IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BARBARA JANE FRECK, GLORIA ROBINSON, JALEEZA OWENS, LYNN MUSERELLI, PAUL CAPELLO, JIM HELTON, and JOSHUA CLARK individually and on behalf of all others similarly situated,	)	Civil Action No. 4:20-cv-00043-BCW
Plaintiffs,	)	
v.	)	
CERNER CORPORATION, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PLAN OF ALLOCATION

Named Plaintiffs Barbara Jane Freck, Gloria Robinson, Jaleeza Owens, Lynn Muserelli, Paul Capello, Jim Helton, and Joshua Clark (collectively, "Plaintiffs"), participants in the Cerner Corporation Foundations Retirement Plan (the "Plan"), by and through their undersigned counsel, hereby respectfully move this Court, pursuant to FED. R. CIV. P. 23, for an Order:

1. Granting final approval to the class action settlement in this action on the terms of the Class Action Settlement Agreement ("Settlement Agreement"), fully executed on February 17, 2021 and previously filed with the Court on February 18, 2021;

2. Certifying the Class as defined in the Settlement Agreement;

3. Appointing Named Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g);

4. Finding that the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and adequately informed the

Settlement Class members of the terms of the Settlement, how to lodge an objection and obtain additional information; and

5. For such other relief as the Court may deem just and proper.

The grounds for this Motion are set forth in the following documents filed contemporaneously herewith:

A. Suggestions in Support of Plaintiffs' Motion For Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of Plan of Allocation;

B. Declarations of Plaintiffs' Counsel, the Named Plaintiffs, and the Settlement/Notice Administrator.

Attached hereto is the proposed Final Order and Judgment.

DATED: June 18, 2021

Respectfully submitted,

CAPOZZI ADLER, P.C.

/s/ Mark K. Gyandoh

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Proposed Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 18th, 2021 a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: */s/ Mark K. Gyandoh*
Mark K. Gyandoh

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PLAINTIFFS' SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PLAN OF ALLOCATION

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Named Plaintiffs Barbara Jane Freck, Gloria Robinson, Jaleeza Owens, Lynn Muserelli, Paul Capello, Jim Helton, and Joshua Clark (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby submit these suggestions in support of their Motion for Final Approval of Class Action Settlement. Plaintiffs' accompanying motion seeks an Order: 1) approving the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") under FED. R. CIV. P. 23(e); (2) certifying a Settlement Class; (3) appointing Named Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding that the manner in which the Settlement Class was notified of the Settlement was the best manner practicable under the circumstances and adequately informed Settlement Class members of the terms of the Settlement and how to lodge an objection and obtain additional information; and (5) approving the Plan of Allocation as set forth in the Settlement Agreement.

I. INTRODUCTION

On March 5, 2021, the Court preliminarily approved the Settlement in this Action (ECF No. 61), which provides for the creation of a $4,050,000.00 Settlement Fund with additional non-monetary consideration.[1] The Court's Preliminary Approval Order also, *inter alia*, conditionally certified a Settlement Class and appointed the Named Plaintiffs as class representatives and Capozzi Adler, P.C. ("Capozzi Adler") and Foulston Siefkin, LLP ("Foulston Siefkin") as Class Counsel. *Id*. Plaintiffs and Class Counsel believe each of these findings in the Preliminary Approval Order should be made final because the proposed Settlement represents an outstanding recovery. In particular, the Settlement represents approximately 27% to 40.5% of the Settlement

[1] The Settlement Agreement, previously submitted to the Court, is being submitted herein as Exhibit 1 to the Declaration of Mark K. Gyandoh ("Gyandoh Decl.") which is filed contemporaneously with this memorandum. Undefined capitalized terms herein have the same meaning as in the Settlement Agreement.

Class's estimated realistic damages as calculated by Plaintiffs. Gyandoh Decl., ¶ 30. Class Counsel achieved this Settlement only after extended negotiations under the auspices of Hunter R. Hughes, III, a neutral, third-party private mediator with experience mediating ERISA class actions. Without doubt, the Settlement was reached after arm's length negotiations by experienced counsel on both sides. Plaintiffs now present the Settlement Agreement for final approval.[2]

II. THE PROPOSED SETTLEMENT

The Settlement provides Cerner (or its insurers) will pay $4,050,000.00 to be allocated to participants on a pro-rata basis pursuant to the Court-approved Plan of Allocation (described in Article V of the Settlement Agreement). The Parties also agreed to prospective relief which includes Cerner issuing a request for proposal for recordkeeping services for the Plan and precluding Cerner employees employed within the Company's Investment Relations function from serving on the Cerner Foundations Retirement Plan Administrative and Investment Committee ("Committee") for a period no less than three years. *See* Settlement Agreement, Art. VI. Cerner also shall send an annual notice, for a period of no less than three years, to all Plan participants reminding participants about the benefits of diversification. *Id.*

III. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

Pursuant to the Preliminary Approval Order, Class Counsel has overseen the issuance of the Court-approved Class Notice. Class Counsel retained Analytics Consulting, LLC ("Analytics") to serve as settlement and notice administrator. *See* Declaration of Jeffrey Mitchell, Project Manager at Analytics ("Mitchell Decl.") (attached as Ex. 2 to the Gyandoh Declaration).

[2] The full procedural history of this matter is recounted in the Gyandoh Declaration, filed contemporaneously with this memorandum, at ¶¶10-27.

On or about March 12, 2021, Defendants provided Analytics data consisting of, among other information, the names, mailing addresses, contact information, Social Security numbers, and other identifying data of individuals identified as potential Settlement Class Members. Mitchell Decl., ¶ 7. Analytics updated the Settlement Class member address information using data from the National Change of Address ("NCOA") database and updated the Settlement Class list. Mitchell Decl., ¶ 8.

On April 5, 2021, Class Notices were mailed to 45,772 Settlement Class Members. *Id.*, ¶ 9. Some of the Notices were returned due to invalid mailing addresses. *Id.*, ¶¶ 11-12. For the returned Notices, Analytics conducted a skip trace to ascertain a valid address for the affected Settlement Class Members and resent the Notices. *Id.* As of June 17, 2021, only 620 Class Notices have been returned because they were not able to be delivered resulting in an over 98% success rate. *See* Mitchell Decl., ¶ 13.

The notice program apprised Settlement Class members of the terms of the Settlement, and of their right to object to any or all of the terms of the Settlement, Plan of Allocation, Case Contribution Awards, or to Class Counsel's motion for award of attorneys' fees and reimbursement of litigation expenses. The Class Notice was also posted on a dedicated website – www.CernerERISASettlement.com – through which the public, and the Plan's current and former participants could (1) view a summary description of the Action and the status of the Action, and (ii) access the Settlement Agreement and related Settlement documents. *See* Mitchell Declaration, ¶ 14. As of June 17, 2021, the Settlement website received 4,032 total views. *Id.* Analytics also created and maintained a toll-free telephone support line as a resource for Settlement Class Members seeking information about the Settlement. *See* Mitchell Declaration, ¶ 16. As of June 6, 2021, 397 calls had been received. *See* Mitchell Declaration, ¶ 17.

Where, as here, a notice program includes direct mail notice to absent class members and is supplemented by a settlement website and a toll-free telephone number, this constitutes the "best notice practicable." *Hashw v. Dep't Stores National Bank*, 182 F.Supp.3d 935, 946 (D. Minn. 2016) (citations omitted). Indeed, the Court previously found the combination of the direct-mail Class Notice and dedicated Settlement website and phone number was adequate to inform Settlement Class members of the terms of the proposed Settlement and how to lodge an objection and obtain additional information. *See* Preliminary Approval Order, ¶ 7.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Legal Standard

To grant final approval of a settlement, a court must determine that a settlement is "fair, reasonable and adequate." *In re Uponor, Inc*., 716 F.3d 1057, 1063 (8th Cir. 2013). The Eighth Circuit directs courts to consider the following factors in evaluating if it should approve a class action settlement:

> (1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.

In re Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005). A district court has broad discretion in assessing the weight and applicability of these factors. *Prof. Firefighters Ass'n of Omaha Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). Further, FED. R. CIV. P. 23(e)(2) specifies consideration of the following factors:

> (A) the class representatives and 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)[3]; and (D) the proposal treats class members equitably relative to each other.

As set forth below, the Settlement is fair, reasonable and adequate and should be granted final approval.

B. The Settlement is Fair, Reasonable, and Adequate

1. The Merits of the Case Weigh In Favor of the Terms of the Settlement

The merits of Plaintiffs' case are the most important consideration in deciding whether a settlement is fair, reasonable, and adequate. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999). The first step in determining if a settlement is fair is analyzing the strength of the plaintiff's case to establish the value of class members' claims. "This is not a simple mathematical exercise with definite outcomes; a 'high degree of precision cannot be expected in valuing a litigation.'" *Hashw*, 182 F.3d at 943 (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Courts perform a "ballpark valuation." *Synfuel Techs.*, 463 F.3d at 463.

Here, Class Counsel determined potential damages to the Plan of between $10 - $15 million for Plaintiffs' core claims that (1) Defendants failed to utilize or move more quickly to lower cost identical mutual funds or materially identical collective trusts ("CITs") or separately managed accounts ("SMAs"), and (2) the Plan had unreasonably high recordkeeping fees that averaged

[3] Rule 23(e)(3) requires "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3). Class Counsel have agreed among themselves on how they will share any fee award that is granted by the Court at the discretion of the Court. As set forth in the Fee Memorandum filed contemporaneously herewith, under the terms of that agreement, assuming the Court approves the requested one-third contingency fee, $364,500 of those fees will be paid to Foulston Siefkin (along with the expenses of Foulston Siefkin) and the remainder of the fees will be paid to Capozzi Adler and Welder Blunt Welder & Associates, LLC.

nearly $50 per participant annually (when, Plaintiffs allege, a reasonable amount was no more than $35 per participant). Gyandoh Decl. at ¶ 30. Accordingly, the Settlement Amount of $4,050,000.00 is approximately 27% to 40.5% of the Settlement Class's maximum potential damages. This percentage, in and of itself, is reasonable and warrants final approval. *See, e.g.*, *Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) (finding that a 27% recovery of maximum possible full verdict at trial to be reasonable). Moreover, as noted above, Class Counsel negotiated prospective relief that inures to the benefit of the Settlement Class.

In considering the Settlement's fairness, a court must consider the challenges that plaintiffs would face in prevailing on their claims. *See, e.g.*, *Ramsey v. Sprint Comm. Co., L.P.*, 2012 WL 6018154, at *3 (D. Neb. Dec. 3, 2012). In doing so, a court "does not try the case," but instead identifies the disputed factual and legal issues that make it less likely for the plaintiffs to receive a full recovery. *Id*. (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)).

Here, Plaintiffs faced significant hurdles to recovering their maximum damages, no matter what the figure. As an initial matter, their maximum damages figure is contingent on the Court certifying a class. Defendants would be expected to oppose class certification on a number of grounds, including that several of the Plaintiffs signed arbitration agreements potentially making them inadequate class representatives. Plaintiffs would also face other challenges in proving their claims.

Breach of fiduciary duty claims under ERISA depend on the process by which decisions were made rather than the results of those decisions. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). The Plan's investment decisions were made by the Committee. Defendants maintain that the process by which the Committee approved the Plan's investment selection meets or exceeds the requirements of ERISA. Further, Defendants maintain that

discovery would have shown that recordkeeping fees were appropriate. While Plaintiffs disagree with Defendants' positions, these disputed issues support the Settlement's approval. *See, e.g.*, *Cooper v. Integrity Home Care, Inc.*, 2018 WL 3468372, at *2 (W.D. Mo. July 18, 2018) ("A settlement is bona fide if it reflects a reasonable compromise over issues actually in dispute."). Further, proving damages would not be a given. As set forth above, the $10-$15 million damages amount was a "best case" scenario and Defendants would try to minimize -- if not eliminate -- these alleged damages at the summary judgment stage or at trial.

The proposed Settlement is an immediate guaranteed result for the Class and warrants approval. Indeed, plaintiffs in two recent analogous breach of fiduciary actions, including one in this District Court, have survived a motion to dismiss only to lose at trial. *See Wildman, et al.*, *v. Am. Century Servs.*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. NYU*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).[4]

2. Defendants' Financial Condition

While Cerner could withstand a judgment in an amount larger than the Settlement amount, the risks and expenses attendant to continuing this litigation, combined with the immediacy of the benefit to Settlement Class members, easily support a prompt resolution to this matter. This factor supports the Court's final approval of the Settlement. *See, e.g.*, *Cooper*, 2018 WL 3468372, at *4.

3. Complexity and Expense of Further Litigation

"The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement should be approved." *In re Charter Commc'ns*, 2005 WL 4045741, at *8 (E.D. Mo. June 30, 2005). Without settlement, the Action

[4] The Settlement is also being reviewed by an Independent Fiduciary to determine among other things, the fairness of the Settlement. The report is due to be completed on June 22nd. Plaintiffs will submit the report prior to the Final Fairness hearing.

would proceed with additional motions relating to class certification and then into merits discovery, and summary judgment, as well as a trial and a possible appeal. Each stage will take time and, importantly, present additional risks the Plaintiffs and Settlement Class members will receive less than the $4,050,000.00 that they are now being offered.

The Settlement provides money to the Settlement Class ***now***, instead of years in the future ***if*** the Plaintiffs prevail on their claims. Courts have repeatedly recognized that ERISA 401(k) cases "often lead [] to lengthy litigation." *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). It is not unusual for ERISA "fee" cases to last for a decade or longer.[5] Plaintiffs would also incur considerable expenses if this case continued. To prove their claims, Plaintiffs would need to depose several Committee members and Fidelity Management Trust Company ("FMTC") employees. These depositions, including the costs of transcripts and travel, would be expensive and reduce the net amount of the Class's recovery. *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (granting final approval, noting that "early settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways."). Thus, the immediate and guaranteed benefit to the Settlement Class here outweighs the uncertainty and costs of continued litigation.

[5] *See, e.g.*, *Tussey v. ABB, Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings on amount of damages more than 10 years after the suit was filed); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed in 2007); *See also Cullan and Cullan LLC v. M-Qube, Inc.*, 2016 WL 5394684, *7 (D. Neb. Sept. 27, 2016) (approving settlement because it provided "a real and substantial remedy without the risk and delay inherent in prosecuting this matter through trial and appeal…").

4. The Reaction of the Class to the Settlement

To date, no objections have been received to the Settlement. The objection deadline is July 1, 2021 and Class Counsel will address any objections prior to the Fairness Hearing in accordance with the schedule set forth in the Preliminary Approval Order.

C. The Requirements of FED. R. CIV. P. 23(e)(2) Is Satisfied

The Rule 23(e)(2) factors which the Court must address are (1) whether the class representatives and class counsel have adequately represented the class; (2) whether the proposal was negotiated at arm's length; (3) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (4) the terms of any proposed award of attorney's fees, including timing of payment; and (5) whether the proposal treats class members equitably relative to each other.

1. Adequacy of Representation

First, with respect to the Plaintiffs' adequacy of representation, their claims and interests are aligned with those of the Settlement Class, as they are seeking to prove Defendants' liability based on common facts and claims and to maximize monetary recovery to the Plan and protect the Plan from excessive fees in the future. The interests of the Plaintiffs are not antagonistic to any Settlement Class member. Since the damages and remedies for ERISA fiduciary breach claims all go to the Plan as a whole, to then be credited later to the accounts of individual participants, the Named Plaintiffs have the same interest as any participant of the Plan – specifically, recovering their share of the Plan's losses.

Second, with respect to Plaintiffs' Counsel's adequacy of representation, Rule 23(g) directs consideration of: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the

types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class." FED. R. CIV. P. 23(g)(1)(A)(i)-(iv). Proposed Class Counsel Capozzi Adler, P.C. and Foulston Siefkin LLP, have done substantial work, have experience litigating ERISA class actions and complex matters, and have committed ample resources to prosecute this matter. *See* Gyandoh Decl., ¶¶3-21, 23-30; Nehrbass Decl., ¶¶ 7-20. Accordingly, they are well-qualified to weigh the risks and benefits of continued litigation as compared to the relief provided by the Settlement. Thus, Plaintiffs retained highly qualified and experienced attorneys in satisfaction of Rules 23(a)(4) and 23(g).

2. Arm's Length Negotiations

The proposed Settlement here is the result of lengthy and complex arms-length negotiations between the Parties under the auspices of Hunter R. Hughes, III, a neutral, third-party private mediator with extensive experience mediating ERISA class actions.

A class action settlement is a private contract negotiated between the parties that is "presumptively valid." *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig*., 716 F.3d 1057, 1063 (8th Cir. 2013) (internal quotations omitted). Courts look for "glaring substantive or procedural deficiencies" and consider whether the "settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys." *Adams*, 2016 WL 7664135, * 3 (citation omitted).

The Settlement does not contain any deficiencies, glaring or otherwise. Class Counsel was fully aware of this case's strengths and weaknesses when negotiating the Settlement, which supports the Settlement's final approval. *See, e.g.*, *King v. Ranieri Constr., LLC et al.*, 2015 WL 631253, at *3 (E.D. Mo. Feb. 12, 2015) (approving settlement when the "parties engaged in

settlement negotiations and exchanged a large amount of documents and information for a month before submitting the proposed settlement."). Prior to engaging in settlement discussions, the Parties exchanged initial disclosures and engaged in targeted discovery in which Defendants produced nearly four thousand pages of documents to Plaintiffs' counsel. Gyandoh Decl. at ¶¶ 24-27. Class Counsel also has in-depth knowledge of the legal framework applicable to this case. Class Counsel have extensive experience prosecuting, settling, and trying ERISA cases (and other complex matters) on behalf of retirement plan participants and extensive and recent experience litigating matters such as this one in the Kansas City area federal courts, which they used to evaluate and negotiate the Settlement. Gyandoh Decl. at ¶¶ 3-9; Nehrbass Decl. ¶¶ 5-9, 20-26; *see, e.g., Schapker v. Waddell & Reed Fin., Inc*., 2018 U.S. Dist. LEXIS 28458, 2018 WL 1033277 (D. Kan. Feb. 22, 2018). Class Counsel used that knowledge and experience to not only negotiate for monetary relief, but also prospective non-monetary relief (including Cerner issuing a request for proposal for recordkeeping services for the Plan and precluding Cerner employees employed within the Company's Investment Relations function from serving on the Committee) that will benefit the Plan moving forward. *See* Settlement Agreement, Art. VI.

Because the Settlement was negotiated by experienced counsel, there is a presumption it was "the product of arm's length negotiations." *Netzel*, 2017 WL 1906955, at *6; *see also Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) ("If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable.").

3. <u>Effectiveness of Plan of Distribution</u>

"A court must also look beyond the settlement documents and review the plan of allocation to assure it is 'fair and reasonable.'" *Zilhaver v. UnitedHealth Group, Inc.,* 645 F.Supp.2d 1075,

1080 (D. Minn. 2009) (citation omitted). The proposed Plan of Allocation here, detailed in Article V of the Settlement Agreement, is premised on calculating a Settlement Class member's distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. Settlement Agreement at § 5.1. Any Class Member with an available payment of less than $2.00 shall receive a payment of zero ($0.00) dollars. *Id.*

Further, current participants will receive their share of the Settlement Fund through an electronic distribution to their Plan account. *Id*. at § 5.2. Former participants will have the opportunity to elect a tax-qualified rollover of his or her Entitlement Amount to an individual retirement account or other eligible employment plan, which he or she has identified on the Former Participant Rollover Form, provided that the Former Participant supplies adequate information to the Settlement Administrator to effect the rollover. *Id*. at § 5.3. Former Participants who do not select a rollover will be issued a check from the Qualified Settlement Fund in the amount of the Former Participant's Entitlement Amount. *Id*. Beneficiaries and Alternate Payees will similarly receive a check in the amount of the Former Participant's Entitlement Amount. *Id*. at § 5.4.

The plan of allocation described in the Settlement has been utilized in other analogous ERISA matters and is highly effective. *See, e.g., McDonald v. Edward Jones*, 791 Fed. Appx. 638, 640 (8th Cir. 2020) (affirming judgment that granted final approval to settlement in ERISA action with analogous plan of allocation); *Beach et al. v. JPMorgan Chase Bank, N.A. et al.*, No. 1:17-cv-00563-JMF, ECF NO. 221 (S.D.N.Y. Aug. 21, 2020) (Order granting final approval of similar plan of allocation in analogous ERISA matter). Where the Settlement Fund "proceeds will be distributed among class members in proportion to their calculated losses," courts have found this distribution plan to be "fair and reasonable." *Zilhaver,* 645 F.Supp.2d at 1080.

4. Terms of Proposed Attorneys' Fees

The Settlement does not excessively compensate Class Counsel. The Settlement is not contingent on Class Counsel receiving a specific amount of fees and any fees they receive will be determined by the Court. Settlement at §§ 7.1 and 7.3. *Adams*, 2016 WL 7664135, at *6 (granting preliminary approval when "class counsel's compensation is not set by the settlement but will be determined by petition to the Court."). The amount of fees Class Counsel is requesting, a third of the monetary portion of the Settlement, is reasonable and consistent with the awards in other ERISA cases.[6] As noted above, the Settlement also includes prospective non-monetary relief that will substantially benefit the Plan moving forward. *See* Settlement Agreement, Art. VI.

5. Equitable Treatment of Class Members

The Settlement does not unduly favor the Plaintiffs. Plaintiffs' shares of the Settlement will be based on the losses to their Plan account. While Plaintiffs are requesting Case Contribution Awards, the Settlement is not contingent on Plaintiffs receiving an award in a specified amount, and the amount Plaintiffs intend to request is in line with the awards in other cases.[7] Further, the Plan of Allocation agreed to by the Parties clearly treats class members equitably relative to each other because each member is entitled to their pro rata share of losses and any Class Member with at least $2.00 in losses will be entitled to a recovery.

Given the above, Rule 23(e)(2) is satisfied.

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[6] The support for Class Counsel's fee request is set forth in their Motion and Memorandum in Support of an Award of Attorneys' fees, Reimbursement of Expenses, and Case Contribution Awards to the Named Plaintiffs, which is being filed contemporaneously.

[7] *See generally* Fee Petition.

V. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

Before entering the Preliminary Approval Order, this Court examined the record and conditionally certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1). *See* Preliminary Approval Order at ¶¶ 1-3. Nothing has changed in the record that would compel the Court to now reach a different conclusion with respect to the final approval of the Settlement Class. Indeed, courts across the country have determined that breach of fiduciary duty claims under ERISA analogous to those at issue in this action are uniquely appropriate for class treatment.[8] Accordingly, Plaintiffs request that the Court make the same findings it made previously and certify the following Class for settlement purposes only:

> All persons who were participants in or beneficiaries of the Plan at any time from January 21, 2014 through March 5, 2021, inclusive. Excluded from the Class are Defendants (and their Beneficiaries) and any individuals who were members of the Compensation Committee or the Retirement Plan Committee from January 21, 2014 through the date of the Settlement Agreement, inclusive (and their Beneficiaries).

Moreover, the Supreme Court has acknowledged the propriety of certifying a class solely for settlement purposes. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997).

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[8] *See, e.g., Henderson, et al. v. Emory Univ*., et al., No. 1:16-cv-02920 (N.D. Ga. Sept. 13, 2018) (certifying class under 23(b)(1)(A) and (B)); *Fuller et al. v. SunTrust Banks, Inc. et al.*, 2018 U.S. Dist. LEXIS 113108 (N.D. Ga. June 27, 2018) (same); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. April 13, 2018) (same); *Sacerdote v. New York Univ.,* 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018) (same); *Troudt v. Oracle Corp., et al.*, 325 F.R.D. 373 (D. Colo. 2018) (certifying class and subclasses pursuant to Rule 23(b)(1)(A)); *Wildman v. Am. Century Servs., LLC,* 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017) (certifying class and subclasses pursuant to Rule 23(b)(1)); *Marshall, et al. v. Northrop Grumman Corp.*, 2017 WL 6888281 (C.D. Cal. Nov. 2, 2017) (certifying class and subclasses pursuant to Rules 23(a) and 23(b)(1)); *Sims v. BB & T Corp*., 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017) (certifying class and subclasses pursuant to Rules 23(a) and Rule 23(b)(1)(A)); *Cryer v. Franklin Templeton Res., Inc.*, 2017 WL 4023149 (N.D. Cal. July 26, 2017) (certifying class and subclasses pursuant to Rule 23(b)(1)); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678 (C.D. Cal. June 15, 2017) (certifying class and subclass pursuant to Rule 23(b)(1)); *Rozo v. Principal Life Ins. Co*., 2017 WL 2292834 (S.D. Iowa May 12, 2017) (certifying class and subclasses pursuant to Rules 23(a) and Rule 23(b)(1)(A)).

VI. CONCLUSION

For the reasons set forth above, and accompanying declarations, the Settlement meets the standard for final approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) approving the Class Action Settlement Agreement under FED. R. CIV. P. 23(e); (2) certifying the above-defined Settlement Class; (3) appointing Named Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding the manner in which the Settlement Class was notified of the Settlement was the best manner practicable under the circumstances and fair and adequate; and (5) approving the Plan of Allocation set forth in the Settlement Agreement.

DATED: June 18, 2021

Respectfully submitted,

CAPOZZI ADLER, P.C.

/s/ Mark K. Gyandoh

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Proposed Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021 a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: */s/ Mark K. Gyandoh*_____
Mark K. Gyandoh