmons Decl. ¶ 21; Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" at 3 (2010) ("The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%."); *In re TikTok, Inc., Consumer Priv. Litig.*, No. 20-cv-4699, 2021 WL 4478403, at *12 (N.D. Ill. Sept. 30, 2021) ("The Federal Judicial Center has found that a notice plan calculated to reach between 70% and 95% of the class in total is reasonable."); *Douglas v. W. Union Co.*, 328 F.R.D. 204, 218 (N.D. Ill. 2018) (explaining that notice is ordinarily adequate when it reaches between 70–95% of class members); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 596 (N.D. Ill. 2011) (notice adequate when it reached approximately 90% of class members). Of the over 193,000 Class members who received the notice, only two filed objections, which the Court considered and denied. *See* Dkt. Nos. 116, 120.

Under these circumstances, it is not realistic to suspect that mailing notice to the remaining 3% of the Class would generate a reasonable objection whose substance the Court has not already considered and rejected. Therefore, the Class List's later-discovered omissions do not undermine the fairness of the settlement, which should proceed as planned. *See Torrisi*, 8 F.3d at 1375 (affirming settlement despite alleged lack of timely notice to around one-third of the class because "the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement"); *see also Fidel*, 534 F.3d at 514; *DeJulius*, 429 F.3d at 946. That a third party (the recordkeeper) provided underinclusive records should not delay relief to the Class as a whole. *Cf. Shurland*, 271 F.R.D. at 146 (reasoning that deficiencies in a defendant company's records should not prevent the class as a whole from obtaining class-wide relief).

IV. PROPOSED ORDER

Accordingly, the interests of the Class would be best served by proceeding with the settlement payments as scheduled, rather than by delaying payment to many thousands of Class members awaiting their distributions. In an abundance of caution, however, Plaintiffs propose that the Court: (1) approve the attached notice (**Ex. 3**) to be sent to those Class members who were omitted from the original Class List and (2) set a deadline by which those class members may file a motion to intervene and for relief from the judgment. *See* Fed. R. Civ. P. 24(b) (intervention);[9] Fed. R. Civ. P. 60(b) (relief from the judgment). Class Counsel will direct the Administrator to place their award of attorney's fees in an escrow account until that deadline passes. Payments to all Class members, including those left of the original Class List, would proceed in the interim.[10]

This procedure, outlined in the attached proposed order, will allow class members omitted from the original Class List to raise any argument that they should not be bound by the judgment, or to raise any additional challenge to Class Counsel's fee award, without impacting the finality of the settlement or delaying payments to the entire Class. *See* Fed. R. Civ. P. 60(c)(2) (providing that a motion under Rule 60 "does not affect the judgment's finality or suspend its operation").

CONCLUSION

Therefore, Plaintiffs respectfully request that the Court enter the attached proposed order.

Dated: April 4, 2022

/s/ Charles Field

*Charles Field

[9] *See Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) (holding, in effect, that absent class members must ordinarily move to intervene in order to seek relief from the judgment).

[10] The proposed order also provides for the Administrator to send a rollover form for those among the 142 additional participants who prefer to roll their awards into a qualified retirement account. The rollover form is attached as Exhibit 4 and is substantially the same as the form previously approved by the Court except for the updated deadline for submission. *See* **Ex. 4**.

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