UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN DUDENHOEFFER, ALIREZA PARTOVIPANAH, *et al.*,

Plaintiffs,

vs.

FIFTH THIRD BANCORP, *et al.*,

Defendants.

Civil Action No.: 08-cv-538

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF CLASS NOTICE, APPROVAL OF PLAN OF ALLOCATION, AND SCHEDULING OF A FINAL APPROVAL HEARING

S.D. OHIO RULE 7.2(a)(3) TABLE OF CONTENTS AND SUMMARY

The Parties have reached a proposed Settlement of this Action, which asserts claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), for $6,000,000.00 cash and substantive Non-Monetary Relief, namely structural changes to the Plan.

Plaintiff John Dudenhoeffer, a former employee of Fifth Third and participant in the Plan, filed his initial class action complaint on August 12, 2008 pursuant to §§ 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, against Fifth Third and certain other named and de facto fiduciaries of the Plan, who allegedly are and were responsible for the investment of the Plan's assets. Thereafter, a similar case was filed by Alireza Partovipanah in this Court on September 11, 2008. On September 21, 2009, Plaintiffs filed an amended Consolidated Class Action Complaint (Dkt. No. 54), the operative complaint in this Action.

On October 5, 2009, Defendants filed a motion to dismiss the Complaint with prejudice pursuant to FED. R. CIV. P. 12(b)(6) (Dkt. No 56). Plaintiffs filed an opposition to Defendants' motion to dismiss on November 5, 2009 (Dkt. No. 59) fully addressing each of Defendants' points. Thereafter, Defendants filed a reply in support of their motion to dismiss on December 7, 2009 (Dkt. No. 60). On November 24, 2010, the Court issued its Order granting Defendants' motion to dismiss with prejudice and denied Plaintiffs' request to amend the Complaint (Dkt. No. 81).

Following an unsuccessful telephonic mediation conference on February 2, 2011 before the Office of the Circuit Mediators for the Sixth Circuit, the Parties briefed the Action to the Sixth Circuit Court of Appeals. The Sixth Circuit held oral argument on June 7, 2012. On September 5, 2012, the Sixth Circuit issued a decision reversing and remanding the District Court's opinion.

On December 20, 2012, Defendants filed a petition for a writ of certiorari to the Supreme Court regarding the Sixth Circuit's September 5, 2012 decision. However, the Parties continued to litigate this Action while Defendants' petition for writ of certiorari was pending.

As noted above, on December 14, 2012, Defendants petitioned for a writ of certiorari to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision.

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Plaintiffs John Dudenhoeffer and Alireza Partovipanah ("Named Plaintiffs" or "Plaintiffs"), participants in the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"),[1] respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Approval of the proposed Settlement[2] ("Motion for Preliminary Approval") with Defendants.[3] Plaintiffs seek an Order (1) granting preliminary approval of the Settlement, (2) preliminarily certifying the below-defined Settlement Class pursuant to FED. R. CIV. P. 23, (3) approving the manner of giving notice of the Settlement to the proposed Settlement Class ("Notice Plan"), and (4) approving the proposed Plan of Allocation, and (5) setting a date for a Final Approval Hearing.[4]

I. INTRODUCTION

The Parties have reached a proposed Settlement of this Action, which asserts claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), for $6,000,000.00 cash and substantive Non-Monetary Relief, namely structural changes to the Plan. This Settlement, which represents a hard-fought and excellent result for the Settlement Class, provides substantial benefits to members of the Settlement Class and resolves all claims asserted by Plaintiffs in this Action.

This case has been litigated all the way to the United States Supreme Court and back again to the Court of Appeals for the Sixth Circuit, and along the way made new law under ERISA.

[1] Now known as the Fifth Third Bancorp 401(k) Savings Plan.

[2] The Stipulation of Settlement (the "Settlement Agreement"), attached hereto as Exhibit A, has several exhibits, including the proposed forms of notice of Settlement and proposed forms of the Preliminary and Final Approval Orders. The provisions of the Settlement Agreement, including all definitions and defined terms, are incorporated by reference herein. Thus, all capitalized terms not otherwise defined in this memorandum shall have the same meaning as ascribed to them in the Settlement Agreement.

[3] Defendants shall mean the following persons and/or entities: Fifth Third Bancorp, Kevin T. Kabat, and the members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee, including Paul L. Reynolds, Nancy Phillips, Greg Carmichael, Robert Sullivan, Mary Tuuk, and other John Doe Defendants.

Specifically, the Supreme Court's decision in *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) rejected the *Moench*[5]*/Kuper*[6] "presumption of prudence" that had existed for close to twenty years, *id. at* 2467, and established new "considerations" for courts to analyze in "company stock" cases. *Id.* at 2472-73. The Supreme Court vacated the opinion of the Sixth Circuit and remanded for further proceedings. In doing so, the Supreme Court left "it to the courts below to apply," *id.* at 2473, the new considerations "through context-sensitive scrutiny of a complaint's allegations." *Id.* at 2470. While the Action was pending before the Sixth Circuit, the Parties reached this Settlement under the auspices of the Office of the Circuit Mediators for the Sixth Circuit with Robert Kaiser, one of the mediators, presiding over the negotiations. It took multiple telephonic settlement sessions and one in-person session, to finally resolve this matter. The involvement of a neutral, accordingly, demonstrates the absence of fraud or collusion in the proposed Settlement.

Given the long history of this case and uncertainty of the outcome of the litigation in light of the Supreme Court's pronouncements in *Fifth Third*, this case epitomizes the risk of ERISA litigation and underscores how this Settlement is an excellent result for the Settlement Class. Based on an evaluation of the facts, governing law and the recognition of the substantial risks of continued litigation, Plaintiffs and Class Counsel submit that the proposed Settlement is fair, reasonable and adequate, and in the best interests of the proposed Settlement Class by providing a meaningful recovery now. Continued litigation of this Action could result in a judgment or verdict lesser than the recovery under the Settlement Agreement, or in no recovery at all.

The proposed Settlement is also particularly impressive for two other reasons. First, when it is

[5] *Moench v. Robertson*, 62 F.3d 553, 571 (1995).

[6] *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995)

compared to the result obtained to date in the companion securities litigation which arose out of facts similar to this case. In that action, involving many more millions of shares of Company stock than were held in the Plan, the plaintiffs obtained a settlement recovery of $16 million. *See The Eshe Fund v. Fifth Third Bancorp*, No. 1:08-cv-421 (S.D. Ohio), Dkt. No. 212. Second, here, there was no insurance to cover the settlement. It is Plaintiffs' understanding that Defendants had fiduciary liability insurance to cover the Class Period, but the insurance policy specifically excluded claims for breach of fiduciary duty related to Company Stock.

Further, Plaintiffs submit that certification of a non-opt-out Settlement Class pursuant to FED. R. CIV. P. 23 is clearly appropriate. As an integral part of the Settlement Agreement, the Parties seek preliminary class certification of all participants or beneficiaries in the Plan for whose individual accounts the Plan purchased and/or held interests in the Fifth Third Stock Fund at any time during the period July 19, 2007 to January 15, 2016, inclusive (the "Settlement Class Period").

Plaintiffs also believe the proposed Notice Plan should be approved. The proposed Notice Plan exceeds the requirements of due process. The Notice will be sent by direct mail to the last known address of the Settlement Class Members, all of whom are current or former employees of Fifth Third or of entities acquired by Fifth Third during the Class Period. The Notice will also be published in the *Cincinnati Enquirer* and PR Newswire, as well as posted to a dedicated Internet Settlement website described herein. These forms of notice are consistent with the forms of notice approved in directly analogous actions. Such notice will inform Settlement Class Members of the terms of the Settlement, how to object to the Settlement, and the date of the Final Approval Hearing.

As set forth below in detail, all prerequisites for preliminary approval of the Settlement have been met. In short, the proposed Settlement should be preliminarily approved allowing

Plaintiffs to begin notifying the Settlement Class.[7]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Investigation of Claims and Filing of Operative Complaint

Plaintiff John Dudenhoeffer, a former employee of Fifth Third and participant in the Plan, filed his initial class action complaint on August 12, 2008 pursuant to §§ 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, against Fifth Third and certain other named and *de facto* fiduciaries of the Plan, who allegedly are and were responsible for the investment of the Plan's assets. Thereafter, a similar case was filed by Alireza Partovipanah in this Court on September 11, 2008.

By Order dated October 9, 2008, the Court consolidated the two ERISA cases. Dkt. No. 20. Thereafter there was motion practice over whether this case should be consolidated with the *Eshe* securities case and eventually on March 16, 2009 it was for discovery purposes only. Dkt. No. 36. On May 15, 2009, Plaintiffs filed a Consolidated Class Action Complaint for Violations of ERISA that alleged, *inter alia*, that Defendants and other Plan fiduciaries violated their statutory duties of prudence, care, and loyalty under Section 404(a) of ERISA, 29 U.S.C. § 1104(a), through their management, oversight and administration of the Plan's investment in Fifth Third Stock during the Class Period. Plaintiffs asserted causes of action for the losses suffered by the Plan as the result of the alleged breaches of fiduciary duty by Defendants. Dkt. Nos. 41 to 41-7. The Outside

[7] The Preliminary Approval Order proposed by all Parties to the Settlement Agreement is attached to the Settlement Agreement as Exhibit 1, and the proposed Final Approval Order and Judgment is attached to the Settlement Agreement as Exhibit 2.

Director Defendants[8] filed a motion to dismiss on July 29, 2009. Dkt. Nos. 50 to 50-2. The Fifth Third Defendants[9] also filed their own motion to dismiss on July 29, 2009. Dkt. Nos. 52 to 52-15.

The Outside Director Defendants argued in their motion to dismiss that they were not ERISA fiduciaries for the Plan for purposes of the claims asserted in the lawsuit. In order to avoid lengthy and costly litigation on the question of ERISA fiduciary status of the Outside Director Defendants, Plaintiffs agreed to dismiss the claims against the Outside Director Defendants without prejudice in exchange for entering into an agreement with the Outside Director Defendants that tolled the running of any statute of limitations against the Outside Director Defendants. Thus, the Parties were able to preserve their respective rights and defenses pending further discovery that would likely shed light on whether or not the Outside Directors were fiduciaries of the Plan. The tolling agreement went into effect on September 21, 2009 and was first set to expire on September 21, 2011. The expiration date was extended several times per agreement of the Parties in accordance with the tolling agreement and now expires on September 21, 2016. Dkt. No. 122. Following the agreement to dismiss the Outside Director Defendants, on September 21, 2009, Plaintiffs filed an amended Consolidated Class Action Complaint (Dkt. No. 54) (the "Complaint") which did not name the Outside Directors as defendants, but otherwise pled similar allegations as the prior consolidated complaint. As discussed below, the Fifth Third Defendants re-filed their motion to dismiss the Complaint.

Before filing the initial complaints in this matter, Class Counsel consulted with a forensic accounting expert, reviewed pertinent cases, researched legal claims and reviewed voluminous public records, government filings, and financial information regarding the Company. The same

[8] The Outside Directors are Darryl F. Allen, John F. Barrett, Ulysses L. Bridgeman, Allen M. Hill, James P. Hackett, Gary R. Heminger, Robert L. Koch, Mitchel D. Livingston, Ph.D., Hendrick G. Meijer, James E. Rogers, John J. Schiff, Jr., Dudley S. Taft, and Thomas W. Traylor.

scope of research was performed in filing Plaintiffs' 81 page, 287 paragraph Complaint. It is clear that Class Counsel conducted a thorough investigation into Plaintiffs' claims and allegations set forth in the Complaint. These efforts included, but were not limited to: (i) review of documents produced by Defendants, including Plan-related documents in response to Plaintiffs' request for such documents pursuant to ERISA § 104(b); (ii) review of publicly-available materials relating to the Company and the Plan; (iii) analysis of specific corporate transactions; and (iv) interviews of Plan participants.

The Complaint in this matter alleges four counts. Count I alleges that the Company, Defendant Kabat, Fifth Third's Chief Executive Officer ("CEO") and President during the Class Period, and members of Fifth Third's Pension, Profit Sharing and Medical Plan Committee ("Plan Committee"), each of whom acted as a fiduciary with respect to the Plan, breached their fiduciary duties under ERISA by failing to prudently and 1oyally manage the Plan's investment in Fifth Third stock. Count I primarily concerns the offering of imprudent Fifth Third Stock as one of the investment choices offered under the Plan. Count II alleges that the Company and Defendant Kabat -- who were responsible for the selection, appointment and monitoring of Plan Committee members -- breached their fiduciary duties by failing to properly monitor the performance of their fiduciary appointees. Count III alleges that all Defendants failed to avoid or ameliorate inherent conflicts of interest. Count IV alleges that all Defendants are liable for the breaches of their co-fiduciaries.

The gravamen of Plaintiffs' claims is that Defendants breached their fiduciary duties under ERISA by continuing to invest Plan assets in Fifth Third Stock, and maintaining the Plan's significant investments in Fifth Third Stock during the Class Period when it was imprudent to do

[9] The Fifth Third Defendants are the Defendants identified in n. 3 *supra.*

so. In particular, in July 2007 and thereafter, Defendants failed to take any action to protect the Plan's assets from suffering the adverse effects resulting from Fifth Third's radical shift away from its historically conservative lending practices which impaired its loan portfolio.

B. Motion To Dismiss Briefing

This complex litigation was hotly contested by Defendants from the outset. On October 5, 2009, Defendants filed a motion to dismiss the Complaint with prejudice pursuant to FED. R. CIV. P. 12(b)(6) (Dkt. No. 56). Defendants asserted, *inter alia*, that the Complaint should be dismissed because: (1) Plaintiffs failed to state a claim that Defendants breached their duty to prudently and loyally manage the Plan's investment in Company stock; (2) Plaintiffs failed to state a claim that Defendants had breached their fiduciary duties by not providing complete and accurate information to the Plan participants; (3) Plaintiffs failed to state a claim that Defendants had a conflict of interest; and (4) Plaintiffs' duty to monitor and co-fiduciary liability claims failed as a matter of law. Plaintiffs filed an opposition to Defendants' motion to dismiss on November 5, 2009 (Dkt. No. 59) fully addressing each of Defendants' points. Thereafter, Defendants filed a reply in support of their motion to dismiss on December 7, 2009 (Dkt. No. 60). The consolidated matter was transferred to the docket of Magistrate Judge J. Gregory Wehrman on May 24, 2010 (Dkt. No. 70).

After briefing on Defendants' motion to dismiss was complete, the Parties continued to submit notices of supplemental authority to the Court advising it of recently decided decisions that were relevant to Defendants' motion to dismiss. *See* Dkt. Nos. 61-72, 75-76, 80. On November 24, 2010, the Court issued its Order granting Defendants' motion to dismiss with prejudice and denied Plaintiffs' request to amend the Complaint (Dkt. No. 81). This Court's decision granting Defendants' motion to dismiss was based on application of the now-abrogated *Moench/Kuper* "presumption of prudence." Judgment was entered on November 24, 2010 (Dkt. No. 82), and

Plaintiffs timely filed their Notice of Appeal to the Sixth Circuit Court of Appeals on December 22, 2010 (Dkt. No. 83).

C. Proceedings in the Sixth Circuit

The Parties attended a telephonic mediation conference on February 2, 2011 before the Office of the Circuit Mediators for the Sixth Circuit, but it was to no avail. The Parties were simply too far apart in their positions. On July 7, 2011, Plaintiffs filed their opening brief. On September 21, 2011, Defendants filed their opposition brief. Then, on October 11, 2011, Plaintiffs filed their reply brief. While the matter was pending before the Sixth Circuit the Parties continued to submit applicable supplemental authority. The Sixth Circuit held oral argument on June 7, 2012. On September 5, 2012, the Sixth Circuit issued a decision reversing and remanding this Court's opinion. *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012). Specifically, the Sixth Circuit held as follows:

> We hold that Count I of the Amended Complaint — including the allegations that Defendants breached their fiduciary duties (1) by continuing to offer Fifth Third Stock as a Plan investment option and failing to divest the Plan of the Stock and (2) by providing false and misleading information and failing to provide complete and accurate information about the Stock to Plan participants — states a claim upon which relief may be granted. The allegations of Count I easily satisfy the requirements that there be a plausible allegation that a fiduciary breached its duty to the plan and a causal connection between that breach and the harm suffered by the plan.

Id. at 423. Further, because the Sixth Circuit found that Plaintiffs' remaining claims in Counts II through IV depended upon the fiduciary breach allegations of Count I that were plausibly alleged, the Sixth Circuit returned those counts to this Court for further consideration in accordance with the opinion. *Id.* at 424. On September 19, 2012, however, Defendants petitioned the Sixth Circuit for a rehearing and rehearing *en banc*, which was denied October 12, 2012. A mandate issued on October 23, 2012. Thereafter, on December 14, 2012, Defendants

petitioned for a writ of certiorari to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision.

D. District Court Proceedings Post-Sixth Circuit Remand

The Parties continued to litigate this Action while Defendants' petition for writ of certiorari was pending. On October 31, 2012 Defendants filed an Answer to the Complaint. Dkt. No. 94. Plaintiffs filed a motion to strike certain of the affirmative defenses pled in the Answer on November 21, 2012. Dkt. Nos. 95, 96. After obtaining a brief extension, Defendants filed their response on January 7, 2013. Dkt. No. 104. Plaintiffs filed their reply on January 22, 2013. Dkt. No. 107. Plaintiffs served discovery requests and interrogatories on Defendants on March 19, 2013. Defendants responded by filing a motion for protective order on April 18, 2013 and seeking a stay of the Action pending resolution of Defendants' petition for writ of certiorari. Dkt. No. 115. On April 23, 2013, this Court held a status conference regarding whether to stay this Action in light of the pending writ of certiorari. At the conclusion of the status conference, this Court stayed the Action for thirty (30) days and set a status conference for June 4, 2013 to determine whether the stay would continue or be dissolved. Dkt. No. 116.

Following the June 4th status conference, this Court lifted the stay for the limited purpose of allowing Defendants to produce to Plaintiffs the hard drive/archive of documents produced in the *Eshe* companion securities action in lieu of responding to Plaintiffs' discovery requests. Dkt. No. 119. Fifth Third had produced almost 2,000,000 pages of documents in the securities action. Per the Court's order, Fifth Third then produced these documents to Plaintiffs.

E. Proceedings Before the Supreme Court

As noted above, on December 14, 2012, Defendants petitioned for a writ of certiorari to the Supreme Court of the United States regarding the Sixth Circuit's September 5, 2012 decision.

Plaintiffs filed an opposition to the petition for certiorari on February 22, 2013. The petition was granted by the Supreme Court on December 16, 2013. *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, 134 S. Ct. 822 (2013).

Defending Plaintiffs' case in front of the Supreme Court was a formidable challenge. Defendants filed their opening brief on the merits on January 27, 2014 which was followed by the filing of several amicus curiae brief in support of Defendants' position. Plaintiffs consulted with experts in preparing their response to Defendants' opening brief which also addressed points raised in several of the amicus curiae briefs that had been filed on behalf of Defendants. Plaintiffs filed their opposition brief on February 26, 2014. Plaintiffs also secured the assistance of the Department of Labor which, through the Solicitor General on the United States, submitted an amicus curiae brief generally supporting Plaintiffs' position. In addition, Plaintiffs secured the support of a group of prominent law professors, the AFl-CIO and AARP, which each submitted their own amicus curiae briefs raising different points in favor of Plaintiffs' cause. The Supreme Court held oral argument on April 2, 2014. On June 25, 2014, the Supreme Court issued a unanimous opinion vacating and remanding the Sixth Circuit's decision. *Fifth Third Bancorp et al. v. Dudenhoeffer et al.*, 134 S. Ct. 2459 (2014).

Importantly, Plaintiffs achieved a key victory: the Supreme Court held that defendant-fiduciaries in ERISA breach of fiduciary duty actions such as the instant matter are not entitled to a "presumption of prudence" but rather that "ESOP[10] fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are." 134 S. Ct. at 2467. *See also id.* at 2468 (rejecting claim that "the content of ERISA's duty of prudence varies" depending on the type of ERISA plan); *id.* at 2471 ("the law does not create a special presumption of prudence for ESOP

[10] Employee Stock Ownership Plan.

fiduciaries"). The Supreme Court's rejection of the fiduciary-friendly "presumption of prudence" abrogated twenty (20) years of ERISA jurisprudence. *See Dudenhoeffer v. Fifth Third Bancorp*, 757 F. Supp. 2d 753, 759-63 (S.D. Ohio 2010). Some would argue this victory is not complete as the Supreme Court erected new hurdles for plaintiffs to overcome in cases such as this, as discussed further below in *infra* Section III.B.1(a).

F. Mediation

Once remanded to the Sixth Circuit, the Parties agreed to again engage in mediation under the auspices of the Sixth Circuit Mediation Office with one of the office's mediators, Robert Kaiser, presiding over the negotiations. The mediation before Mr. Kaiser was vigorously contested, extensive, repeated, and involved exchange of information and data. The Parties each drafted mediation briefs setting forth their position on the law, facts, and settlement possibilities. An in-person mediation session was held before Mr. Kaiser on February 3, 2015. At the end of the in-person session, some progress had been made towards reaching a settlement, but no settlement was reached. Thereafter, the Parties participated in multiple continued telephonic negotiations under the guidance of Mr. Kaiser until an agreement in principle was finally reached on August 6, 2015. The Parties then drafted a Memorandum of Understanding ("MOU") that set forth the cash and Non-Monetary Relief, and executed it on November 16, 2015. Thereafter, the Parties negotiated the actual Settlement Agreement and all its necessary Exhibits, and executed the same on January 15, 2016.

In short, the negotiations in this matter were arms'-length, intense, and complex with both sides strenuously arguing their respective positions.

G. The Proposed Settlement

The Settlement provides that the Defendants will pay $6,000,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation. Additionally, the Parties agreed to the Non-Monetary Relief, which are a series of structural changes to the Plan which will provide significant benefits to the Plan participants. Specifically, the Non-Monetary Relief includes:

- The freezing of the Fifth Third Stock Fund, including prohibiting new Plan Participants from investing in the Fifth Third Stock Fund;
- Continuing the current practice of matching contributions in cash, rather than in Fifth Third Stock, for a period of at least eight (8) years;
- The dissemination of an annual notice to Plan Participants who currently have more than 20% of their account(s) invested in Fifth Third regarding the benefits of asset allocation and diversification; and
- Improved fiduciary training.

See Settlement Agreement, Exhibit A, at § 7.4. Plaintiffs have retained an expert who will provide a valuation of the structural relief obtained as part of the Settlement. The expert's report will be submitted in connection with the filing of Plaintiffs' motion for final approval of the Settlement. In exchange for the benefits obtained, Plaintiffs and the Plan will dismiss all claims in the Complaint as set forth more fully in the Settlement Agreement. The Settlement Agreement also sets forth the proposed Notice Plan to Settlement Class members and provides for the payment of attorneys' fees and Plaintiffs' Case Contribution Awards, both of which are subject to Court approval.

H. Proposed Timetable

The proposed Preliminary Approval Order includes a blank date for the date of the Final Approval Hearing, which must be completed by the Court in order to properly effectuate the Settlement. In this regard, the Parties have consented to the following generalized schedule of events if the Court is inclined to preliminarily approve the Settlement:

Event	Time for Compliance
Deadline for Mailing of Class Notice to members of the Settlement Class (the "Notice Date").	45 calendar days after entry of the Preliminary Approval Order. *See* Order, ¶ 7.
Deadline for Publishing Notice in the *Cincinnati Enquirer*, PR Newswire, and on the dedicated Settlement website.	45 calendar days after entry of the Preliminary Approval Order. *See* Order, ¶ 7.
Filing of Motion for Counsel Fees, Reimbursement of Expenses, and for Case	31 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 8.
Filing of Motion in Support of Final Approval of Settlement	31 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 9.
Deadline for filing of Objections.	21 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 10.
Deadline for Appearance of Counsel regarding Objections.	21 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 10.
Deadline for Filing Intention to Appear at Final Approval Hearing regarding Objection.	21 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 10.
Deadline for Filing a Response to Any Objections	7 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 10.
Deadline for submitting additional briefs	7 calendar days prior to the date of the Final Approval Hearing. *See* Order, ¶ 10.
Final Approval Hearing Date.	On or after 100 calendar days after filing of Preliminary Approval Motion, or at the Court's convenience (but not less than 60 days after mailing of Class Notice). *See* Order, *See* Order, ¶ 6.

As reflected in the above chart, the Parties request that the Court schedule a Final Approval Hearing at least one hundred (100) days from the filing of the instant Motion for Preliminary Approval. This time period will ensure, as required by CAFA,[11] that the Final Approval Hearing takes place at least ninety (90) days from the date Defendants mail notice of the Settlement pursuant to CAFA ("CAFA Notice"). The Parties also request that the Final Approval Hearing take place at least sixty (60) days from the mailing of Class Notice to give the Settlement Class fair notice of the hearing date.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

A. The Law Favors and Encourages Settlements

There are three steps which must be taken by the court in order to approve a settlement: "(1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement." *Amos v. PPG Indus., Inc.*, No. 05-cv-70, 2015 WL 4881459, at *1 (S.D. Ohio Aug. 13, 2015) (citing FED. R. CIV. P. 23(e)). The district court "bases its preliminary approval of a proposed settlement upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement." *Mayborg v. City of St. Bernard*, No. 04-cv-00249, 2007 WL 3047235, at *3 (S.D. Ohio Oct. 18, 2007). "With such preliminary approval, the settlement is presumptively reasonable." *Id.*

"This Court recognizes that settlement of class actions is generally favored and encouraged." *Connectivity Sys. Inc. v. Nat'l City Bank*, No. 08-cv-1119, 2011 WL 292008, at *1 (S.D. Ohio Jan. 26, 2011) (citing *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981)); *In re Nationwide Fin. Servs. Litig.*, No. 08-cv-249, 2009 U.S. Dist. LEXIS 126962, at *3 (S.D. Ohio

[11] Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

Aug. 18, 2009) (finding the law generally favors and encourages the settlement of class actions); *In re Broadwing, Inc. ERISA Litig*., 252 F.R.D. 369 (S.D. Ohio 2006) (same).

In the Sixth Circuit, the district courts consider the following factors in evaluating the fairness, adequacy and reasonableness of a proposed settlement: (1) the plaintiff's likelihood of ultimate success on the merits balanced against the amount and form of relief offered in settlement; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the judgment of experienced trial counsel; (5) the nature of the negotiations; (6) the objections raised by the class members; and (7) the public interest. *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Broadwing, Inc. ERISA Litig*., 252 F.R.D. at 372; *Spine and Sports Chiropractic, Inc. v. Zirmed, Inc.*, No. 13-cv-00489, 2015 WL 1976398, at *1-*2 (W.D. Ky. May 5, 2015). "'The district court enjoys wide discretion in assessing the weight and applicability of these factors.'" *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (quoting *Granada Inv. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992)).

B. The Proposed Settlement Should be Preliminarily Approved

1. Plaintiffs' Likelihood of Ultimate Success on the Merits Balanced Against the Amount and Form of Relief Offered in Settlement

(a) Likelihood of Success

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." *Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 372 (citing *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984)). However, the Court "has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties." *Williams*, 720 F.2d at 921 (citing *Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981)). Rather, the focus is on "whether the interests of the class as a whole

are better served if the litigation is resolved by the settlement rather than pursued." *UAW v. General Motors Corp.*, No. 05-cv-73991, 2006 WL 891151, at *15 (E.D. Mich. Mar. 31, 2006) (citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citations omitted)).

While Plaintiffs believe they would ultimately be successful in this Action, they would face strong defenses. In particular, from the outset of the case, Defendants consistently denied any liability for the claims asserted. Defendants argued that any deterioration in the Fifth Third loan portfolio was an unavoidable consequence of the unprecedented global financial crisis during 2008-2009, not a result of any misconduct or errors in judgment by Fifth Third. Defendants maintain that they fulfilled all of their fiduciary duties to the Plan and its participants at all times. Defendants categorically have denied that there were any nondisclosures or omissions in their public securities filings and maintain that the credit trends at Fifth Third were fully and fairly disclosed. Defendants also have denied that Fifth Third stock ever was an imprudent investment as evidenced by the facts that large institutional investors continued to purchase when the price of the stock declined dramatically and the Fifth Third stock price recovered quickly and exceeded pre-crisis levels relatively soon after it declined.

Plaintiffs would also face some unique challenges. If the case were to continue in the Sixth Circuit or District Court, Defendants would assert that *Fifth Third* makes it difficult for Plaintiffs to prevail given the Supreme Court's pronouncement that (1) a fiduciary is not imprudent for relying on the market price of company stock as an accurate assessment of its value, and (2) that a fiduciary cannot be expected to divest company stock on the basis of insider information unless it determines that taking action will be less harmful to the retirement plan than non-action. 134 S. Ct. at 2471-73. As to the first type of claim, the Sixth Circuit recently held in a 2 to 1 opinion that it interprets *Fifth Third* to mean that "a plaintiff claiming that an ESOP's investment in a

publicly traded security was imprudent must show special circumstances to survive a motion to dismiss." *Pfeil v. State Street Bank and Trust Co.*, 806 F.3d 377, 386 (6th Cir. 2015). To Class Counsel's knowledge, no plaintiff has successfully pled "special circumstances" in an action post-*Fifth Third*.[12] The second type of claim - that a company's stock is imprudent because the stock price is artificially inflated, and that the fiduciaries should have understood the overvaluation because of nonpublic information of which they (but not the Plan participants) were aware - have survived post-*Fifth Third*. The only post-*Fifth Third* Circuit-level decision to Plaintiffs' knowledge to address such claims upheld them. *See Harris v. Amgen, Inc.*, 770 F.3d 865 (9th Cir. 2014). However, the Supreme Court recently reversed the Ninth Circuit's decision and remanded for further proceedings. *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016).

Despite the uncertainty in the case law, Plaintiffs believe they could surmount these issues. First, the Supreme Court merely noted that the Sixth Circuit "did not point to any special circumstances rendering reliance on the market price [of Fifth Third stock] imprudent." 134 S. Ct. at 2472. In fact, the Sixth Circuit specifically noted that Plaintiffs sufficiently alleged that Fifth Third stock was artificially inflated. It unequivocally stated that Plaintiffs' Count I states a claim that Defendants breached their fiduciary duties "by providing false and misleading information and failing to provide complete and accurate information about the Stock to Plan participants." 692 F.3d at 418.[13] Moreover, given that this Court in *Eshe*, the companion

[12] To be sure, plaintiffs have prevailed in ERISA breach of fiduciary duty "company stock" cases post-*Fifth Third* based on public-information where courts have reasoned that such cases fall outside the purview of *Fifth Third*. *See, e.g.*, *Gedek v. Perez*, 66 F. Supp. 3d 368, 375 (W.D.N.Y. 2014) (finding that *Fifth Third* did not "address the situation presented by the plaintiffs' factual allegations here, *i.e.*, allegations that a company's downward path was so obvious and unstoppable that, regardless of whether the market was 'correctly' valuing the stock, the fiduciaries should have halted or disallowed further investment in it.").

[13] This Court only dismissed Plaintiffs' claims that the fiduciaries had violated their duty to make proper disclosures to Plan participants because it held that the alleged misstatements and omissions were not made in a fiduciary capacity. *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d at 421. The Sixth Circuit,

securities case against Fifth Third, found the allegations were plausible that the Company committed material omissions and misstatements concerning, *inter alia*, the failure to disclose the deteriorating quality of Fifth Third's loan portfolio under a heightened pleading standard for fraud (*see Local 295/Local 851 IBT Employer Group Pension Trust and Welfare Fund, et al. v. Fifth Third Bancorp. et al.*, 731 F. Supp. 2d 689, 711 (S.D. Ohio 2010)), Plaintiffs could plausibly and adequately state under Rule 8 that it was imprudent for the Plan fiduciaries to rely on the market price of Fifth Third stock because they knew it was artificially inflated.

Second, the Supreme Court appeared to assume that the Sixth Circuit upheld Plaintiffs' breach of fiduciary duty claim against Fifth Third on the basis of the Complaint's allegations that the price of Fifth Third stock was "***inflated***" based on ***public*** and non-public information, reflecting an "erroneous understanding of the prudence of relying on the market." 134 S. Ct. at 2471-72 (emphasis added). However, Plaintiffs' Complaint presented two distinct bases for finding that the Fifth Third stock was imprudent. One basis was that the Company stock was artificially inflated based on material non-disclosed information. The other, separate basis was that based on publicly available information alone, the Plan fiduciaries should have known the Company stock was much too risky as a retirement option within the Plan after the Company changed its investment focus to subprime speculation, given that the primary purpose of the fund was to assist Plan participants to save for retirement. *See* Complaint ¶ 40.

Nonetheless, Plaintiffs recognize that ultimate success is not assured and believe that this substantial Settlement, when viewed in light of the risks of proving liability, is undoubtedly fair, adequate, and reasonable. As the court in *Broadwing* reasoned in approving the settlement there:

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however, rejected this holding and found that the alleged misstatements and omissions *were* made in a fiduciary capacity. *Id.* at 423. This portion of the Sixth Circuit's opinion was not disturbed by the Supreme Court.

> Several district court decisions favor the possibility of establishing liability in cases alleging fiduciary breaches concerning holdings of risky company stock in individual retirement accounts; however, few of these cases reached the stage of a decision based on the merits. As a result, little authority supports the theories that are fundamental to Plaintiffs' [ERISA] claims. Moreover, if litigation were to continue, Plaintiffs would need to establish new law to overcome Defendants' defenses to liability.

252 F.R.D. at 372-73. *See also In re Delphi Corp. Sec., Der. & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (finding factor satisfied noting the risk inherent in any litigation "is even more acute in the complex area[] of ERISA law"); *Rankin v. Rots*, No. 02-cv-71045, 2006 UWL 1876538, at *4 (E.D. Mich. June 26, 2006) (noting that "[a]lthough plaintiffs survived a motion to dismiss by defendants, whether they would prevail on the merits of their [ERISA] breach of fiduciary duty claims is far from clear.").

(b) The Amount and Form of Relief Offered in Settlement

"In evaluating the amount and form of relief offered in Settlement, the Court [should be] mindful of the notion that '[t]he determination of what constitutes a 'reasonable' settlement is not susceptible of a mathematical equation yielding a particularized sum. Rather... in any case, there is a range of reasonableness with respect to a settlement.'" *Amos*, 2015 WL 4881459, at *3 (quoting *In re Broadwing*, 252 F.R.D. at 373). Indeed, settlements never result in the recovery of the full amount of alleged losses. *UAW*, 2006 WL 891151, at *17. Rather, a "just" settlement is generally "an arbitrary point between competing notions of reasonableness." *Id.* Here, "the court need not decide the amount of a potential recovery at trial, since the approval of the settlement should not involve a trial on the merits." *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 373.

Plaintiffs have entered into this Settlement with a full and comprehensive understanding of the strengths and weaknesses of their claims, which are based on Class Counsel's extensive investigation during the prosecution of this Action as well as their unique experience with these

types of claims. Before filing the Complaint, and afterward, Class Counsel consulted with, among other experts, damages experts. Plaintiffs calculated potential damages to range anywhere from mid-seven figures to eight figures. But proving damages presents a challenge in these types of cases.

ERISA requires the breaching fiduciaries to make good to the plan the difference between what the plan earned and what it would have earned but for the breaches of fiduciary duty. *See, e.g.*, *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) ("the measure of damages is the amount that affected accounts would have earned if prudently invested") (citing *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985)); *see also Horn v. McQueen*, 215 F. Supp. 2d 867, 878 n.11 (W.D. Ky. 2002) ("*Donovan v. Bierwirth* holds that the measure of loss under ERISA section 409 requires a comparison of what the Plan actually earned on the ... investment with what the Plan would have earned had the funds been available for other Plan purposes.") (citation omitted). In general, the calculation of "ERISA" damages is "complex, time-consuming and expensive." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004). A final, actual calculation of damages would have to wait until the full discovery process and trial was concluded, where the judge, as fact-finder, would determine the relevant time period when the Company Stock Fund was "imprudent" for this Plan, a factually intensive question in and of itself. A factual finding that the Stock was imprudent for a short amount of time would lead to a short "damages period" which in turn would result in less recoverable damages for Plaintiffs. And for purposes of trial, an expert must create a reliable and legally admissible model, which he or she must then test and be able to effectively present to the court. This intricate and complex process creates the possibility of a model being ruled inadmissible. Defendants would also present their own experts to counter Plaintiffs' experts. Thus, proving damages is fraught with risks.

The two aspects of the Settlement are the monetary portion, which is $6,000,000, and the Non-Monetary Relief, which are a series of structural changes to the Plan. First, the $6 million Settlement provides valuable and certain relief to all applicable Plan participants. Once approved, the Settlement Fund will be allocated to each Class Member's account without the need for any further action to be taken by the Class Members to avail themselves of the relief. Additionally, the Non-Monetary Relief negotiated by Class Counsel will provide significant additional value for the Settlement Class. *See* Section II.G, *supra*; *see also* Settlement Agreement at § 7.4 (providing for, among other changes, the freezing of the Fifth Third Stock Fund and prohibiting new Plan Participants from investing in the Fifth Third Stock Fund; continuing the current practice of matching contributions in cash, rather than in Fifth Third Stock, for a period of at least eight (8) years; and the dissemination of an annual notice to Plan Participants who currently have more than 20% of their account(s) invested in Fifth Third regarding the benefits of asset allocation and diversification).

Thus, on balance, the risk of continued litigation compared with the form of relief favors approval of the Settlement. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 373 ("balanced against the possibility that the Class Members will receive nothing by going forward on the merits of their claims, this factor weighs in favor of approving the proposed Settlement.").

2. The Complexity, Expense and Likely Duration of the Litigation Favors Settlement

"Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement." *In re Delphi*, 248 F.R.D. at 497. This is because "in general, 'most class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them.'" *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 373 (quoting *In re Telectronics Pacing Sys., Inc.*, 137

F. Supp. 2d 985, 1013 (S.D. Ohio 2001)). Courts in this Circuit have aptly characterized class action trials as a "long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court." *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 556 (S.D. Ohio 2000) (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3d Cir. 1998)). As the *In re Delphi* court recognized, "[f]or class actions in particular, courts view settlement favorably because it 'avoids the costs, delays and multitudes of other problems associated with them.'" *In re Delphi*, 248 F.R.D. at 497 (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1013). Class action trials of claims alleging breach of fiduciary duty under ERISA are no different.

Here, in the absence of settlement, the Parties would recommence litigation in earnest almost eight years after the first complaint was filed, focusing on Defendants' expected argument that Plaintiffs need to replead their Complaint in light of the "considerations" announced by the Supreme Court. *See Dudenhoeffer*, 134 S. Ct. at 2472-73. Defendants then would presumably seek permission to brief another motion to dismiss. Assuming that the Court entertained but denied the motion to dismiss, the Parties would conduct ERISA and merits discovery, including extensive depositions, all of which would lead to dispositive motions, trial, and likely multiple appeals. Were this case to proceed to judgment on the merits, both sides would retain experts in numerous areas – including experts on Fifth Third's financial reporting and other accounting issues, fiduciary responsibility and damages. In addition, the huge volume of documents and the complexity of the underlying factual issues would necessitate the presentation of large numbers of fact witnesses and exhibits at trial. In short, the Parties and the Court would face burdensome litigation without the Settlement.

The certain and immediate benefits to the Class as a result of the Settlement outweigh the possibility of obtaining a better result at trial, particularly when factoring in the additional expense and long delay inherent in prosecuting this complex litigation through trial and appeal. Thus, although Class Counsel believe that they can overcome the potential obstacles to establishing Defendants' liability and proving damages, they recognize the inherent uncertainties of litigation which militate in favor of settlement at this time. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 374 ("Given the time value of money, a future recovery, even one greater than the proposed Settlement, may be less valuable to the Class than receiving the benefits of the proposed Settlement now. To delay this matter further would not substantially benefit the Class. … Thus, this factor also weighs in favor of approving the proposed Settlement. It secures a substantial benefit for the Class in a highly complex action, undiminished by further expenses, and without delay, costs, and uncertainty of protracted litigation."); *In re Delphi*, 248 F.R.D. at 498 ("Avoiding such unnecessary expenditure of time and resources clearly benefits all parties and the Court."); *Int'l Union v. Ford Motor Co.*, No. 05-cv-74730, 2006 WL 1984363, at *24 (E.D. Mich. July 13, 2006) ("The costs and uncertainty of lengthy and complex litigation weigh in favor of settlement.").

3. The Stage of the Proceedings and the Amount of Discovery Completed

Exhaustive discovery is not a prerequisite for preliminary approval of class action settlements. *Manners v. American Gen. Life Ins. Co.*, No. 98-cv-0266, 1999 WL 33581944, at *21 (M.D. Tenn. Aug. 11, 1999). Neither is formal discovery. "[T]he absence of formal discovery is not unusual or problematic, so long as the parties and the court have adequate information in order to evaluate the relative positions of the parties." *Amos*, 2015 WL 4881459, at *4; *see also UAW*, 2006 WL 891151, at *19 (citing cases).

The volume and substance of Plaintiffs' knowledge of this case are unquestionably adequate to support the Settlement. Even before filing the Complaint, Class Counsel conducted an extensive investigation and informal discovery in relation to the lawsuit, including: (a) review and analysis of Plan-related documentation and communications, including Plan annual reports to the SEC and Department of Labor ("DOL"); (b) analysis of Fifth Third's publicly disseminated financial statements; (c) review of media reports and public financial analyst reports; (d) review and analysis of voluminous publicly-available materials – media reports, filings in factually related cases – with regards to the factual predicates outlined in the Complaint; (e) interview of a number of participants, including Plaintiffs, as well as potential fact witnesses; (f) extensive research of the applicable law with respect to the claims asserted in the Complaint and Defendants' potential defenses thereto; and (g) monitoring and evaluating the performance of Fifth Third Stock during and after the proposed Class Period. Thereafter, Class Counsel reviewed newly filed and published public filings, annual reports, press releases and other public statements as part of their ongoing investigation. Plaintiffs were also received and reviewed a trove of documents produced in the companion securities litigation.

In preparation for mediation and before agreeing to settle Plaintiffs' claims, Plaintiffs also reviewed a significant quantity of Plan materials produced by Defendants including, but not limited to, Plan documents, the Plan Statement of Investment Policy, Plan educational materials, Plan prospectuses, and summary Plan descriptions and insurance information. In addition, Plaintiffs also reviewed hundreds of pages of pleadings and exhibits from the related securities action.

Further, Plaintiffs have negotiated as part of the Settlement the significant Non-Monetary Relief provisions based on their intimate knowledge of ERISA in general and this Plan in particular. Accordingly, Plaintiffs respectfully submit that their investigative efforts in this litigation provided

them with more than ample information to properly and fairly assess the merits of the proposed Settlement Agreement.

4. The Recommendation and Experience of Counsel

"In deciding whether a proposed settlement warrants approval, "[t]he Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties." *In re Delphi*, 248 F.R.D. at 498 (citing *Rankin*, 2006 WL 1876538 at *3); *UAW*, 2006 WL 891151, at *18 (noting it is "well recognized that the court should defer to the judgment of experienced counsel who has competently evaluated the strength of the proofs."); *Wess v. Storey*, No. 08-cv-623, 2011 WL 1463609, at *6 (S.D. Ohio April 14, 2011) (same); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 375 (same). Here, Class Counsel have substantial experience in handling class actions, other complex litigation, and claims of the type asserted in this Action. Class Counsel, together and separately, have litigated numerous similar ERISA class action cases.

Kessler Topaz Meltzer & Check, LLP's ("KTMC") ERISA practice group, headed by name partner Joseph H. Meltzer and his partner Edward W. Ciolko, is widely recognized as one of the most preeminent in the country. [14] Indeed, in addition to the results achieved during the appeal of this Action with its co-counsel, KTMC's advocacy in appeals before the First, Third, and Ninth Circuits, have resulted in seminal ERISA fiduciary breach of duty decisions.[15] Moreover, KTMC is one of only a very few firms in the country with trial experience in ERISA "company

[14] *See* firm résumé of KTMC attached as Exhibit B.

[15] In *Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), KTMC successfully argued that former employees who received lump sum distributions of the entire balance of their retirement plan have standing to sue under ERISA for fiduciary mismanagement of plan assets during the time period before they received their lump sum distributions. *See also In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005) (finding that a subset of participants in a defined contribution plan had standing to sue on behalf of the plan pursuant to ERISA § 502(a)(2)); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008) (overturning the district court's grant of summary judgment).

stock" fiduciary breach class actions. In May of 2009, KTMC as Co-Lead Class Counsel, completed a trial that spanned several weeks in *Brieger v. Tellabs, Inc.*, No. 06-cv-01882 (N.D. Ill.), an ERISA company stock breach of fiduciary duty class action analogous to the instant matter. To the best of KTMC's knowledge, this was only the fourth such ERISA case to go to trial.

In addition to its extensive litigation experience, including efforts that have resulted in favorable court opinions in a number of ERISA decisions denying defendants' motions to dismiss and motions for summary judgment,[16] KTMC has successfully engaged in extensive, intricate, and successful settlement negotiations and mediations involving complex legal and factual issues, especially in ERISA matters. *See, e.g.*, *In re Colgate-Palmolive Co. ERISA Litig.*, No. 07-cv-9515 (S.D.N.Y. July 8, 2014) (KTMC as Co-Lead Counsel, helped obtain a $45.9 million settlement on behalf of retirement plan participants); *In re Merck & Co., Inc. Secs., Der. & ERISA Litig.*, No. 05-cv-2369 (D.N.J. Nov. 29, 2011) (as a member of the Lead Counsel Committee, KTMC helped obtain a settlement of $49.5 million); *In re National City ERISA Litig.*, No. 08-cv-70000 (N.D. Ohio Nov. 30, 2010) (KTMC as Co-Lead counsel obtained a $43 million settlement on behalf of participants of a defined contribution plan).

KTMC has also been named Lead or Class Counsel in numerous breach of fiduciary class actions across the nation, including the following within this Circuit: *In re Huntington Bancshares ERISA Litig.*, No. 08-cv-00197 (S.D. Ohio); *Nowak v. Ford Motor Co.*, No. 06-cv-11718 (E.D. Mich.); *In re Lear ERISA Litig.*, No. 06-cv-11735 (E.D. Mich. Apr. 10, 2006); *In re Diebold ERISA*

[16] *See, e.g.*, *In re SunTrust Banks, Inc. ERISA Litig.*, No. 08-cv-3384, Dkt. No. 194 (N.D. Ga. June 18, 2015); *Borboa v. Chandler, et al.*, No. 13-cv-844, Dkt. No. 62 (E.D. Va. Dec. 31, 2014); *Gedek v. Perez, et al.*, No. 12-cv-6051, Dkt. No. 75 (W.D.N.Y. Dec. 17, 2014); *In re Fannie Mae 2008 ERISA Litig.*, Nos. 09-cv-1350, MDL No. 09-2013, Dkt. No. 129 (S.D.N.Y. Apr. 21, 2014); *Morrison, et al. v. Citizens Republic Bancorp, Inc., et al.*, No. 11-cv-11709, Dkt. No. 72 (E.D. Mich. Apr. 10, 2014); *Alford v. United*

Litig., No. 06-cv-0170 (N.D. Ohio Nov. 16, 2006); *Gee v. UnumProvident Corp.*, No. 03-cv-1552 (E.D. Tenn.).[17]

Gainey McKenna & Egleston ("GM&E") also has extensive ERISA class action experience in the Sixth Circuit, and, indeed, throughout the country. For example, GM&E served as co-lead counsel[18] for the ERISA class *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432 (D.N.J.) (Co-Lead Counsel in ERISA Class Action) (recovery of $12.25 million for the company's 401(k) plan); *In re Popular Inc. ERISA Litig.*, No. 09-cv-01552-ADC (D. P.R.) (Co-Lead Counsel in ERISA Class Action) (recovery $8.2 million for the company's 401(k) plan); *Morrison v. MoneyGram Int'l, Inc., et al.*, No. 08-cv-1121 (D. Minn.) (Lead Counsel in ERISA Class Action) (recovery of $4.5 million for the company's 401(k) plan); *In re General Growth Properties, Inc. ERISA Litig.*, No. 08-cv-6680 (N.D. Ill.) (Co-Class Counsel for the Settlement Class in ERISA class action) (recovery of $5.75 million for the company's 401(k) plan); *In re Comcast Corp. ERISA Litig.*, No. 08-cv-00773-HB (E.D. Pa.) (recovery of $5 million for the company's 401(k) plan); and *Jennifer Taylor v. Monster Worldwide, Inc.*, No. 06-cv-8322 (AKH) (S.D.N.Y.) (Co-Lead Counsel in ERISA Class Action) (recovery of $4.25 million for the company's 401(k) plan).

Community Banks, Inc., et al., No. 11-cv-309, Dkt. No. 47 (N.D. Ga. Jan. 31, 2013); *In re Fannie Mae 2008 ERISA Litig.*, Nos. 09-cv-1350, MDL No. 09-2013, 2012 WL 5198463 (S.D.N.Y. Oct. 22, 2012).

[17] KTMC's other appointments within just the last ten years include, but are not limited to: *In re 2014 RadioShack ERISA Litig.*, No. 14-cv-959, Dkt. No. 29 (N.D. Tex. Jan. 9, 2015) (order appointing KTMC as interim lead class counsel committee chair with SSB as a committee member); *Borboa v. Chandler, et al.*, No. 13-cv-844, Dkt. No. 32 (E.D. Va. Sept. 26, 2014) (order appointing KTMC interim class counsel; *Harris v. First Regional Bancorp,* No. 10-cv-07164 (C.D. Cal. Jan. 6, 2011) (order appointing KTMC interim class counsel); *In re Advanta Corp. ERISA Litig.*, No. 09-cv-04974 (E.D. Pa. June 4, 2010) (appointing KTMC interim class counsel); *In re Level 3 Commc'ns ERISA Litig.*, No, 09-cv-0658, Dkt. No. 75 (D. Colo. Mar. 18, 2010) (appointing KTMC as Interim Lead Class Counsel Committee Chair); *In re R.H. Donnelley Corp. ERISA Litig.*, No. 09-cv-07571 (N.D. Ill. Mar. 16, 2010); *In re YRCW Worldwide, Inc. ERISA Litig.*, No. 09-cv-02593, Dkt. No. 18 (D. Kan. Mar. 2, 2010) (order appointing KTMC as Interim Co-Lead Class Counsel for the putative plaintiff class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure); *In re Fannie Mae 2008 ERISA Litig.*, Nos. 09-cv-1350, MDL No. 09-2013 (S.D.N.Y. May 15, 2009).

[18] *See* firm résumé of GM&E attached as Exhibit C.

Based on (1) their extensive and broad-based experience litigating and successfully resolving ERISA breach of fiduciary duty cases, and (2) after diligently investigating the claims and fully exploring the claims and defenses during the mediation process and while negotiating a potential settlement, Class Counsel strongly recommend this Settlement.

5. The Nature of the Negotiations

Another factor the Sixth Circuit has directed courts to consider in evaluating class action settlements is whether the settlement is the product of arm's-length negotiations. "Without evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreements were reached without collusion." *In re Delphi*, 248 F.R.D. at 501 (citing *Telectronics*, 137 F. Supp. 2d at 1018); *see also* Newberg on Class Actions § 11.51 (3d ed. 1992) ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.").

Recently, another judge in this Court found in approving a settlement:

> Both parties to the negotiations vigorously attempted to secure the most desirable conclusion for their respective clients. Settlement proposals were exchanged back and forth between the parties on numerous occasions in an attempt to resolve the key issues relative to the proposed Settlement. This process resulted in a fair, reasonable, and adequate Settlement. As a result, the Court concludes that the proposed Settlement was reached in good faith. This factor weighs in favor of approving the proposed Settlement.

Wess, 2011 WL 1463609, at *6 (citation omitted). Similarly, the Parties reached settlement in this case after intensive, drawn-out, and adversarial negotiations. *See also* discussion *supra* at Section II.F. The Parties recognized a unique opportunity to resolve this litigation while the case was on remand back to the Sixth Circuit and seized upon it. Moreover, as noted above, even after the Settlement in principle had been reached, several months of further negotiation ensued regarding

the specific terms of the Settlement in order to execute the MOU and then the Settlement Agreement. Thus, this factor also weighs in favor of approving the Settlement.

6. The Objections Raised by the Class Members

At this stage of the litigation, prior to preliminary approval, and class notice being disseminated, analysis of this factor is premature. However, both of the Plaintiffs, who are Settlement Class Members, approve this Settlement.

7. Public Interest

Public policy favors settlement, especially in complex matters, such as class actions alleging breach of fiduciary duty claims under ERISA. Indeed, the Sixth Circuit has expressly recognized the public interests served through compromise:

> Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

Stotts v. Memphis Fire Dept., 679 F.2d 541, 555 n.11 (6th Cir. 1982), *rev'd on other grounds*, 467 U.S. 561 (1984); *Amos*, 2015 WL 4881459, at *5 ("Public interest favors approval of the Settlement Agreement. There is certainly a public interest in the settlement of disputed cases that require substantial federal judicial resources to supervise and resolve."); *Wess*, 2011 WL 1463609, at *6 (noting that "the proposed Settlement ends potentially long and protracted litigation and frees the Court's valuable judicial resources").

The Settlement of this litigation brings closure to this eight-year litigation, which if litigated through trial and further appeals would consume an enormous amount of the Parties' time and the valuable resources of this Court. Further, the Settlement brings significant benefit to the Class years earlier than the uncertain amount to be gained years from now after trial and more

appeals. Accordingly, the public interests, as well as the Class members' interests, are served by resolution of this action now. *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 376 ("In the instant case, the proposed Settlement ends potentially long and protracted litigation and frees the Court's valuable judicial resources. The Court concludes that this factor weighs in favor of approving the proposed Settlement because the public interest is served by resolution of this action.").

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

Rule 23(c)(2)(A) provides that, "for any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." As this Court recently recognized, "[t]he Court must 'direct notice in a reasonable manner to all class members who would be bound by the proposal.'" *Bowling v. Pfizer Inc.*, No. 91-cv-256, Order Granting Preliminary Approval, Dkt. No. 3111, at 3 (S.D. Ohio July 24, 2015) (quoting FED. R. CIV. P. 23(e)(1)). Moreover, "[d]ue process requires that the notice to the class 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.'" *Bowling*, Preliminary Approval Order at 3 (quoting *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013)). Moreover, the notice "must 'fairly apprise the prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests.'" *Bowling*, Preliminary Approval Order at 3 (quoting *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007)). The proposed Notice Plan here meets these standards.

The Notice Plan will fully inform Settlement Class members about the Action, the proposed Settlement, and the facts that they need in order to make informed decisions about their rights. The Notice Plan includes multiple components designed to reach the largest number of

Settlement Class members possible. The Notice of Class Action Settlement, attached as Exhibit A to the Preliminary Approval Order, will be sent by first-class mail to the last known address of the Class members within 45 days of entry of the Preliminary Approval Order. Additionally, by that same date, the Notice by Publication, attached as Exhibit B to the Preliminary Approval Order, will be published in the *Cincinnati Enquirer* and on PR Newswire, at least once (together, the Class Notice and Summary Notice are referred to as "Notices"). Plaintiffs will also post both forms of notice on a dedicated Settlement website, established by the Settlement Administrator at the direction of Class Counsel.[19] The number and variations of these types of notices will help ensure the dissemination of adequate and reasonable notice and information consistent with standards employed in notification programs designed to reach unidentified members of settlement groups or classes. All Notices will provide potential Settlement Class members with contact information for Class Counsel.

Courts in this Circuit have determined that direct mailings to class members' last known address coupled with publication of notice provide class members with reasonable notice. *See Hainey v. Parrott*, 617 F. Supp. 2d 668, 672-673 (S.D. Ohio 2007). Here, Plaintiffs' proposed means of class notice exceed these standards and thus more than satisfies the mandates of due process. Plaintiffs believe that the combination of the direct mail, publication in the *Cincinnati Enquirer* and on PR Newswire, and the dedicated Internet Settlement website presence will result in a very high percentage of actual notice to affected Settlement Class Members and beneficiaries.

Here, the form and method of notice of the proposed Settlement agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23(e)(1)(B). The proposed Notices describe in plain English: (i) the terms and operation of the Settlement; (ii) the

[19] Other documents related to this litigation, such as a list of frequently asked questions and the Settlement Agreement and all of its exhibits, will be posted to the Settlement website.

nature and extent of the release of claims; (iii) the maximum counsel fees and Plaintiffs' Case Contribution Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place of the Final Approval Hearing. Similar Notice Plans utilized in the settlement of analogous actions have been judicially approved in this Circuit and across the country as fair, reasonable, and adequate. *See, e.g.*, *In re Lear ERISA Litig.* No. 06-cv-11735 (E.D. Mich.) (Dkt. No. 93); *In re Visteon Corp. ERISA Litig.*, No. 05-cv-71205 (E.D. Mich. Mar. 9, 2007) (order granting final approval of the settlement approving form and method of notice) (Dkt. No. 58); *Gee v. UnumProvident Corp., et al*, No. 03-cv-147 (E.D. Tenn. Jan. 25, 2008) (order that the settlement class received proper and adequate notice) (Dkt. No. 135); *Rankin*, 2006 WL 1876538, at *4 (E.D. Mich. June 28, 2006) (Dkt. No. 114).[20] As such, the proposed Notices satisfy the requirements of due process. *See* Newberg on Class Actions, § 8.34 (4th Ed. 2002).

V. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole; the distribution plan must be fair, reasonable and adequate." *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2013 WL 6511860, at *7 (E.D. Mich. Dec. 12, 2013). The proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit 3, is premised on calculating a Settlement Class Member's pro rata distribution based upon the individual's balance in the Plan on the first day of the Class Period plus any acquisitions of Fifth Third Stock during the Class Period, and then subtracting all dispositions of Fifth Third Stock during the Class Period and the balance, if any,

[20] *See also In re 2008 Fannie Mae ERISA Litig.*, No. 09-cv-1350, Order Granting Preliminary Approval of Settlement at ¶ 6 (S.D.N.Y. May 5, 2015) (approving analogous notice plan, finding "such proposed manner is the best notice practicable under the circumstances"); *In re Advanta Corp. ERISA Litig.*, No. 09-cv-4974, Order Granting Preliminary Approval of Settlement at ¶ 6 (E.D. Pa. Oct. 9, 2013) (same); *Dalton v. Old Second Bancorp. Inc.*, No. 11-cv-1112, Order Granting Preliminary Approval of Settlement at ¶ 4 (N.D. Ill. Mar. 1, 2013) (same).

of Fifth Third Stock remaining on the last day of the Class Period. The Net Losses of the Settlement Class Members as calculated pursuant to this formula will then be totaled to yield the loss of the Plan as a whole over the Class Period. All Settlement Class Members are treated equally such that no Settlement Class Member is singled out for either disproportionately favorable or unfavorable treatment. Indeed, the Plan of Allocation calculates the dollars lost in each individual's account as a result of holding Fifth Third Stock using the formula discussed above which has been previously approved in analogous ERISA breach of fiduciary duty actions around the country. *See, e.g.*, *Griffin*, 2013 WL 6511860, at *7 (approving identical *pro rata* plan of allocation, noting "the plan of allocation is similar to plans used and approved in many ERISA company stock fund cases").[21]

VI. PRELIMINARY CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

A. The Proposed Class Meets the Prerequisites for Class Certification Under Rule 23(a)

Pursuant to the Settlement Agreement, Plaintiffs seek certification of the following Settlement Class for settlement purposes only:

> All Persons (excluding the Defendants and their Immediate Family Members) who were participants in or beneficiaries (including alternate payees) of the Fifth Third Bancorp 401(k) Savings Plan formerly known as the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan") at any time between July 19, 2007 and January 15, 2016, (the "Class Period"), and whose accounts included investments in Fifth Third Stock.

The Supreme Court has acknowledged the propriety of certifying a class solely for settlement purposes. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). In conducting this task, the

[21] *See also In re: Bear Stearns Cos. ERISA Litig.*, MDL No. 1963, Order and Final Judgment at 7 (S.D.N.Y. Sept. 20, 2012); *Young, et al. v. Heimbuch, et al.*, No. 10-cv-8914, Order and Final Judgment at 7 (C.D. Cal. May 21, 2012); *In re Fed. Nat'l Mortg. Assoc. Sec., Der., & "ERISA" Litig.*, MDL No. 1668, Order and Final Judgment at 8 (D.D.C. Aug. 3, 2010).

court's "dominant concern" is "whether a proposed class has sufficient unity so that absent members can fairly be bound by the decisions of class representatives." *Id.* at 621.

Plaintiffs' claims for breach of fiduciary duty under ERISA are well-suited for certification. Time and again, courts have certified similar ERISA claims for breach of fiduciary duty for class treatment. *See, e.g.*, *In re Nortel Networks Corp. ERISA Litig.*, No. 03-md-01537, 2009 WL 3294827 (M.D. Tenn. Sept. 2, 2009) (magistrate report and recommendation) (certifying claims for breach of fiduciary duty under Rule 23(b)(1); *Shirk v. Fifth Third Bancorp*, No. 05-cv-049, 2008 WL 4425535, at *5 (S.D. Ohio Sept. 30, 2008) (same); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004) (same); *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004) (same).[22]

Class certification for settlement purposes under Rule 23 of the Federal Rules of Civil Procedure entails a two-step analysis. First, the Court must determine whether Rule 23(a)'s prerequisites are met, which are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Next, the court must determine whether Plaintiffs have met the requirements of Rule 23(b). *See In re Cardizem*, 218 F.R.D. at 517. Here, Plaintiffs satisfy the prerequisites of Rule 23(a) as well as the requirements of Rule 23(b)(1).

1. Rule 23(a)(1) – "Numerosity"

To satisfy the numerosity requirement, the Court must find that the class is "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This Court recently noted that "[w]hile the Sixth Circuit has not established a strict numerical test for the satisfaction of the numerosity requirement, it has held that "substantial" numbers usually satisfy the requirement.

[22] *See also Moore v. Comcast Corp.,* 268 F.R.D. 530 (E.D. Pa. 2010) (certifying 23(b)(1)(B) class); *Stanford v. Foamex L.P.*, 263 F.R.D. 156 (E.D. Pa. 2009) (certifying 23(b)(1)(A) and (B) class); *Jones v. Novastar Fin., Inc.*, 257 F.R.D. 181 (W.D. Mo. 2009) (same); *Merck & Co., Inc. Securities, Derivative & ERISA Litig.*, MDL No. 1658, 2009 WL 331426 (D.N.J. Feb. 10, 2009) (same); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-0701, 2009 WL 969713, at * 9 (S.D. Ill. Apr. 3, 2009) (same).

Michel v. WM Healthcare Solutions, Inc., No. 10-cv-638, 2014 WL 497031, at *6 (S.D. Ohio Feb. 7, 2014) (quoting *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006)). As the Court further reasoned, "[a] proposed class of thousands of individuals is 'substantial.'" *Id.*

In this case, Defendants do not dispute numerosity and the Plan's publicly filed documents reveal that there were thousands of participants in the Plan. For example, the Plan's Form 5500 for Plan year 2006 indicates that the Plan had 41,153 participants at the end of 2006. While not all of them will have held the Company Stock Fund in their Plan accounts, many of them will have. Thus, numerosity is satisfied. Accordingly, there is no dispute that the proposed Settlement Class satisfies the numerosity requirement. *See, e.g.*, *Crawford v. TRW Automotive U.S. LLC*, No. 06-cv-14276, 2007 WL 851627, at *7 (E.D. Mich. Mar. 21, 2007) (finding that a class including forty or more members generally satisfies Rule 23's numerosity requirement).

2. Rule 23(a)(2) – "Commonality"

"Rule 23(a)(2)'s commonality requirement is satisfied if the resolution of at least one common issue will affect the class as a whole." *Ledford ex rel. Epperson v. Colbert*, No. 10-cv-706, 2012 WL 1207211, at *4 (S.D. Ohio Apr. 11, 2012) (citing *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998)). "A 'perfect fit' of all issues is not required," "[r]ather, the commonality required by Rule 23(a)(2) is 'qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.'" *Ledford ex rel. Epperson*, 2012 WL 1207211, at *4 (quoting *In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996)). "The resolution of the common issue should advance the litigation." *Id.* at *4 (citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)).

The Settlement Class proposed in this action easily meets this requirement. The paramount question of law and fact shared by *all* class members is whether Defendants breached

their fiduciary duties owed to the Plan and its participants by allowing the Plan to invest in Company stock when Defendants knew or should have known of non-public financial and operational problems that affected the prudence of Fifth Third stock as an investment of the Plan during the Class Period. These common questions satisfy the commonality standard. *See, e.g.*, *Griffin*, 2013 WL 6511860, at *6 ("Here there are several common issues of law and fact such as whether Defendants owed a duty to the Plan participants and whether Defendants breached their fiduciary duties by continuing to offer investment in Flagstar stock. The commonality requirement is met."); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 377 ("In addition, the fundamental claims and defenses pertain to Defendants' conduct as fiduciaries, which are generally suitable for class treatment. *See* Rule 23(b)(1)(B) advisory committee's note. Thus, Rule 23(a)(2) is satisfied because there are questions of law or fact common to the Class."); *Rankin*, 220 F.R.D. at 517-18 (finding commonality in analogous action alleging nearly identical common questions of law and fact); *see also CMS Energy ERISA Litig.*, 225 F.R.D. at 543-544 (finding in ERISA company stock case that the plaintiffs had "persuaded the court that common issues, the resolution of which would advance the litigation, certainly exist among members of the proposed class, including whether the company stock was an imprudent investment for the Plan).

3. Rule 23(a)(3) – "Typicality"

In *Amos*, the court noted that:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to the class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiffs claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

Amos, 2015 WL 4881459, at *6-*7 (citing *In re Am. Med. Sys. Inc.*, 75 F.3d at 1082) (quoting NEWBERG, § 3-13 at 3-76 (footnote omitted)). "If there is a strong similarity of legal theories, the requirement [of typicality] is met, even if there are factual distinctions among named and absent class members." *Griffin*, 2013 WL 6511860, at *6; *Ford Motor*, 2006 WL 1984363, at *19 (same).

Typicality is often met in putative class actions brought for breaches of fiduciary duty under ERISA. *See, e.g.*, *Griffin*, 2013 WL 6511860, at *6 ("Plaintiffs allege that all Class Members suffered the same type of injury from the Defendants' breaches of their fiduciary duties. The typicality requirement is met."); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 378 ("Here, the representative party's claims concerning their retirement account arises from the same events, practices and course of conduct that gives rise to the claims of the other Class Members. In addition, the representative party's claims are based on the same legal theories as other Class Members. … Rule 23(a)(3) is satisfied."); *CMS ERISA Litig.*, 225 F.R.D. at 543-44 (typicality exists where plaintiffs' and the putative class claims stem from the same alleged facts and circumstances); *Rankin*, 220 F.RD. at 519 (ERISA company stock cases are properly certified since "the appropriate focus in a breach of fiduciary duty claim is on the conduct of the defendants").

Plaintiffs' claims here are clearly typical of those of the proposed Settlement Class. The claims of the Plaintiffs and the Settlement Class arise from Defendants' alleged breaches of fiduciary duty and Plaintiffs and the Settlement Class seek to recover based upon the very same legal theories. Each class member alleges injury arising out of Defendants' alleged wrongful conduct of breaching of their fiduciary duties and violating ERISA during the Class Period as alleged in the Complaint. Therefore, the typicality requirement of Rule 23(a)(3) is easily met.

4. Rule 23(a)(4) – Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties[23] will fairly and adequately protect the interests of the class." "The Sixth Circuit uses a two-prong test to determine whether a class representative satisfies the adequacy of representation factor under Rule 23(a)(4): '1) [T]he representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Michel*, 2014 WL 497031, at *7 (citing *Vassalle*, 708 F.3d at 757).

Plaintiffs here meet both of the Sixth Circuit's criteria. The first prong of the "adequacy" requirement largely overlaps with the commonality and typicality requirements of Rule 23(a)(2)-(3). Plaintiffs' interests here are not antagonistic to those of the Settlement Class. Instead, Plaintiffs have been harmed by the same wrongdoing by Defendants as the absent Settlement Class members. Their interests are united in proving Defendants' alleged fiduciary misconduct and achieving the maximum possible recovery. Both of the plaintiffs' individual focuses is on recovering losses to the Plan (and, only indirectly, to themselves). *See Rankin*, 220 F.R.D. at 520. Here, Plaintiffs' interests are squarely in line with those of the proposed Settlement Class. Moreover, both Plaintiffs have contributed to the efficient prosecution of this litigation evidenced by their production of documents pertinent to this litigation and their steadfastness in sheparding this case through eight years of litigation to the Supreme Court and back. Also, both Plaintiffs were prepared to make themselves available for a deposition by Defendants if the case proceeded into discovery and to appear at trial. Plaintiffs thus satisfy Rule 23(a)(4).

B. The Class May Be Properly Certified Under Rule 23(b)(1)

[23] While the adequacy of the named plaintiffs is governed by Rule 23(a)(4), the adequacy of counsel is governed by Rule 23(g). *See* FED. R. CIV. P. 23 Advisory Committee Notes. Accordingly, Class Counsel's adequacy is discussed *infra* in Section VI.C.

"In addition to fulfilling the four prerequisites of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (citing *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2250 (2011)). "Rule 23(b)(1)(A) considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *Wess*, 2011 WL 1463609, at *9; *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 379 (same). The Settlement Class here may be certified under Rule 23(b)(1)(B), Rule 23(b)(1)(A), or both.

Many courts have relied on Rule 23(b)(1)(B) in certifying a class in similar cases, because it is particularly suited for cases alleging breach of a defendant's fiduciary obligations to plaintiffs. *See* FED. R. CIV. P. 23(b)(1)(B), Advisory Comm. Notes to 1996 Amendment (stating certification under 23(b)(1) is appropriate "in cases [such as the instant one] charging breach of trust by fiduciary to large class of beneficiaries"). In fact, numerous courts, including within this Circuit and District, have recognized that "in light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *Griffin v. Flagstar Bancorp. Inc.*, No. 10-cv-10610, 2013 WL 6511860, at *6 (E.D. Mich. Dec. 12, 2013) (citing *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases)); *Yost v. First Horizon Nat. Corp.*, No. 08-cv-2293, 2011 WL 2182262, at *13 (W.D. Tenn. June 3, 2011) (same); *Shanehchian v. Macy's Inc.*, No. 07-cv-828, 2011 WL 883659, at *10 (S.D. Ohio Mar. 10, 2011) (same).

As another district court explained when certifying ERISA claims under Rule 23(b)(1)(B), "because Plaintiffs properly bring this action in representative capacity on behalf of the Plan itself, adjudications with respect to individual members of the class … would as a practical

matter be dispositive of the interest of other members not parties to the adjudications or [would] substantially impair their ability to protect their interests." *Smith v. Aon*, 238 F.R.D. 609, 617 (N.D. Ill. 2006). Given ERISA's "representative capacity" and remedial provisions, certification is particularly warranted under Rule 23(b)(1)(B).[24]

C. Class Counsel Should be Appointed as Settlement Class Counsel

As noted above, inquiry into the adequacy of class counsel has been decoupled from the Rule 23(a)(4) inquiry. Rule 23(g) requires the Court to examine the capabilities and resources of counsel for the Settlement Class to determine whether they will provide adequate representation to the Settlement Class. Here, Class Counsel satisfy Rule 23(g) because Class Counsel has substantial experience in handling class actions, other complex litigation, and claims of the type asserted in this action. *See* Section III.B.4, *supra*. Of particular relevance here, Class Counsel has litigated numerous similar ERISA class action cases and has recovered hundreds of millions of dollars for plan participants and retirees in these cases both separately and together.[25]

The capabilities and resources of Class Counsel are demonstrated by the work performed to date in this case. Class Counsel has done substantial work to identify or investigate potential claims in the Action, and have also vigorously pursued the interests of the class through extensive litigation and negotiations. While Your Honor previously denied Class Counsel's request for

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[24] Certification under subsection (b)(1)(A) is also appropriate. In fact, it is not uncommon for courts to certify ERISA class actions under both subsections of Rule 23(b)(1). *See, e.g.*, *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. at 379 ("Here, Plaintiffs' ERISA claims will, as a practical matter, adjudicate the interests of all plan participants. If this case was adjudicated individually and relief was granted in some actions but denied in others, the conflicting declaratory and injunctive relief could make compliance impossible for Defendants. Thus, certification under Rules 23(b)(1)(A) and (B) is appropriate."); *Yost v. First Horizon Nat'l Corp.*, 2011 WL 2182262, at *13-14 (certifying class under Rule 23(b)(1)(A) and 23(b)(1)(B)); *Smith*, 238 F.R.D. at 617; *Rankin*, 220 F.R.D. at 522; *Stanford*, 263 F.R.D. at 173-174; *Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *16; *Jones*, 257 F.R.D. at 193-194; *Merck*, 2009 WL 331426, at *10-11.

[25] *See* KTMC firm résumé, attached as Exhibit B; GM&E firm résumé, attached as Exhibit C.

appointment of interim class counsel as premature (Dkt. No. 37), Class Counsel believe their actions in investigating, litigating, and successfully mediating this Action in a highly contested context underscores their ability and willingness to do everything possible for the benefit of the Settlement Class. Hence, Class Counsel's significant efforts in prosecuting this case, in combination with the in-depth knowledge of counsel for the Settlement Class, satisfy Rule 23(g). Plaintiffs thus respectfully request that the Court appoint KTMC and GM&E as Class Counsel for the Settlement Class.

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully move this Court to grant their Motion for Preliminary Approval of Settlement, Preliminary Certification of the Settlement Class, approval of Class Notice and Plan of Allocation, and scheduling a Final Approval Hearing.

Dated: March 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 15, 2016, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

/s/ Mark K. Gyandoh
Mark K. Gyandoh